

# Texas Historical Statutes Project

1918 SUPPLEMENT TO  
VERNON'S CIVIL AND CRIMINAL STATUTES  
VOLUME 1

Annotated Civil Statutes (Articles 1 to 4607½d)



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SUPPLEMENT  
TO  
VERNON'S  
TEXAS CIVIL AND CRIMINAL  
STATUTES

EMBRACING ALL LAWS OF GENERAL APPLICATION PASSED AT THE  
SECOND AND THIRD CALLED SESSIONS OF THE 33<sup>d</sup>, AND THE  
REGULAR AND CALLED SESSIONS OF THE 34<sup>TH</sup> AND 35<sup>TH</sup>  
LEGISLATURES, EXCEPT SUCH OF THE LAWS  
AS WERE CARRIED INTO VERNON'S  
CRIMINAL STATUTES OF 1916

ANNOTATED  
WITH HISTORICAL NOTES AND NOTES OF DECISIONS

IN TWO VOLUMES

VOLUME 1  
CIVIL STATUTES, TITLES 1 TO 67A

KANSAS CITY, MO.  
VERNON LAW BOOK COMPANY  
1918



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# PREFACE

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THE publisher of Vernon's Sayles' Civil Statutes of 1914 and Vernon's Criminal Statutes of 1916 presents, in two volumes, a combined Supplement continuing to date those publications, with their various features. All laws of general application enacted by the second and third called sessions of the 33d Legislature, and by the 34th and 35th Legislatures, and all of the called sessions thereof, except such laws as were carried into Vernon's Criminal Statutes of 1916, have been included in the Supplement. The new laws have been classified in accordance with the scheme of division adopted by the revisions of 1911. New provisions, which amend or supersede existing laws, are given the same numbers in the Supplement that the old laws bore in the original editions. Entirely new provisions are given lettered numbers, and placed in the titles and chapters to which their subject-matter relates. Notes and references have been made under article headings calling attention to new legislation affecting, but not directly amending or superseding, the old provisions. Thus the reader who has found a provision in the former editions may follow the article number into the Supplement, and will know at once whether any change has been made in the statute law on the matter in hand. If the article number is either omitted from the Supplement or is included for some other purpose, but contains no text or text note, he knows at once that no change has been made by the Legislature as to that subject-matter.

The annotations have been continued on the plan of the former editions down to and including 194 Southwestern Reporter. To facilitate ready reference from the old edition to the Supplement, the notes have been given the same numbers as they bore in the original edition.

The text of the new law is a literal copy of the published Session Laws. What may appear to be typographical errors in this work will be found on examination of the Session Laws to be an exact copy of the law as enacted and published.

A separate index and table of statutes have been prepared for each branch of the statute law, conforming to the plan of the original editions. The valuable matter in the appendix of the original editions has been continued in the Supplement.



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 ANNOTATED CIVIL STATUTES  
 OF THE  
 STATE OF TEXAS

VOLUME 1

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

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TITLE 1  
ADOPTION

- |  |  |
|--|--|
| Art.<br>1. How heir adopted.<br>2. Rights of adopted heir. | Art.<br>5. Right of adopted child to support, etc. |
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**Article 1. [1] How heir adopted.**

Cited, *Mellville v. Wickham* (Civ. App.) 169 S. W. 1123; *Masterson v. Harris* (Sup.) 174 S. W. 570.

**Nature of relation.**—Adoption is unknown to the common law, and is purely statutory. *Thompson v. Waits* (Civ. App.) 159 S. W. 82.

**Agreement for adoption—Sufficiency.**—Instrument executed by husband and wife having no children, attempting to adopt a child, held ineffective, where it provided that he should be only a coheir with their other legal heirs. *Thompson v. Waits* (Civ. App.) 159 S. W. 82.

**Civil and common law.**—Adoption was unknown at common law. *Harle v. Harle* (Civ. App.) 166 S. W. 674.

Since adoption did not exist at common law, the adoption statutes ingrafted upon the law of the state the provisions of the civil law on the subject, as well as its construction of the law thereon. *Id.*

**Construction of statute.**—The legislative intention in enacting the adoption statutes should be determined by giving to the words therein their ordinary meaning. *Harle v. Harle* (Civ. App.) 166 S. W. 674.

**Rights as to community property—Rights of children of adopted child.**—See *Harle v. Harle* (Civ. App.) 166 S. W. 674.

**Birth of issue as affecting will.**—See *Evans v. Evans* (Civ. App.) 186 S. W. 815.

**Art. 2. [2] Rights of adopted heir.**

Cited, *Mellville v. Wickham* (Civ. App.) 169 S. W. 1123.

**Inheritance by adopted child.**—Instrument executed by husband and wife having no children, attempting to adopt a child, held ineffective, where it provided that he should be only a coheir with their other legal heirs. *Thompson v. Waits* (Civ. App.) 159 S. W. 82.

An adoption merely places the adopted child on the same footing as the foster parent's other children, leaving such parent free to dispose of his property by will as he may desire. *Masterson v. Harris* (Sup.) 174 S. W. 570, answer to certified questions conformed to (Civ. App.) 179 S. W. 284.

In an action for partition, evidence held not to sustain a finding that a decedent, adopting a child of his intended wife, intended that she should take, either under his will or upon his intestacy, equally with his own children. *Masterson v. Harris* (Civ. App.) 179 S. W. 284.

In action for partition, held, on the pleadings, that proof that decedent had intended that an adopted child, through whom plaintiff claimed, should have the same interest in his estate as his own children, did not authorize judgment for plaintiff. *Id.*

An adopted heir, upon the death of the adopting party, becomes entitled, if living, to an interest in all the property of which he may die intestate. *Evans v. Evans* (Civ. App.) 186 S. W. 815.

The law of adoption applies only to heirship and the right to maintenance and support, giving full rights of inheritance, and brings him within general laws of descent and distribution. *State v. Yturria* (Civ. App.) 189 S. W. 291.

— **Children of adopted child.**—In view of articles 1, 2, and 5, held that the children of an adopted child may take the same as natural children under article 2469. *Harle v. Harle* (Civ. App.) 166 S. W. 674.

**As working revocation of will.**—Child adopted by testator subsequent to the execution of his will was not a child within articles 7866, 7867, making the birth of an after-born child a revocation of the will, and not entitled to inherit any of testator's property. *Evans v. Evans* (Civ. App.) 186 S. W. 815.

**Exemption of property from inheritance taxes.**—Under Inheritance Tax Law, art. 7487, property passing by testator's will to his adopted children was exempt, in view of this article. *State v. Yturria* (Civ. App.) 189 S. W. 291.

**Art. 5. Right of adopted child to support, etc.**

**Rights in community property of children of adopted child.**—See *Harle v. Harle* (Civ. App.) 166 S. W. 674.

## TITLE 2

## AFFIDAVITS, OATHS AND AFFIRMATIONS

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|---|---|
| <p>Art.<br/>10. Oaths, etc., generally, who to administer.<br/>11. Affidavit may be by agent or attorney.</p> | <p>Art.<br/>12. All affidavits must be in writing and signed.<br/>13. Officers authorized to take affidavits.</p> |
|---|---|

**Article 10. [4] [4] Oaths, etc., generally by whom administered.**

**Interest of notary.**—Under this article, in a suit for injunction, affidavit of president of plaintiff bank in support of petition held not void because made before a notary public who was cashier of bank. *Schaefer v. First Nat. Bank, Bay City* (Civ. App.) 189 S. W. 556.

**Justice of the peace.**—A justice of the peace is authorized to take affidavits. *Millner v. State, 75 Tex. Cr. R. 22, 169 S. W. 899.*

**Art. 11. [5] [5] Affidavit may be made by agent or attorney.**

**Knowledge of facts.**—Affidavits required in the course of pleadings or for the obtaining of writs or special process, if made either by a party seeking relief or by his agent or attorney, should be on the knowledge of affiant as to the truth of the facts. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

**Art. 12. [6] [6] All affidavits must be in writing, and signed.**

**Necessity of date.**—The jurat to the verification of plaintiff's petition held sufficient, though undated. *Order of Aztecs v. Noble* (Civ. App.) 174 S. W. 623.

**Definition of "affidavit."**—An "affidavit" is an oath reduced to writing. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

**Art. 13. [7] [7] Officers authorized to take affidavits.**

**Authority of attorney of interested party.**—Affidavits accompanying a motion for new trial may not be sworn to before defendant's counsel. *Burnett v. State, 73 Cr. R. 477, 165 S. W. 581; Gordon v. State, 72 Cr. R. 285, 162 S. W. 522; Pope v. State* (Cr. App.) 179 S. W. 874; *McDonald v. State* (Cr. App.) 179 S. W. 880; *Sanford v. State* (Cr. App.) 185 S. W. 22; *Holloway v. State* (Cr. App.) 193 S. W. 145; *Savalla v. State* (Cr. App.) 194 S. W. 829.

That a pleading was verified by a party before one of his attorneys in the case was not ground for sustaining a special exception thereto. *Coody v. Shawver* (Civ. App.) 161 S. W. 935.

An affidavit for a writ of sequestration was not defective because it was sworn to before plaintiff's attorney as a notary public. *Power v. First State Bank of Crowell* (Civ. App.) 162 S. W. 416.

Attorney of record for party held authorized to administer oath to an affidavit to his client. *Forest Oil Co. v. Wilson* (Civ. App.) 178 S. W. 626.

The affidavit introduced by the state should not be considered, the oath thereto being taken by counsel for the state. *Melton v. State* (Cr. App.) 182 S. W. 289.

A motion for continuance may not be sworn to before one of the defendant's attorneys, and if objected to on this ground, will be stricken from the record. *Hall v. State* (Cr. App.) 185 S. W. 574.

**Officer in other state.**—An affidavit in lieu of an appeal bond sworn to before the judge of a county court of another state is defective. *Rounds v. Coleman* (Civ. App.) 179 S. W. 530.

## TITLE 2 A

## AGRICULTURE

Chap.

5. Farmers' county library.  
6. Co-operative demonstration work.

Chap.

7. Farmers' co-operative societies.

## CHAPTER FIVE

## FARMERS' COUNTY LIBRARY

## Article 14xx.

See Arts. 1498½-1498½s, post.

## CHAPTER SIX

## CO-OPERATIVE DEMONSTRATION WORK

**Article 14zzz. Canning demonstration work.**—The commissioners courts of the respective counties of this State may and they are hereby authorized and empowered to appropriate and use under such rules and regulations as they may prescribe any sum or sums of money not to exceed fifteen hundred (\$1500.00) dollars per year for the canning demonstration agent in their respective counties along the same lines as this work is and may be conducted by the Agricultural and Mechanical College and may conduct such work jointly in their respective counties with the agents and representatives of the Agricultural and Mechanical College upon such terms and conditions as may be agreed upon between the agents of the Agricultural and Mechanical College and the commissioners court. [Act May 19, 1917, 1st C. S., ch. 35, § 1.]

Took effect 90 days after May 17, 1917, date of adjournment.

## CHAPTER SEVEN

## FARMERS' CO-OPERATIVE SOCIETIES

Art.

- 14½. Corporations may be created.  
14½a. Locality of operation; public funds not to be used in organizing societies; joint agencies.  
14½b. Incorporation proceedings.  
14½c. Charter fees; filing charters, amendments, etc., with Secretary of State; approval of Attorney General; filing charters, etc., with county clerk; certified copies.  
14½d. Purposes of corporations; franchise tax; statements; surplus.

Art.

- 14½e. Assets; payment of contributions; rights of certificate holders before payment; notes.  
14½f. Powers.  
14½g. Membership.  
14½h. Membership certificates not transferable; withdrawal.  
14½i. Liability of members; waiver of exemption.  
14½j. Forms to be prepared by Attorney General.

**Article 14½. Corporations may be created.**—That private corporations may hereafter be incorporated for the purpose of enabling those engaged in agricultural pursuits to co-operate with each other for the purposes named in this Act. Only those engaged in agricultural pursuits can become incorporators of or members of Societies chartered under this Act.

Each corporation chartered hereunder shall contain as a part of its name these words, "Farmers' Co-operative Society." No. 1. Pro-

vided, persons not engaged in agricultural pursuits may be permitted to contribute an amount not in excess of one-third the outstanding working capital of the society. [Act April 4, 1917, ch. 193, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 14 $\frac{1}{2}$ a. Locality of operation; public funds not to be used in organizing societies; joint agencies.**—Corporations chartered hereunder shall be purely local in their character, shall confine their activities, business operations and membership to the community in which they are located, and in no event to extend beyond the territory surrounding the town, village or city designated as the place of business of the corporation, provided that no public funds appropriated to any department of State Government, or to any State Institution shall be used in organizing any societies or corporations mentioned in this Act. Provided, that corporations incorporated hereunder may join with other corporations incorporated under this Act in establishing and maintaining joint agencies for the accomplishment of the purposes for which they are incorporated. [Id., § 2.]

**Art. 14 $\frac{1}{2}$ b. Incorporation proceedings.**—Those desiring to form corporations hereunder shall, in the exercise of the rights herein granted and subject to the limitations herein provided, prepare and file their charters under the General Corporation Laws of this State, which said corporation laws shall govern them except where in conflict with the provisions of this Act, and then in such instances this Act shall govern. [Id., § 3.]

**Art. 14 $\frac{1}{2}$ c. Charter fees; filing charters, amendments, etc., with Secretary of State; approval of Attorney General; filing charters, etc., with County Clerk; certified copies.**—The Secretary of State shall, instead of the statutory fees charged for filing charters, charge for filing charters and amendments to charters of corporations incorporated hereunder the sum of Ten Dollars for each charter and amendment thereof. Charters, amendments to charters and all by-laws must be filed in the office of the Secretary of State, and must first before being filed be approved by the Attorney General. Copies of the charter and by-laws properly certified to by the Secretary of State shall also be filed in the office of the County Clerk of the county in which is located any Society which is incorporated hereunder, but need not be recorded by the County Clerk but shall be kept by him subject to inspection of any person interested. The Secretary of State shall, in furnishing the corporation certified copies of charters, amendments and by-laws, furnish to the Society two certified copies of each, one for the files of the Society and one to be filed in the office of the County Clerk. [Id., § 4.]

**Art. 14 $\frac{1}{2}$ d. Purposes of corporations; franchise tax; statements; surplus.**—Corporations chartered hereunder shall be purely co-operative, and not for profit, and shall not be required to pay any annual franchise tax, but shall nevertheless make a statement of their assets and liabilities to the Secretary of State, showing the condition of their affairs, in such form as may be prepared for the Secretary of State by the Attorney General. Such Societies may, by their Directors in accordance with their by-laws pass their profits to the surplus fund or divide the same among the members of the Society in proportion to the respective contributions in cash to the working capital of the corporation, and patronage of their members. [Id., § 5.]

**Art. 14 $\frac{1}{2}$ e. Assets; payment of contributions; rights of certificate holders before payment; notes.**—Corporations chartered hereunder shall have property of not less than Five Hundred Dollars in value, which may be cash, property or notes acceptable to the Board of Directors; provided, however, that no membership certificates shall be is-

sued for subscriptions in the form of notes until such notes have been paid in full, principal and interest, and the holders of membership certificates for which cash or property has not been paid, while entitled to vote in the management of the affairs of the corporations shall not be entitled to share in its dividends nor in a distribution of any assets until such notes are paid in full. However, they may become borrowers from the corporation under the provisions of this Act and the by-laws adopted hereunder. Such notes shall be construed to be valid subscription contracts, and shall be the property of the corporations chartered hereunder for any and all purposes. [Id., § 6.]

**Art. 14½f. Powers.**—Corporations chartered under this Act shall have authority to borrow money and discount notes to an aggregate amount not in excess of five times the working capital of the corporation; such corporations shall have the right to loan their funds to members only upon such terms and such security, if any, as may be provided in their by-laws; they shall also have the right to act as the co-operative selling and purchasing agents of their members only, and may for their members sell any and all agricultural products, and for their members purchase machinery and all supplies of any kind or character, including the purchase of fire, livestock, hail, cyclone and storm insurance for its members in the event of purchasing insurance for its members, however, the corporation shall have authority to be, and shall be appointed and licensed as, the agent of the insurance companies, and the commissions so received by it shall be a part of the corporate funds of the company; they shall also have authority to own and operate such machinery and instrumentalities as may be necessary in the production, harvesting, and preparation for market of farm and ranch products. [Id., § 7.]

**Art. 14½g. Membership.**—Membership in Societies incorporated under this Act can be obtained only by election thereto at the time of the organization of the Society by the organizers thereof, or by the Board of Directors of such Society when organized under such rules and limitations as may be made in the by-laws. Members shall each have one vote only in the management of the affairs of the corporation. Members may be suspended or expelled for misconduct under such rules and regulations as may be prescribed, in the by-laws. In case of expulsion the Society shall return to the member at such time as may be fixed in its by-laws an amount equal to the money value of the amount contributed by such member to the working capital of the society. [Id., § 8.]

**Art. 14½h. Membership certificates not transferable; withdrawal.**—Membership certificates shall not be transferable, but members shall have the right of withdrawal under such rules and regulations as may be adopted by the Society in its by-laws. In case of withdrawal the society may return to the member an amount equal to the money value of the amount contributed by him to the working capital of the society. [Id., § 9.]

**Art. 14½i. Liability of members; waiver of exemption.**—Unless otherwise provided, the members of a corporation chartered hereunder shall not be responsible to the corporation, or to its creditors, in excess of the membership shares subscribed by them, and when such shares are paid for their liability shall cease; provided, however, that the association may, in its by-laws, make each member responsible for an additional amount equal to 100 per cent. of the shares owned by a member, payable upon assessment of the Board of Directors for the payment of the debts and obligations of the corporation; And may provide in like manner that members may waive their right to claim personal property exempt from seizure for debt as against debts and obligations due to the society; but in all such instances such liability must be plainly provided for in

the by-laws, which by-laws in this and all other instances must be signed by the member. [Id., § 10.]

**Art. 14½j. Forms to be prepared by Attorney General.**—Appropriate forms of charter, charter amendments, by-laws, rules and regulations and annual reports to the members, and such other forms as may be necessary to make this Act effective, shall be prepared by the Attorney General of the State and filed with the Secretary of State who shall cause same, together with copy of this Act, to be published and distributed among the citizens of the State who may be interested. [Id., § 11.]

## TITLE 4

## AMUSEMENTS—PUBLIC

**Article 22. Defining places of public amusement.**

**Negligence in conduct of place of public amusement.**—Unless a defect in a stairway was brought to the notice of the manager of a theater or his employés before an injury to a patron alleged to have been caused thereby, or unless it had existed for such a length of time that by ordinary care he would have discovered it, he was not liable. *Dalton v. Hooper* (Civ. App.) 168 S. W. 84.

In an action for injuries to child while on walk in amusement grounds under defendant's control, measure of duty held to be ordinary care to keep walk in condition, safe for child of plaintiff's years. *Wichita Falls Traction Co. v. Adams* (Sup.) 133 S. W. 155.

Owner of amusement grounds held liable for injuries by tank on walk under its control if placed there by its employés, or if placed there by stranger and it did not exercise ordinary care to remove it. *Id.*

**Liability of manager for breach of contract.**—A manager of a theater for a lessee is not liable for breach of contract based on sale of ticket by an employé of the lessee and ejection by another of the holder of the ticket. *Weis v. Skinner* (Civ. App.) 178 S. W. 34.

A manager of a theater for a lessee is not liable in tort for other employés of the lessee selling a ticket to a performance and ejecting the holder thereof from her seat. *Id.*



TITLE 5  
APPORTIONMENT

Art.

- 24. Senatorial districts.
- 26. Representative districts.
- 28. Congressional districts.
- 29. Supreme judicial districts.
- 30. Judicial districts.

Art.

- 31. Where apportionment law amended, rule as to return of writs, etc., jurors, appearance bonds, etc., and witnesses.

Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.	Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.
Anderson	13	25	7	3	1	Erath	26	96, 97	12	29	2
Andrews	28	122	16	70	8	Falls	11	62, 63	11	82	3
Angelina	13	10	2	2	9	Fannin	3	37, 38	4	6	6
Aransas	22	75	14	36	4	Fayette	18	70, 127	9	22	1
Archer	29	100	13	30	2	Fisher	28	121	18	39	7
Armstrong	29	123	18	47	7	Floyd	29	122	18	64	7
Atascosa	22	80	15	81	4	Foard	29	103	18	46	7
Austin	18	71, 127	10	22	1	Fort Bend	16	18, 127	8	23	1
Bailey	29	123	18	64	7	Franklin	2	35	1	76	6
Bandera	24	115	16	33	4	Freestone	12	58	6	77	5
Bastrop	19	90	10	21	3	Frio	22	80	15	81	4
Baylor	29	102	13	50	2	Gaines	28	122	18	72	8
Bee	22	75	14	36	4	Galveston	17	16, 17	7	10, 56	1
Bell	27	66, 67	11	27	3	Garza	28	122	18	72	7
Bexar	24	85	14	37, 45, 57, 73	4	Gillespie	24	87	16	33	4
Blanco	21	87	14	33	3	Glasscock	28	120	16	70	8
Borden	28	122	18	32	8	Goliad	22	74	9	24	4
Bosque	27	95	11	18	2	Gonzales	21	82	9	25	4
Bowie	1	3	1	5	6	Gray	29	124	18	31	7
Brazoria	17	19	9	23	1	Grayson	4	42, 43	4	15, 59	5
Brazos	12	22	6	85	1	Gregg	8	126	3	4	6
Brewster	25	117	16	63	8	Grimes	15	21, 22	8	12	1
Briscoe	29	122	18	64	7	Guadalupe	21	83	14	25	4
Brooks	23	78	15	79	4	Hale	29	123	18	64	7
Brown	26	110	17	35	3	Hall	29	104	18	46	7
Burleson	19	68, 127	10	21	1	Hamilton	27	94	11	52	3
Burnet	20	92	17	33	3	Hansford	29	125	18	31	7
Caldwell	21	86	10	22	3	Hardeman	29	103	18	46	7
Calhoun	22	74	9	24	4	Hardin	14	12	2	9, 75	9
Callahan	28	108, 110	17	42	2	Harris	16	15	8	11, 55, 61, 80	1
Cameron	23	77	15	28	4	Harrison	8	4, 126	2	71	6
Camp	7	31	1	76	6	Hartley	29	125	18	69	7
Carson	29	125	18	31	7	Haskell	28	102	18	39	2
Cass	1	2, 3	1	5	6	Hays	21	88	10	22	3
Castro	29	123	18	64	7	Hemphill	29	124	18	31	7
Chambers	17	17	7	75	1	Henderson	9	28	3	8	5
Cherokee	13	26	2	2	6	Hidalgo	23	78	15	79	4
Childress	29	104	18	46	7	Hill	10	56, 59	6	66	5
Clay	29	100	13	30	2	Hockley	29	122	18	72	7
Cochran	29	122	18	72	7	Hood	30	97	12	29	2
Coke	25	111	16	51	3	Hopkins	2	34, 35	1	8	6
Coleman	26	112	17	35	3	Houston	13	24	7	3	1
Collin	5	41, 43	4	59	5	Howard	28	120	16	32	2
Collingsworth	29	124	18	46	7	Hudspeth	25	119	16	34	8
Colorado	18	71, 127	9	25	7	Hunt	5	39, 40	4	8, 62	5
Comal	21	88	14	22	3	Hutchinson	29	125	18	31	7
Comanche	26	109	17	52	2	Irion	25	113	16	51	3
Concho	26	112	17	35	3	Jack	29	99	13	43	2
Cooke	4	48	13	16	2	Jackson	22	73	9	24	1
Coryell	27	93	11	52	3	Jasper	14	9	2	1	9
Cottle	29	104	16	50	7	Jefferson	14	13, 14	2	58, 60	9
Crane	28	120	16	70	8	Jeff Davis	25	117	16	63	8
Crockett	25	115	18	33	3	Jim Hogg	23	78	15	79	4
Crosby	29	122	18	72	7	Jim Wells	23	76	15	79	4
Culberson	25	119	16	34	8	Johnson	10	53, 95	12	18	2
Dallam	29	125	18	69	7	Jones	28	106	17	39	2
Dallas	6	44, 47	5	14, 44, 68	5	Karnes	22	81, 84	14	81	4
Dawson	28	122	18	72	2	Kaufman	9	45, 47	3	86	5
Deaf Smith	29	123	18	69	7	Kendall	24	87	14	38	4
Delta	2	35	13	8, 62	5	Kent	28	105	18	39	7
Denton	31	46, 54	13	16	2	Kerr	24	115	16	38	4
DeWitt	22	81	9	24	1	Kimble	25	115	16	33	4
Dickens	29	105	18	50	7	King	29	105	18	50	7
Dimmit	23	116	15	49	4	Kinney	25	117	15	63	4
Donley	29	124	18	47	7	Kleberg	23	77	15	28	4
Dunn	23	76	15	28	4	Knox	29	103	18	50	2
Duval	23	76	15	79	4	Lamar	3	36, 38	1	6, 62	6
Eastland	28	108	17	42	2	Lamb	29	123	18	64	7
Ector	28	120	16	70	8	Lampasas	20	93	17	27	3
Edwards	25	115	16	83	4	La Salle	23	80	15	81	4
Ellis	10	55	5	40	5	Lavaca	18	72	9	25	1
El Paso	25	118, 119	16	34, 41, 65	8	Lee	19	68, 127	10	21	3
						Leon	15	23	6	12	1

Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.	Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.
Liberty .....	14	12, 14	7	9, 75	9	Rusk .....	8	6	3	4	6
Limestone ...	12	60, 63	6	77	5	Sabine .....	14	9	2	1	9
Lipscomb ....	29	124	18	31	7	San Augustine	14	10	2	1	9
Live Oak .....	22	75	15	36	4	San Jacinto ..	15	11	7	9	9
Llano .....	26	87	17	33	3	San Patricio ..	23	75	14	36	4
Loving .....	28	120	16	70	8	San Saba .....	26	114	17	33	3
Lubbock .....	29	122	18	72	7	Schleicher ....	25	113	16	51	3
Lynn .....	28	122	18	72	7	Scurry .....	28	105	18	32	2
Madison .....	15	23	6	12	1	Shackelford ..	28	106	17	42	2
Marion .....	1	3	1	76	6	Shelby .....	8	8	2	4	9
Martin .....	28	120	16	70	8	Sherman .....	29	125	18	69	7
Mason .....	25	115	16	33	4	Smith .....	7	27, 28	3	7	6
Matagorda ....	17	19	9	23	1	Somervell .....	30	97	12	18	2
Maverick .....	25	117	15	63	4	Starr .....	23	78	15	79	4
McCulloch ....	26	114	17	35	3	Stephens .....	28	98	17	42	2
McLennan ...	11	61, 63	11	19, 54, 74	3	Sterling .....	25	113	16	51	3
McMullen .....	23	80	15	36	4	Stonewall .....	28	105	18	39	2
Medina .....	25	116	15	38	4	Sutton .....	25	115	16	83	4
Menard .....	25	115	16	33	4	Swisher .....	29	123	18	64	7
Midland .....	28	120	16	70	8	Tarrant .....	30	52, 54	12	17, 48, 67	2
Milam .....	11	65, 67	6	20	3	Taylor .....	23	107	17	42	2
Mills .....	26	94	17	27	3	Terrell .....	25	117	16	63	8
Mitchell .....	28	121	16	32	2	Terry .....	28	122	18	72	7
Montague .....	31	49	13	16	2	Throckmorton ..	29	102	13	39	2
Montgomery .	15	21	7	9	9, 75	Titus .....	2	32	1	76	6
Moore .....	29	125	18	69	7	Tom Green ..	25	113	16	51	3
Morris .....	1	32	1	76	6	Travis .....	20	89	10	26, 53	3
Motley .....	29	104	18	50	7	Trinity .....	13	20	7	12	1
Nacogdoches ..	14	7	2	2	9	Tyler .....	14	12	2	75	9
Navarro .....	9	57, 58, 59	6	13	5	Upshur .....	7	31	3	7	6
Newton .....	14	9	2	1	9	Upton .....	28	120	16	83	8
Nolan .....	28	121	17	32	2	Uvalde .....	25	116	15	63	4
Nueces .....	23	76	14	28	4	Val Verde .....	25	117	16	63	4
Ochiltree .....	29	124	18	31	7	Van Zandt ...	7	29	3	86	5
Oldham .....	29	125	18	69	7	Victoria .....	22	74	9	24	4
Orange .....	14	14	2	1	2	Walker .....	15	20	7	12	1
Palo Pinto ...	28	98	17	29	2	Waller .....	16	18, 127	8	89	1
Panola .....	8	5	2	4	6, 9	Ward .....	28	120	16	70	8
Parker .....	30	51	12	43	2	Washington ..	19	69	10	21	1
Parmer .....	29	123	18	69	7	Webb .....	23	79	15	49	4
Pecos .....	25	120	16	83	8	Wharton .....	17	73	9	23	1
Polk .....	15	11	7	9	9	Wheeler .....	29	124	18	31	7
Potter .....	29	125	18	47	7	Wichita .....	29	101	13	30, 78	2
Presidio .....	25	117	16	63	8	Wilbarger .....	29	101	13	46	7
Rains .....	5	30	4	8	5	Willacy .....	23	77	15	28	1
Randall .....	29	123	18	47	7	Williamson ..	20	91, 92	10	26	3
Reagan .....	25	120	16	83	8	Wilson .....	22	84	14	81	4
Real .....	24	115	16	38	4	Winkler .....	28	120	16	70	8
Red River ...	2	33	1	6	6	Wise .....	31	50	13	43	2
Reeves .....	25	120	16	70	8	Wood .....	7	30	3	7	5
Refugio .....	22	75	9	24	4	Yoakum .....	28	122	18	72	7
Roberts .....	29	124	18	31	7	Young .....	29	99	13	30	2
Robertson .....	12	64	6	85	3	Zapata .....	23	79	15	49	4
Rockwall .....	6	40	5	86	5	Zavala .....	25	116	15	38	4
Runnels .....	26	111	17	35	3						

SENATORIAL DISTRICTS

Article 24. [16] [11]

Special act fixing apportionment.—Act Feb. 16, 1917, c. 25, § 5, creating Hudspeth county, places such county in the 25th senatorial district.

REPRESENTATIVE DISTRICTS

Art. 26.

Act Feb. 16, 1917, c. 25, creating Hudspeth county, by section 5 thereof, places such county in the 119th representative district.

CONGRESSIONAL DISTRICTS

Art. 28. [20] [15]. The State of Texas shall be apportioned into the following congressional districts, each of which shall be entitled to elect one member of the Congress of the United States;

First—The following Counties shall compose the First District, to wit; Bowie, Red River, Lamar, Delta, Hopkins, Franklin, Titus, Camp, Morris, Cass and Marion.

Second—The following counties shall compose the Second District, to wit; Panola, Shelby, San Augustine, Sabine, Newton, Jasper, Orange, Jefferson, Hardin, Tyler, Angelina, Nacogdoches, Cherokee and Harrison.

Third—The following counties shall compose the Third District, to wit; Kaufman, Van Zandt, Wood, Upshur, Smith, Gregg, Henderson and Rusk.

Fourth—The following counties shall compose the Fourth District, to wit; Fannin, Grayson, Collin, Hunt and Rains.

Fifth—The following counties shall compose the Fifth District, to wit; Dallas, Ellis and Rockwall.

Sixth—The following counties shall compose the Sixth District, to wit; Navarro, Freestone, Limestone, Robertson, Brazos, Milam, Leon, Madison and Hill.

Seventh—The following counties shall compose the Seventh District, to wit; Galveston, Chambers, Liberty, San Jacinto, Polk, Trinity, Houston, Anderson, Walker and Montgomery.

Eighth—The following counties shall compose the Eighth District, to wit; Harris, Fort Bend, Waller and Grimes.

Ninth—The following counties shall compose the Ninth District, to wit; Brazoria, Fayette, Colorado, Wharton, Matagorda, Jackson, Lavaca, Gonzales, De Witt, Victoria, Calhoun, Goliad and Refugio.

Tenth—The following counties shall compose the Tenth District, to wit; Washington, Austin, Burleson, Lee, Bastrop, Caldwell, Hays, Travis and Williamson.

Eleventh—The following counties shall compose the Eleventh District, to wit; Bell, Coryell, Hamilton, Bosque, McLennan and Falls.

Twelfth—The following counties shall compose the Twelfth District, to wit; Erath, Hood, Somervell, Johnson, Tarrant and Parker.

Thirteenth—The following counties shall compose the Thirteenth District, to wit; Cooke, Denton, Wise, Montague, Clay, Jack, Young, Archer, Wichita, Wilbarger, Baylor and Throckmorton.

Fourteenth—The following counties shall compose the Fourteenth District, to wit; Aransas, San Patricio, Bee, Karnes, Wilson, Bexar, Comal, Kendall, Blanco, Nueces and Guadalupe.

Fifteenth—The following counties shall compose the Fifteenth District, to wit; Cameron, Willacy, Kleberg, Jim Wells, Brooks, Hidalgo, Starr, Jim Hogg, Zapata, Webb, Duval, Live Oak, McMullen, LaSalle, Dimmit, Maverick, Zavala, Frio, Atascosa, Medina, Uvalde, and Kinney.

Sixteenth—The following counties shall compose the Sixteenth District, to wit; Andrews, Martin, Howard, Mitchell, Coke, Sterling, Glasscock, Midland, Ector, Winkler, Loving, Ward, Crane, Upton, Reagan, Irion, Tom Green, Menard, Schleicher, Crockett, Sutton, Kimble, Terrell, Pecos, Reeves, Culberson, El Paso, Jeff Davis, Presidio, Brewster, Hudspeth, Real, Kerr, Gillespie, Bandera, Val Verde, Edwards and Mason.

Seventeenth—The following counties shall compose the Seventeenth District, to wit; Burnet, Llano, Comanche, McCulloch, San Saba, Lampasas, Mills, Brown, Coleman, Callahan, Eastland, Stephens, Shackelford, Jones, Palo Pinto, Taylor, Nolan, Concho and Runnels.

Eighteenth—The following counties shall compose the Eighteenth District to wit; Hardeman, Foard, Knox, Haskell, Fisher, Stonewall, King, Cottle, Childress, Collingsworth, Wheeler, Hemphill, Lipscomb, Ochiltree, Roberts, Gray, Donley, Hall, Motley, Dickens, Kent, Scurry, Borden, Garza, Crosby, Floyd, Briscoe, Armstrong, Carson, Hutchison, Hansford, Sherman, Moore, Potter, Randall, Swisher, Hale, Lubbock, Lynn, Dawson, Gaines, Terry, Hockley, Lamb, Castro, Dallam, Hartley, Oldham, Deaf Smith, Palmer, Bailey, Yoakum and Cochran. [Acts

1903, p. 44; Acts 1905, p. 96; Acts 1909, p. 156; Act March 29, 1917, ch. 119, § 1.]

**Explanatory.**—Section 2 provides that the act shall take effect for the general election in 1918, and shall not affect the tenure in office of the present delegation in Congress. Section 3 repeals all laws in conflict.

Act Feb. 16, 1917, c. 25, creating Hudspeth county, by section 5 thereof places such county in the 16th congressional district.

### SUPREME JUDICIAL DISTRICTS

**Art. 29.** [21] [16] The State of Texas shall be, and is hereby divided into nine Supreme Judicial Districts, for the purpose of constituting and organizing courts of civil appeals therein, respectively:

1. The following counties shall compose the First Supreme Judicial District: Houston, Madison, Walker, Harris, Grimes, Washington, Waller, Fort Bend, Brazoria, Matagorda, Wharton, Colorado, Austin, Fayette, Lavaca, Jackson, Anderson, Chambers, Brazos, Leon, Burleson, DeWitt, Galveston and Trinity.

2. The following counties shall compose the Second Supreme Judicial District: Wichita, Cooke, Montague, Clay, Archer, Baylor, Knox, Stonewall, Haskell, Throckmorton, Young, Jack, Wise, Denton, Tarrant, Parker, Palo Pinto, Stephens, Shackelford, Jones, Mitchell, Nolan, Taylor, Callahan, Bosque, Eastland, Erath, Hood, Somervell, Comanche, Johnson, Dawson, Howard, and Scurry.

3. The following counties shall compose the Third Supreme Judicial District: Runnels, Coleman, Brown, Mills, Hamilton, Coryell, Bell, Lampasas, San Saba, McCulloch, Concho, Llano, Burnet, Williamson, Milam, Lee, Bastrop, Travis, Blanco, Hays, Comal, Caldwell, Robertson, McLennan, Falls, Sterling, Coke, Tom Green, Irion, Schleicher, and Crockett.

4. The following counties shall compose the Fourth Supreme Judicial District: Val Verde, Sutton, Edwards, Kinney, Maverick, Menard, Kimble, Kerr, Bandera, Uvalde, Zavala, Dimmit, Webb, LaSalle, Frio, Medina, Duval, McMullen, Atascosa, Bexar, Kendall, Gillespie, Mason, Guadalupe, Wilson, Live Oak, Zapata, Bee, Gonzales, Karnes, Calhoun, Victoria, Goliad, Refugio, San Patricio, Aransas, Nueces, Hidalgo, Cameron, Starr, Jim Hogg, Real, Brooks, Jim Wells, and Kleberg.

5. The following counties shall compose the Fifth Supreme Judicial District: Grayson, Collin, Dallas, Rockwall, Ellis, Navarro, Kaufman, Henderson, Van Zandt, Raines, Hunt, Hill, Limestone, Freestone, Wood, and Delta.

6. The following counties shall compose the Sixth Supreme Judicial District: Lamar, Red River, Bowie, Hopkins, Franklin, Titus, Morris, Cass, Marion, Camp, Fannin, Cherokee, Gregg, Harrison, Panola, Smith, Upshur, and Rusk.

7. The following counties shall compose the Seventh Supreme Judicial District: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Hemphill, Oldham, Potter, Carson, Gray, Wheeler, Deaf Smith, Randell, Armstrong, Donley, Collingsworth, Parmer, Castro, Swisher, Briscoe, Hall, Childress, Bailey, Lamb, Hale, Floyd, Motley, Cottle, Foard, Hardeman, Wilbarger, King, Dickens, Crosby, Lubbock, Hockley, Cochran, Yoakum, Terry, Lynn, Garza, Kent, and Fisher.

8. The following counties shall compose the Eighth Supreme Judicial District: Gaines, Borden, Andrews, Martin, Loving, Winkler, Midland, Glasscock, Reeves, Ward, Crane, Upton, Reagan, Terrell, Pecos, Brewster, Presidio, Jeff Davis, El Paso, Ector, and Culberson.

Act Feb. 16, 1917, c. 25, creating Hudspeth county, by section 5 thereof places such county in the 8th supreme judicial district.

9. The following counties shall compose the Ninth Supreme Judicial District: Shelby, Panola, Nacogdoches, Angelina, San Jacinto, Mont-

gomery, Liberty, Jefferson, Orange, Hardin, Newton, Jasper, Tyler, Polk, Sabine, San Augustine. [Acts 1907, p. 324; Acts 1911, p. 269, § 1; Acts 1911, unpublished, see page 4951 Vernon's Sayles' Civ. St. 1914; Acts 1913, p. 7, § 1; Act March 22, 1915, ch. 70, § 1.]

Within thirty days after the passage of this Act, the Governor shall by and with the consent of the Senate, if in session, appoint one Chief Justice and two Associate Justices, for the Ninth Supreme Judicial District who shall each reside in the territorial limits of the Ninth Supreme Judicial District, and who shall possess the qualifications now required by law, who shall constitute the Court of Civil Appeals within and for the Ninth Supreme Judicial District, and who shall hold their offices until the next general election in 1916, and who shall thereafter be elected and qualify as provided and required by Article 1581 of the 1911 Revised Statutes of Texas. [Id., § 2.]

This act took effect 90 days after March 20, 1915, the date of adjournment of the legislature.

### JUDICIAL DISTRICTS

**Art. 30.** [22] [17] The judicial districts of the state shall be constituted as follows:—

1. Hereafter the First Judicial District of the State of Texas shall be composed of the counties of San Augustine, Sabine, Newton, Jasper and Orange, and terms of the courts in said district shall, on and after July 1st, 1917, be held as follows:

San Augustine county, beginning the first Monday in January and July of each year and continuing for a period of six weeks. In Newton county beginning the seventh Monday after the first Monday in January and July of each year and continuing for a period of four weeks. In Sabine county beginning on the eleventh Monday after the first Monday in January and July of each year and continuing for a period of five weeks. In Orange county beginning on the sixteenth Monday after the first Monday in January and July of each year and continuing for a period of five weeks. In Jasper county beginning on the twenty-first Monday after the first Monday in January and July of each year and continuing for a period of six weeks. The courts of said district shall continue to hold their terms as provided by existing law until July 1st, 1917. [Acts 1907, p. 100; Acts 1913, p. 176; Act March 26, 1917, ch. 99, § 1.]

That all process issued out of the courts of the First Judicial District prior to July 1st, 1917, is hereby made returnable to the terms of the courts as fixed by this Act on and after July 1st, 1917, and all bonds executed and all recognizances entered of record in said courts prior to July 1st, 1917, shall bind the parties for their appearance or to fulfill the obligations thereof at the terms of such courts as fixed by this Act on and after July 1st, 1917, and all process heretofore or hereafter issued or returned prior to July 1st, 1917, as well as all bonds or recognizances taken in the courts of said district heretofore or prior to July 1st, 1917, shall on and after July 1st, 1917, be as valid as if no change had been made in the times of the holding of such courts in said district. [Id., § 2.]

Took effect 90 days after March 21, 1917, date of adjournment.

By Act Feb. 13, 1917, set forth post in subdivisions 9 and 75 of this article, Tyler county is removed from the 1st district and placed in the 75th district.

3. The Third Judicial District shall be composed of the Counties of Houston, Henderson and Anderson, as now constituted, and the district courts shall be held therein as follows:

In the County of Henderson on the first Monday in February and the second Monday before the first Monday in September, and may continue in session for seven weeks.

In the County of Houston on the seventh Monday after the first Monday in February and on the fifth Monday after the first Monday in September, and may continue in session seven weeks.

In Anderson County on the fourteenth Monday after the first Monday in February and may continue in session eight weeks; on the twenty-second Monday after the first Monday in February, and may continue in session until the business is disposed of; on the twelfth Monday after the first Monday in September, and may continue in session until the business is disposed of. [Acts 1905, p. 141; Act Feb. 20, 1915, ch. 19, § 1; Act March 12, 1915, ch. 42, § 1.]

That all process, writs and bonds issued, served or executed prior to the taking effect of this Act and returnable to the terms of the Third Judicial District Court as heretofore fixed by law in the several counties composing said district are hereby made returnable to the terms of said court in said several counties as fixed by this Act, and all process heretofore returnable, as well as all bonds and recognizances heretofore entered into in any court created or reorganized by this Act, shall be valid and binding and have the same effect as if no change had been made by this Act in the times of holding said terms of court. [Id., § 2.]

Took effect March 12, 1915. Section 3 repeals Senate Bill No. 38, regular session 34th Leg. approved Feb. 20, 1915, and all other laws in conflict.

5. That the Fifth Judicial District of Texas shall be composed of the counties of Bowie and Cass, and the terms of the District Court shall be held therein in each year as follows:

In the County of Bowie, beginning on the first Monday in January of each year, and may continue in session for ten weeks.

In the County of Cass, beginning on the tenth Monday after the first Monday in January of each year, and may continue in session for five weeks.

In the County of Bowie, on the fifteenth Monday after the first Monday in January of each year, and may continue in session until the first Monday in September.

In the County of Cass, on the first Monday in September of each year, and may continue in session for five weeks.

In the County of Bowie, on the fifth Monday after the first Monday in September of each year, and may continue in session until the first Monday in January following. [Acts 1907, p. 198; Acts 1911, p. 167, § 1; Act Feb. 9, 1915, ch. 5, § 1.]

The District Judge and the District Attorney of the Fifth Judicial District, elected and now acting for said District, shall hold their respective offices until the term for which they were elected shall expire and their successors are elected and duly qualified. [Id., § 3.]

That all process issued or served before this Act takes effect, including recognizances and bonds returnable to the district courts of any of the counties of the said judicial districts, shall be considered as returnable to the said court in accordance with the terms and provisions as prescribed in this Act, and all such process is hereby legalized, and all grand and petit juries drawn and selected under the existing laws in any of the counties of said judicial district, shall be considered lawfully drawn and selected for the next term of the district court of their respective counties, held after this Act takes effect, and all such processes are hereby legalized and validated; provided, that if any court in any county of said districts shall be in session at the time this Act takes effect, such court or courts affected thereby shall continue in session until the term thereof shall expire under the provisions of existing laws, but thereafter the courts in such counties shall conform to the requirements of this Act. [Id., § 7.]

7. The Counties of Upshur, Wood and Smith shall hereafter constitute and be the Seventh Judicial District of the State of Texas, and the terms of the District Court shall be held therein each year as follows:

In the County of Upshur: One term, beginning on the second Monday in January and may continue in session six weeks.

In the County of Wood: Beginning on the seventh Monday after the second Monday in January and may continue in session six weeks.

In the County of Smith: Beginning on the thirteenth Monday after the second Monday in January and may continue in session until the thirtieth day of June.

In the County of Upshur: Beginning on the first Monday in July and may continue in session six weeks.

In the County of Wood: Beginning on the seventh Monday after the first Monday in July and may continue in session six weeks.

In the County of Smith: Beginning on the thirteenth Monday after the first Monday in July and may continue in session until the third Saturday in December. [Acts 1909, p. 120; Act March 10, 1917, ch. 70, § 3.]

The District Judge of the Seventh Judicial District, as formerly constituted, and the District Attorney thereof, shall continue in office as district judge and district attorney of the Seventh Judicial District, as herein constituted, until the end of the term for which they were elected. [Id., § 4.]

That all process and writs issued out of the district courts of said counties and jurors selected prior to the taking effect of this Act are hereby made returnable to the terms of said courts, as said terms are fixed by this Act, and all bonds executed and recognizances entered in said courts shall bind the parties for their appearance or to fulfill the obligations of such bonds and recognizances at the terms of said courts as they are fixed by this Act, and all process heretofore returned to, as well as all bonds and recognizances heretofore taken in any of said counties' district courts thereof shall be as valid as though no change had been made in the said districts and the times of holding courts therein. [Id., § 8.]

Should any district court of the Seventh, Fourteenth or Fortieth Judicial District be in session in any of the counties in said district under existing laws when this Act takes effect the same shall continue and end its term under such existing laws as if no change in the district had been made, and all process, writs, judgments and decrees shall be valid and shall not be affected by the change in said districts and the times of holding courts therein made by this Act. [Id., § 9.]

Section 11 repeals all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

9. The Ninth Judicial District of the State of Texas shall hereafter be composed of the following named counties, to wit: Hardin, Liberty, Montgomery, San Jacinto and Polk, and the terms of the district courts in and for said Ninth Judicial District of Texas shall be begun and holden therein as follows:

In the County of Montgomery, on the second Monday in January and July of each year, and may continue in session four weeks.

In the County of Liberty on the fourth Monday after the second Monday in January and July of each year, and may continue in session five weeks.

In the County of Hardin, on the eleventh Monday after the second Monday in January and July of each year, and may continue in session five weeks.

In the County of San Jacinto, on the sixteenth Monday after the second Monday in January and July of each year, and may continue in session four weeks.

In the County of Polk, on the twentieth Monday after the second Monday in January and July of each year, and may continue in session until the business is disposed of. [Acts 1909, p. 128; Act April 7, 1915, ch. 155; Act Feb. 13, 1917, ch. 23, § 1.]

Either of the judges of the District Court of Montgomery, Liberty and Hardin Counties in said judicial districts may, at his discretion, either in term time or in vacation transfer any case or cases, civil or criminal, that may at any time be pending in his court to the other district court in said county by an order or orders entered upon the minutes of the court making said transfer; and where such transfer or transfers are made the clerk of said court shall enter such case or cases upon the docket of the court to which said transfer or transfers are made, and when so entered upon the docket the judge of said court shall try and dispose of such cases in the same manner as if such cases were originally filed in such court. The district courts of said Ninth and Seventy-Fifth Districts shall each have and exercise concurrent jurisdiction co-extensive with the limits of said three counties in all civil and criminal matters of which district courts are given jurisdiction under the Constitution and Laws of this State. [Id., § 3.]

The district clerks and sheriffs elected, qualified and acting as officers of the district court in the counties of Montgomery, Liberty and Hardin shall be alike officers of both the Ninth and Seventy-fifth Judicial Districts in their respective counties. [Id., § 4.]

The present judges of the Ninth Judicial District and of the Seventy-fifth Judicial District as same now exist shall remain the district judges of their respective districts as reorganized under the provisions of this Act and shall hold their office until the term for which they have been elected shall have expired and their successors are duly appointed or elected and qualified, and they shall receive the same compensation as now, or may hereafter be provided by law for district judges, and a vacancy in either of said offices shall be filled as is now, or may hereafter be provided for by law. [Id., § 5.]

There shall be a district attorney in and for said Seventy-fifth Judicial District, and the said Ninth Judicial District, and the present district attorneys of the Seventy-fifth Judicial District and of the Ninth Judicial District as same now exist shall remain the district attorneys of their respective districts as reorganized under the provisions of this Act, and shall hold their office until the term for which they have been elected shall have expired and their successors are duly appointed or elected and qualified, and they shall receive the same compensation as now, or may hereafter be provided by law for district attorneys, and a vacancy in either of said offices shall be filled as is now, or may hereafter be provided for by law. [Id., § 6.]

**Explanatory.**—The act amends chapter 155 of the 34th Legislature so as to read as set forth in this subdivision and subdivision 75, post. It also, by section 8, expressly repeals all of the sections of that act, except section 5, and repeals all other laws in conflict. Section 5 of the former act, reserved from the repealing clause, provides that the then present judge of the ninth district should remain the judge of the new district during his term at the same compensation. Became a law Feb. 13, 1917.

13. That the Thirteenth Judicial District of Texas shall hereafter be composed of the county of Navarro, and the terms of the District Court shall be held therein in each year as follows: On the first Mondays in January, April, July and October of each year, and the terms of the January and April terms of said Court shall continue in session twelve weeks, or until all of the business be disposed of; the term beginning on the first Monday in July shall continue in session six weeks, or until the business is disposed of; and the term beginning on the first Monday in October shall continue in session twelve weeks, or until all of the business be disposed of; provided, there shall be no jury trials at the July term of said Court. [Acts 1899, p. 38; Act Feb. 12, 1915, ch. 8, § 1.]



That there shall be organized grand juries at the April and October terms of said District Court of said District, and at such other terms of said Court as may be determined and ordered by the Judge thereof. [Id., § 2.]

That the District Judge of the Thirteenth Judicial District elected and now acting for said District shall hold his office until the term for which he was elected shall expire, and until his successor is duly elected and qualified, and the office of District Attorney for the Thirteenth Judicial District is hereby abolished, the county attorney of Navarro county shall hereafter perform all the duties heretofore performed by said District attorney of the Thirteenth Judicial District. [Id., § 5.]

The several District Clerks of Navarro, Limestone and Freestone counties, duly elected and acting as such shall continue to be the clerks of the District Court of their respective counties, until the next general election and until their respective successors are duly elected and qualified. [Id., § 7.]

That all process issued or served before this Act takes effect, including recognizances, and bonds, returnable to the District Court of any of the counties of said Judicial District, shall be considered as returnable to said Courts in accordance with the terms as prescribed in this Act, and all such process is hereby legalized and grand and petit juries drawn and selected under existing laws in any of the counties of said Judicial Districts shall be considered lawfully drawn and selected for the term of the District Court of their respective counties held after this Act takes effect. And all such process are hereby legalized and validated, provided, that if any court in any county of said District shall be in session at the time this Act takes effect, such court or courts affected hereby shall continue in session until the term thereof shall expire under the provisions of existing laws, but thereafter, the courts in such county shall conform to the requirements of this Act. [Id., § 8.]

14. Dallas County shall constitute the Fourteenth Judicial District instead of Dallas and Rockwall, as it has heretofore existed, and the District Court of the said Fourteenth Judicial District shall hold four terms each year in the County of Dallas as follows:

Beginning on the second Monday in January and ending on the Saturday before the second Monday in April.

Beginning on the second Monday in April and ending on Saturday before the second Monday in July.

Beginning on the second Monday in July and ending on Saturday before the second Monday in October.

Beginning on the second Monday in October and ending on Saturday before the second Monday in January.

The said Fourteenth Judicial District Court shall continue and have jurisdiction as is now provided by the acts of the Thirty-third Legislature, Chapter 89, approved March 31, 1913 [Vernon's Sayles' Civ. St. 1914, art. 30, subd. 14], save and except as the Act may apply to Rockwall County. Nothing herein nor in this Act shall be construed to in any manner affect the jurisdiction or validity of any other district court in Dallas County heretofore created, but this Act shall be construed in so far as it may affect the Fourteenth Judicial District of Dallas County to leave each of said courts, including the Fourteenth District Court, with the same jurisdiction now granted them under existing laws, save and except the transfer of Rockwall County to a new judicial district and the changing of the terms in Dallas County for the said Fourteenth Judicial District. [Acts 1913, p. 171; Act March 10, 1917, ch. 70, § 5.]

The District Judge of the said Fourteenth Judicial District, as formerly constituted, shall continue in office as district judge of the Fourteenth Judicial District, as herein constituted, until the end of the term for which he was elected. [Id., § 6.]

For special provisions relating to this district and districts 7, 40, and 86, see subdivision 7 of this article.

16. The Sixteenth Judicial District shall be composed of the counties of Denton, Montague and Cooke, and the district court shall be held therein as follows: In the County of Montague on the first Monday in January and the twenty-second Monday after the first Monday in January, and may continue in session six weeks; in the County of Denton on the sixth Monday after the first Monday in January, and on the first Monday in September, and may continue in session eight weeks; in the County of Cooke on the fourteenth Monday after the first Monday in January, and the eighth Monday after the first Monday in September and may continue in session eight weeks. [Act Feb. 17, 1917, ch. 26, § 1.]

That all process issued or served before this Act goes into effect, returnable to the district court in said judicial district, shall be returnable to the said court as fixed by the terms of this Act, and said process is hereby legalized and validated, and all grand and petit jurors selected and drawn under existing laws in any of the counties of said judicial district shall be considered as legally drawn and selected for the next term of the district court of the respective counties held after this Act takes effect, and all appearance bonds and recognizances taken in and for said court shall bind the parties therein obligated to appear at the next term of said court under this Act. [Id., § 2.]

17.

Service on first of defendants less than 10 days before the term to which process was returnable cannot support a default judgment, nor would a transfer of the cause to another judicial district, under this subdivision, cure the defect. *McCaulley v. Western Nat. Bank* (Civ. App.) 173 S. W. 1000.

18. That the 18th Judicial District shall be composed of the counties of Johnson, Bosque and Somervell. The district courts in the counties comprising the said 18th Judicial District shall be holden as follows: In the County of Johnson, beginning on the first Monday in January and may continue in session until and including Saturday before the third Monday in March; beginning on the first Monday in May and may continue in session until and including Saturday before the first Monday in July; beginning on the second Monday in October, and may continue in session until and including Saturday before the first Monday in December. In the County of Bosque, beginning on the third Monday in March and may continue in session until and including Saturday before the third Monday in April; beginning on the third Monday in September and may continue in session until and including Saturday the second Monday in October; beginning on the first Monday in December and may continue in session until and including Saturday before the first Monday in January. In Somervell County beginning on the third Monday in April and may continue in session until and including Saturday before the first Monday in May; beginning on the first Monday in September and may continue in session until and including Saturday before the third Monday in September. [Acts 1905, p. 37; Act Feb. 23, 1917, ch. 45, § 1.]

All processes issued or served before this Act goes into effect, including recognizances and bonds, returnable to the district court of any of said counties in each of said Judicial Districts shall be considered as returnable to said courts in accordance with the terms as described by this Act, and all such process is hereby legalized and all grand and petit juries drawn and selected under existing laws in any of the counties of either of said Judicial Districts, shall be considered lawfully drawn and selected for the next term of the district court of their respective counties, held in accordance with this Act, and after this Act takes effect, all such process is hereby legalized and validated; provided, that if any court in any county of either of said Judicial Districts shall be in session at the time this Act takes effect, such court or courts af-

fectured hereby shall continue in session until the term thereof shall expire under the provisions of existing laws, and thereafter the said courts of said county or counties shall conform to the requirements of this Act. [Id., § 3.]

Section 4 repeals all laws in conflict. Became a law Feb. 23, 1917.

19. That McLennan County shall constitute the Nineteenth Judicial District. [Acts 1893, p. 52; Act Jan. 29, 1915, ch. 3, § 1.]

The Judges of the Nineteenth and Fifty-fourth Judicial Districts as heretofore existing, shall be and remain the Judges of the respective Courts, as provided for in this Act, until the expiration of their respective terms of office to which they were elected and until their successors are elected and qualified. [Id., § 4.]

The Clerk of the District Courts of McLennan County as heretofore existing, shall be and remain the Clerk for each of said District Courts, and shall hold his office until his successor is elected and qualified. [Id., § 5.]

The terms of the Nineteenth Judicial District shall be held as follows:

On the first Mondays in January, April, July and October in each year, and may continue in session until the business is disposed of; provided, the October term shall not continue longer than the last Saturday before the 25th day of December. [Id., § 8.]

The Judges of the Nineteenth and Seventy-fourth Judicial Districts shall never impanel a Grand Jury in their Courts, but may at any time reconvene the Grand Jury impaneled by the Judge of the Fifty-fourth District, when a necessity therefor exists in the judgement of the Judge or Judges of said Nineteenth and Seventy-fourth Judicial Districts. [Id., § 9.]

Either of the Judges of said Courts may, in their discretion, either in term time or vacation, transfer any cause or causes Civil or Criminal, that may at any time be pending in his court, to either of the other said District Courts in McLennan County, by order or orders entered upon the minutes of his said Court, and where such transfer or transfers are made, the Clerk of said Courts shall enter such cause or causes upon the docket of the Court to which such transfer or transfers are made, and when so entered upon the docket, the Judge of said Court to which such cause or causes have been transferred, shall try and dispose of said cause or causes in the same manner as if such cause or causes were originally in said Court. [Id., § 10.]

The Judges of the Nineteenth and Fifty-fourth Judicial Districts shall transfer to the docket of the Seventy-fourth Judicial District immediately upon the taking effect of this Act, a sufficient number of cases now pending in their respective Courts to equalize the cases and business of the Nineteenth, Fifty-fourth, and Seventy-fourth Judicial Districts. [Id., § 11.]

No petit Juries shall be drawn for the July term of the Nineteenth Judicial District or for the August term of the Seventy-fourth Judicial District, unless the Judges of said Courts shall deem the same necessary. [Id., § 12.]

20. That the Twentieth Judicial District of Texas shall hereafter be composed of the county of Milam, and the terms of the District Court shall be held therein in each year as follows: On the first Monday in the months of January, March, May and September, and the second Monday in the month of November of each year, and each term may continue in session until and including the Saturday next preceding the beginning of the next succeeding term, unless the business of the term shall be disposed of. [Acts 1893, p. 52; Act March 26, 1916 (1917), ch. 96, § 1.]

Grand Juries in said Twentieth Judicial District shall be organized at the May and November terms of said court and at such other terms as the judge of said District Court may determine and order by

causing an order to that effect to be entered upon the minutes of said court by the clerk thereof. [Id., § 2.]

That the District Judge of the Twentieth Judicial District elected and now acting for said district shall hold his office until the term for which he was elected shall have expired and until his successor is duly elected and qualified, but shall continue as judge of said Twentieth Judicial District as herein constituted. [Id., § 6.]

The office of district attorney for the Twentieth Judicial District as now existing, is hereby abolished. Provided, that the District Attorney of said Twentieth Judicial District as now constituted, and now acting as such shall hold his office as District Attorney of the Twentieth Judicial District as it now exists, charged with the duties of prosecuting all felony cases presented in the District Courts of said three counties until the term for which he was elected shall have expired; provided further that the respective duly elected county attorneys of Milam, Brazos and Robertson counties, shall be charged with the duties of prosecuting all misdemeanor cases prosecuted in their respective counties during the term for which they were elected.

And it is further provided, that at the expiration of the term for which said District Attorneys was elected for said Twentieth Judicial District shall have expired, that said office of District Attorneys for said Districts as created by this Act shall be abolished; and the regularly elected county attorneys for the counties of Milam, Brazos, and Robertson, elected at the general election to be held in November, A. D. 1918, and each regular election thereafter held, shall perform all the duties of District Attorneys in their respective counties, theretofore performed by said District Attorney. [Id., § 7.]

The several clerks of Milam, Robertson, and Brazos Counties, duly elected and acting as such, shall continue to be the clerk of the District Court of their respective counties until the next general election and until their respective successors are duly elected and qualified. [Id., § 8.]

The District Court of the Twentieth Judicial District shall have all such powers and jurisdiction as District Courts now have or which may hereafter be conferred upon them and under the laws and Constitution of the State of Texas, and shall also have and exercise all such other and further jurisdiction as may be at any time transferred to it from the County Court of Milam County by any Act or Acts of the Legislature. [Id., § 9.]

It is provided that in case a term of any of the District Courts of the three counties of Milam, Robertson and Brazos, shall in session at the time this Act takes effect, said term of said Court shall continue until said term shall have been adjourned or expired under the existing law, and in case said term of said court is in session in any of said counties, then the provisions of this Act shall not be operative as to said court in said county until such term shall have expired or shall be adjourned sine die by the Judge of said District Court as the same is now constituted. [Id., § 19.]

It is provided further that an official Court Reporter of said Twentieth Judicial District, and also one for said Eighty-fifth Judicial District, shall be appointed by the Judge of said Courts, the said official Court Reporters, to have the qualifications, be subject to the duties and regulations, and entitled to the same compensation as official court reporters for District Courts of this State are now or may hereafter be subject to and entitled to under the general laws of this State. [Id., § 20.]

It is further provided that Chapter 67 of the General Laws of the 18th Legislature of the State of Texas, passed at the Regular Session, and approved April 9th, 1883, entitled "An Act to re-district the State into Judicial Districts, and fixing a time for the holding of Court therein, and

to provide for the election of Judges and District Attorneys in said District," and which now constitutes Section 20, Article 30, of the Revised Statutes of 1911, and also all other laws and parts of laws in conflict with this bill, are here now repealed. [Id., § 21.]

The act took effect 90 days after March 21, 1917, date of adjournment.

21. The counties of Washington, Burleson, Lee and Bastrop shall constitute the Twenty-first Judicial District, and the district courts therein shall be held as follows: in the county of Washington, on the first Monday in March and September, and may continue in session six weeks; in the county of Lee, on the sixth Monday after the first Monday in March and September, and may continue in session four weeks; in the county of Burleson, on the tenth Monday after the first Monday in March and September, and may continue in session five weeks; in the county of Bastrop there shall be held two terms of said court in each year, the first term to be held on the second Monday in January of each year, and may continue in session six weeks, and the second term to be held on the fifteenth Monday after the first Monday in March of each year, and may continue in session six weeks. [Acts 1911, p. 39; Act March 28, 1917, ch. 118, § 1.]

The act amends paragraph 21, art. 30, of title 5, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

22. That the counties of Comal, Hays, Caldwell, Fayette and Austin shall constitute the Twenty-second Judicial District, and the District Courts therein shall be held twice in each year, as follows:

In the County of Comal on the first Monday in February and September of each year, and may continue in session three weeks.

In the County of Hays on the third Monday after the first Monday in February and September of each year, and may continue in session four weeks.

In the County of Caldwell on the seventh Monday after the first Monday in February of each year, and may continue in session five weeks, and on the seventh Monday after the first Monday in September of each year, and may continue in session four weeks.

In the County of Fayette on the twelfth Monday after the first Monday in February of each year, and may continue in session five weeks; and on the eleventh Monday after the first Monday in September of each year, and may continue in session six weeks.

In the County of Austin on the seventeenth Monday after the first Monday in February and September of each year, and may continue in session four weeks. [Acts 1903, p. 27; Act March 19, 1915, ch. 64, § 1.]

All process, writs and bonds, civil and criminal, issued or executed prior or subsequent to the taking effect of this Act and returnable to the terms of said court as heretofore fixed by law in the several counties composing the said Twenty-second Judicial District are hereby made returnable to the terms of said courts in the several counties as fixed in this Act, and in conformity with the change herein made, and all process heretofore returned, as well as all bonds and recognizance heretofore entered into or hereafter entered into after this Act takes effect in any of said courts shall be as valid and as binding as if no change had been made in the time of holding said courts. [Id., § 2.]

Became a law March 19, 1915. Section 3 of the act repeals all laws in conflict.

23. That the Twenty-third Judicial District of Texas shall be composed of the Counties of Brazoria, Fort Bend, Wharton and Matagorda, and the terms of the district court in said counties shall be held therein in each year as follows:

In the County of Brazoria, beginning on the first Monday in September of each year, and may continue in session for five weeks.

In the County of Fort Bend, beginning on the fifth Monday after the first Monday in September of each year, and may continue in session for five weeks.

In the County of Wharton, beginning on the tenth Monday after the first Monday in September of each year, and may continue in session five weeks.

In the County of Matagorda, beginning on the seventeenth Monday after the first Monday in September of each year, and may continue in session five weeks.

In the County of Brazoria, beginning on the first Monday in February of each year, and may continue in session for six weeks.

In the County of Fort Bend, beginning on the sixth Monday after the first Monday in February of each year, and may continue in session for six weeks.

In the County of Wharton, beginning on the twelfth Monday after the first Monday in February of each year, and may continue in session for six weeks.

In the County of Matagorda, beginning on the eighteenth Monday after the first Monday in February of each year, and may continue in session for six weeks. [Acts 1905, p. 80; Act June 3, 1915, 1st C. S. ch. 19, § 1; Act Feb. 23, 1917, ch. 44, § 1.]

That the District Judge of the Twenty-third Judicial District of Texas elected and now acting as judge for said district shall hold his office until the term for which he was elected shall expire, and until his successor is duly elected and qualified. [Act June 3, 1915, 1st C. S. ch. 19, § 4.]

That any judge of any civil district court of Harris County may, in his discretion, either in term time or in vacation, transfer any civil case, that may at any time be pending in his court, to any other civil district court in said county, by order entered upon the minutes of the court making such transfer, and where such transfer is made, the clerk of said court shall enter the case upon the docket of the court to which the same is transferred, and when the same has so been entered upon the docket, the judge of the court to which the case has been transferred shall try and dispose of said case in the same manner as other cases pending in said court. [Id., § 7.]

That upon the county attorney of Waller County elected and now acting as such in said county, and his successor in office, is imposed the same duties of representing the State in all matters, both civil and criminal, now imposed by general law upon county and district attorneys in reference to matters of which district courts have jurisdiction under the Constitution and laws of the State, and his compensation shall be that now provided by law for county attorneys in counties having no district attorney. [Id., § 8.]

That the several district clerks of Brazoria, Fort Bend, Wharton, Waller and Matagorda Counties, duly elected and acting as such, shall continue to be the clerks of the district court of their respective counties, until the next general election and until their respective successors are duly elected and qualified. [Id., § 9.]

That the district attorney of the Twenty-third Judicial District of Texas, elected and now acting as district attorney shall hold his office until the term for which he was elected shall expire and until his successor is duly elected and qualified. [Id., § 10.]

That all process issued or served before this Act takes effect, including recognizances, and bonds returnable to the district court of any of the counties of the Twenty-third Judicial District, shall be considered as returnable to said courts in accordance with the terms as prescribed in this Act, and all such process is hereby legalized and grand and petit juries drawn and selected under existing laws in any of the counties of said judicial district, and in the county of Waller, shall be considered lawfully drawn and selected for the term of the district court of their respective counties held after this Act takes effect. All such process is hereby legalized and validated. It is further provided that if any court in any county of said district shall be in session at the time this Act takes

effect, such court or courts affected hereby shall continue in session until the term thereof shall expire under the provisions of existing laws, but thereafter, the court in such county shall conform to the requirements of this Act. [Id., § 11.]

That all laws or parts of laws in conflict with the provisions of this Act be and the same are hereby repealed, provided that this Act shall take effect and be in force from and after the first day of September, 1915. [Id., § 13.]

That all process issued or served before this Act takes effect, including recognizances and bonds returnable to the district court of any of the counties of the Twenty-third Judicial District shall be considered as returnable to said court, in accordance with the terms as prescribed in this Act, and all such process is hereby legalized, and grand and petit juries drawn and selected under existing laws in any of the counties of said Judicial District shall be considered lawfully drawn and selected by the term of the court of their respective counties held after this Act takes effect, as herein provided. All such process is hereby legalized and validated.

It is further provided that if any court in any county of said district shall be in session at the time this Act takes effect, such court or courts affected hereby shall continue in session until the term thereof shall expire under the provisions of existing laws, but thereafter the court in such county shall conform to the requirements of this Act. [Act Feb. 23, 1917, ch. 44, § 2.]

Act Feb. 23, 1917, c. 44, amends section 1, c. 19, Gen. Laws 34th Leg. Took effect 90 days after March 21, 1917, date of adjournment.

Cited, *Hartsough-Stewart Const. Co. v. Harty & Vogelsang* (Civ. App.) 183 S. W. 1.

26. The Twenty-sixth Judicial District shall be composed of the counties of Travis and Williamson, and the terms of the District Court of said district shall be held hereafter for the trial of civil cases therein as follows:

(a) In the County of Williamson, on the first Monday in February, and may continue in session to and including the last Saturday before the first Monday in March; on the first Monday in June, and may continue in session five weeks; and on the first Monday in November, and may continue in session four weeks.

(b) In the County of Travis, on the first Monday in March, and may continue in session to and including the last Saturday in May; on the third Monday in September, and may continue in session to and including the last Saturday in October; and on the first Monday in December, and may continue in session to and including the last Saturday in January. [Acts 1913, 1st C. S. p. 15; Act Feb. 18, 1915, ch. 17, § 1.]

The Twenty-sixth and Fifty-third District Courts of Travis County shall have concurrent jurisdiction with each other throughout the limits of Travis County of all matters civil of which jurisdiction is given to the district courts by the Constitution and the laws of the State of Texas.

(a) The clerk of the District Courts of Travis County as heretofore constituted, and his successors in office, shall be the clerk of the Twenty-sixth and Fifty-third District Courts, and also the clerk of the Criminal District Court in Travis County hereinafter created, and shall perform all the duties pertaining to all of said courts; and the clerk of the District Court of Williamson County, as heretofore constituted, and his successors in office, shall be the clerk of the Twenty-sixth District Court in Williamson County, and also the clerk of the Criminal District Court in Williamson County, Texas, hereinafter created, and shall perform all duties pertaining to both of said courts.

(b) Either of the judges of the Twenty-sixth and Fifty-third District Courts in Travis County may in his discretion transfer any civil

cause that may at any time be pending in his court to the other Civil District Court in Travis County, by an order entered upon the minutes of his court; when such transfer is made the clerk of the District Court of Travis County shall enter such cause upon the docket of the court to which such transfer is made, and when so entered upon the docket the judge of said court shall try and dispose of said cause in the same manner as if such cause was originally instituted in said court.

(c) All writs, process and bonds in civil cases and matters issued, executed or entered into prior to the taking effect of this act in the Twenty-sixth and Fifty-third District Courts, respectively, and returnable to terms of said courts heretofore fixed by law in the counties of Travis and Williamson, are hereby made returnable to the next ensuing term of said respective courts as fixed by this act, and shall be as valid and binding as if no change had been made in the time of holding of said courts; and all juries drawn and selected under existing laws shall be as valid as if no change had been made in the time of holding said courts, and provided further, that jurors drawn and selected under existing laws shall be required to appear and serve at the next ensuing term of said respective courts as fixed by this act, and their acts shall be as valid as if no change had been made in the time of holding said courts.

(d) Should either the Twenty-sixth or Fifty-third District Court be in session under existing laws when this act takes effect, such court shall continue in session for the time fixed by such existing law, and all process, writs, orders, judgments and decrees issued and rendered by said court shall be valid, and shall not be affected by the change in the terms of said court made by this act. [Id., § 3.]

**Note.**—A criminal district court for Travis and Williamson counties is created by Act Feb. 18, 1915. This court is given jurisdiction in divorce cases as well as in criminal cases. The jurisdiction in those subjects is taken away from the regular district court. See Vernon's Code of Cr. Proc. 1916, arts. 97vv-97zzz.

28. That the Twenty-eighth Judicial District of the State of Texas shall be composed of the counties of Nueces, Kleberg, Willacy and Cameron, and the terms of the Civil District Court shall be held in said district each year as follows:

In the County of Nueces on the first Monday in January of each year and may continue in session ten weeks; and on the last Monday in July of each year and may continue in session ten weeks.

In the County of Cameron on the tenth Monday after the first Monday in January of each year and may continue in session five weeks; and on the twenty-first Monday after the first Monday in January of each year and may continue in session five weeks; and on the fifteenth Monday after the last Monday in July of each year and may continue in session five weeks.

In the county of Kleberg on the fifteenth Monday after the first Monday in January of each year and may continue in session four weeks; and on the tenth Monday after the last Monday in July of each year and may continue in session three weeks.

In the county of Willacy on the nineteenth Monday after the first Monday in January of each year and may continue in session two weeks; on the thirteenth Monday after the last Monday in July and may continue in session two weeks. [Acts 1913, 1st C. S. p. 14; Act March 12, 1915, ch. 48, § 1; Act Feb. 26, 1917, ch. 46, § 6a; Act March 15, 1917, ch. 82, § 6a; Act May 17, 1917, 1st C. S. ch. 19, § 6a.]

That all processes, writs, and bonds issued, served or executed prior to the taking effect of this Act and returnable to the term of said court as heretofore fixed by law in the several counties composing said district are hereby made returnable to the terms of said court in the several counties as fixed by this Act, and all processes heretofore returnable, as well as all bonds and recognizances heretofore entered into, in



any of said courts, shall be valid and binding as if no change had been made by this Act in the times of holding said terms of court. [Act March 15, 1917, ch. 82, § 2.]

The present district judge and district attorney of the Twenty-eighth Judicial District, as the same now exists, being residents of the Twenty-eighth Judicial District as recognized under the provisions of this Act shall hold their office until the time for which they were elected shall expire and their successors are duly elected and qualified. [Act March 12, 1915, ch. 48, § 3.]

**Note.**—Act May 17, 1917, 1st C. S., c. 19, amends section 6a, c. 82, Acts regular session 35th Legislature, approved March 15, 1917. Section 2 repeals all laws in conflict. Became a law May 17, 1917.

Act Feb. 26, 1916 [1917], c. 46, creates a criminal district court for the counties above enumerated, and such court is given jurisdiction not alone of criminal cases, but of divorce matters and actions to enforce tax liens. The text of the act is set forth post as articles 97½ to 97½<sup>1</sup> of the Code of Criminal Procedure. Section 11 of the act repeals all laws in conflict.

29. The 29th Judicial District shall be composed of the Counties of Palo Pinto, Hood and Erath. The district courts in the counties, comprising the said 29th Judicial District, shall be holden as follows: In Palo Pinto County, beginning on the first Monday in March and September and may continue in session eight weeks. In Hood County beginning on the eighth Monday after the first Monday in March and September and may continue in session five weeks. In Erath County beginning on the thirteenth Monday after the first Monday in March and September, and may continue in session until all the business is disposed of. [Acts 1909, 2nd C. S. p. 390; Act Feb. 23, 1917, ch. 45, § 2.]

For special provisions relating to this and the 18th district, see subdivision 18 of this article.

30. The Thirtieth Judicial District shall be composed of the counties of Young, Archer, Clay and Wichita, and terms of the district court shall be held therein each year as follows:

In the county of Young on the first Monday in March and September and may continue in session four weeks.

In the county of Archer, on the fourth Monday after the first Monday in March and September and may continue in session three weeks.

In the county of Clay on the seventh Monday after the first Monday in March and September and may continue in session eight weeks.

In the county of Wichita on the fifteenth Monday after the first Monday in March and September, and may continue in session until the business of the term is disposed of. [Acts 1903, p. 96; Act March 23, 1915, ch. 128; Act May 28, 1915, 1st C. S. ch. 6, § 1.]

All process issued from the office of the district clerk of Wichita County, Texas, since March 23, 1915, providing for service on the thirteenth Monday after the first Monday in March and served more than ten days before May 31, 1915, is hereby validated and shall be as effective for service as if calling for the time provided in this Act. [Id., § 2.]

For special provisions relating to this district and district 78, see subdivision 78 of this article.

**Note.**—Act approved May 28, 1915, which became effective on date of approval, amends paragraph 30 of article 30, title 5, Rev. Civ. St. 1911, as amended by chapter 128 of acts of regular session of 34th legislature, so as to read as above.

32. That the Thirty-second Judicial District of Texas shall hereafter be composed of the following counties:

Howard, Borden, Nolan, Mitchell and Scurry; and the terms of the district courts shall be held therein in each year as follows:

In the county of Howard on the first Mondays in February and September, and may continue in session three weeks.

In the County of Borden on the third Mondays after the first Mondays in February and September and may continue in session one week.

In the County of Nolan on the fourth Mondays after the first Monday in February and September and may continue in session seven weeks.

In the County of Mitchell on the eleventh Mondays after the first Monday in February and September and may continue in session five weeks.

In the County of Scurry on the sixteenth Mondays after the first Mondays in February and September and may continue in session four weeks. [Acts 1913, p. 4; Act Jan. 29, 1917, ch. 4; Act Feb. 12, 1917, ch. 12, § 1.]

That all process and writs issued out of the district courts of said counties, prior to the taking effect of this Act are hereby made returnable to the terms of said courts as fixed by this Act, and all bonds executed, and recognizances entered of record in said courts shall bind the parties for their appearance, or to fulfill the obligation of such bonds and recognizances at the terms of said courts as they are fixed by this Act, and all process heretofore returned to, as well as all bonds and recognizances heretofore taken in any of said courts shall be valid or as valid as if no change had been made in the time of holding said courts. [Id., § 4.]

The present judges and district attorneys of the said Thirty-second, Thirty-ninth and Seventieth Judicial Districts shall continue to hold their offices until their said present terms expire. [Id., § 5.]

Became a law Feb. 12, 1197.

33. That the Thirty-third Judicial District of this State shall be composed of the counties of Kimble, Gillespie, Mason, Blanco, Menard, San Saba, Llano and Burnet, and the district courts shall be holden therein as follows:

In the county of Kimble, on the first Monday in February and September, and may continue in session two weeks.

In the county of Gillespie, on the third Monday in February and September, and may continue in session two weeks.

In the county of Mason, on the fourth Monday after the first Monday in February and September, and may continue in session two weeks.

In the county of Blanco, on the sixth Monday after the first Monday in February and September, and may continue in session two weeks.

In the county of Menard on the eighth Monday after the first Monday in February and September, and may continue in session two weeks.

In the county of San Saba on the tenth Monday after the first Monday in February and September, and may continue in session three weeks.

In the county of Llano on the Thirteenth Monday after the first Monday in February and September, and may continue in session three weeks.

In the county of Burnet on the first Monday in January and may continue in session three weeks, and on the sixteenth Monday after the first Monday in February, and may continue in session until the business is disposed of. [Acts 1913, ch. 37, p. 68; Act June 3, 1915, 1st C. S., ch. 16, § 1.]

**Explanatory.**—The title of the act purports to amend chapter 37, General Laws, regular session 33rd Legislature. The enacting part makes no reference to the former law. Section 2 repeals all laws in conflict. Took effect 90 days after May 28, 1915, date of adjournment.

34. The terms of the District Court of the Thirty-fourth Judicial District, composed of El Paso and Culberson Counties, shall be held in each of said counties each year as follows, to-wit:

In El Paso County the terms of said court shall be as follows:

Beginning on the first Monday in September of each year and may continue in session for four weeks thereafter; a term beginning on the first Monday in November of each year and may continue in session until the last Saturday before the 25th day of December of each year thereafter; a term beginning on the first Monday in January of each year and

may continue in session until the last Saturday in March thereafter; a term beginning on the first Monday in May of each year and may continue in session until the last Saturday in June of each year thereafter.

In Culberson County the terms of said court shall be as follows:

A term beginning on the first Monday in April of each year and may continue in session for four weeks thereafter; and a term beginning on the first Monday in October of each year and may continue in session for four weeks thereafter. [Acts 1913, 1st C. S. p. 17; Act Feb. 25, 1915, ch. 24, § 4.]

The said District Courts of El Paso County shall have concurrent civil and criminal jurisdiction with each other in said county of matters over which the jurisdiction is given or shall be given by the Constitution and laws of Texas to District Courts; provided, that no grand jury shall be impaneled in the District Courts of said county, other than that of the Thirty-fourth Judicial District, unless by special order of the judge of either of the other District Courts a grand jury shall be called for either of said courts. [Id., § 6.]

The District Attorney of the Thirty-fourth Judicial District shall also act as District Attorney in and for the Forty-first and Sixty-fifth Judicial Districts, and the clerk of the District Court of El Paso County shall act as clerk of the District Court for each of said District Courts. [Id., § 7.]

Either of the Judges in the said District Courts in El Paso County may, in their discretion, either in term time or vacation, transfer any case or cases, civil or criminal, to any other of said District Courts by order entered on the minutes of his court, or minutes of orders made in chambers, as the case may be, which orders, when made, shall be copied and certified to by said clerk, together with all orders made in said case, and such certified copies of such orders shall be filed among the papers of any case thus transferred, and the fees therefor shall be taxed as part of the costs of said suit. And the clerk of said court shall docket any such cause in the court to which it shall have been transferred, and, when so entered, the court to which the same shall have been thus transferred shall have like jurisdiction therein as in cases originally brought in said court, and the same shall be dropped from the docket of the court from which it was transferred; provided, that where there shall be a transfer of any case from one court to another, as herein provided, on motion of either of the parties to said suit, notice must be given to either the opposite party or his attorney by the party making the motion to transfer one week before the time of entering the order of transfer. [Id., § 8.]

Took effect March 15, 1915.

Note.—By Act Feb. 16, 1917, c. 25, p. 39, Hudspeth county is created, and, when organized, is to constitute a part of the 34th judicial district, the court in which district shall hold two sessions of two weeks each annually in the new county at the county seat on the third Monday in April and October in each year.

36. That the Thirty-sixth Judicial District of Texas shall hereafter be composed of the counties of Aransas, San Patricio, Bee, Live Oak, and McMullen, and the district courts shall be held therein as follows:

In the County of Aransas, on the first Monday in September and February and may continue in session two weeks.

In the County of San Patricio, on the second Monday after the first Monday in September and February, and may continue in session six weeks.

In the County of Bee, on the eighth Monday after the first Monday in September and February, and may continue in session eight weeks.

In the County of Live Oak, on the sixteenth Monday after the first Monday in September and February, and may continue in session three weeks.

In the County of McMullen, on the nineteenth Monday after the first Monday in September and February, and may continue in session two weeks.

That all processes, recognizances, writs and bonds issued, served or executed prior to the taking effect of this Act, and returnable to the terms of said court, as heretofore fixed by law, in the several counties composing said district, are hereby made returnable to the terms of said court in the several counties as fixed by this Act, and all processes heretofore returnable, as well as all bonds and recognizances heretofore entered into in any of said courts shall be valid and binding as if no change had been made by this Act in the times of holding said terms of court.

That the present district judge of the Thirty-sixth Judicial District shall be and remain the judge of said district, as fixed by this Act, for the term for which he was elected and until his successor is duly elected and qualified.

That the Governor of the State is hereby empowered to appoint a district attorney for said Thirty-sixth Judicial District of Texas, who shall hold his office until the next general election and until his successor is duly elected and qualified.

That all grand and petit jurors selected in any of said counties shall be legal jurors for the terms of said court, fixed by this Act. [Acts 1913, p. 190; Act March 20, 1917, ch. 91, § 1.]

**Explanatory.**—Section 4 repeals all laws in conflict. Section 5 provides that the act shall take effect Aug. 1, 1917.

38. The Thirty-eighth Judicial District of the State of Texas shall be composed of the counties of Kendall, Zavalla, Medina, Bandera, Real and Kerr, and the district courts therein shall be held as follows:

In the county of Kendall, on the first Mondays in March, and September of each year, and may continue in session three weeks.

In the county of Zavalla on the third Monday after the first Monday in March and September and may continue in session three weeks.

In the county of Medina on the sixth Monday after the first Monday in March and September and may continue in session four weeks.

In the county of Bandera on the tenth Monday after the first Monday in March and September and may continue in session three weeks.

In the county of Real on the thirteenth Monday after the first Monday in March and September and may continue in session two weeks.

In the county of Kerr on the fifteenth Monday after the first Monday in March and September and may continue in session until the business is disposed of. [Acts 1913, 1st C. S. p. 22; Act Mar. 9, 1917, ch. 67; Act April 9, 1917, ch. 209, § 1.]

The district judge and district attorney for the Thirty-eighth and Sixty-third Judicial Districts, respectively, and now in office, shall continue in office during the time for which they were elected respectively. [Id., § 4.]

The district courts of the Thirty-eighth Judicial District in the county of Uvalde, shall be held as now provided for the April 1917 term, and be presided over by the district judge of said district, and all the courts of said Thirty-eighth District shall be holden at the times now prescribed for the spring terms, including the court in Kerr county on the nineteenth Monday after the first Monday in March 1917; and thereafter all the courts in said Thirty-eighth District shall be holden at times as herein prescribed in Section One of this Act. [Id., § 3.]

All process issuing out of the district court of any of the counties named in this Act, issued or served before this Act takes effect, including recognizances and bonds, returnable to the district courts of any such respective counties, shall be considered as returnable to such respective courts in accordance with the terms and times of holding same as prescribed in and fixed by this Act; and all such process is hereby legalized.

And all grand and petit juries drawn and selected under existing laws for any of the counties of said districts shall be considered lawfully drawn and selected for the next term of the respective district courts held after this Act takes effect, and all such process is hereby legalized and validated. [Id., § 6.]

Took effect 90 days after March 21, 1917, date of adjournment.

39. That the Thirty-ninth Judicial District of Texas shall hereafter be composed of the counties of Fisher, Kent, Stonewall, Throckmorton, Haskell and Jones; and the terms of the district courts shall be held therein in each year as follows:

The County of Fisher of the sixth Monday after the first Monday in January and the first Monday in September and may continue in session three weeks.

In the County of Kent on the ninth Monday after the first Monday in January and third Monday after the first Monday in September and may continue in session two weeks.

In the County of Stonewall on the eleventh Monday after the first Monday in January and fifth Monday after the first Monday in September and may continue in session three weeks.

In the County of Throckmorton on the fourteenth Monday after the first Monday in January and the eighth Monday after the first Monday in September and may continue in session two weeks.

In the County of Haskell the sixteenth Monday after the first Monday in January and tenth Monday after the first Monday in September and may continue in session five weeks.

In the County of Jones on the first Monday in January and the twenty-first Monday after the first Monday in January and may continue in session six weeks. [Acts 1899, p. 171; Acts 1903, p. 26; Act Jan. 29, 1917, ch. 4, § 2; Act Feb. 12, 1917, ch. 12, § 2.]

For special provisions relating to this district and the 32nd and 70th districts, see subdivision 32 of this article.

40. That the County of Ellis be and the same is hereby constituted the Fortieth Judicial District and the terms of district courts therein shall be held each year as follows:

One term beginning on the first Monday in March of each year and continuing in session until the first Monday in June.

One term, beginning on the first Monday in June of each year and continuing in session until the first Monday in September.

One term, beginning on the first Monday in September of each year and continuing in session until the first Monday in December.

One term, beginning on the first Monday in December of each year and continuing in session until the first Monday in March. [Acts 1913, p. 171; Act March 10, 1917, ch. 70, § 1.]

The District Judge of the Fortieth Judicial District, as formerly constituted, shall continue in office as district judge of the Fortieth Judicial District, as herein constituted until the end of the term for which he was elected. [Id., § 2.]

For special provisions relating to this district and districts 7, 14, and 86, see subdivision 7 of this article.

41. The terms of the District Court of El Paso County in and for the Forty-first Judicial District, composed of El Paso County, shall be as follows:

Beginning on the first Monday in January of each year and may continue in session until the last Saturday before the first Monday in March, thereafter; beginning on the first Monday in March of each year and may continue in session until the last Saturday before the first Monday in May, thereafter; beginning on the first Monday in May of each year and may continue in session until the last Saturday before the first Monday in July, thereafter; beginning on the first Monday in September of each year and may continue in session until the last Saturday before the

first Monday in November, thereafter; beginning on the first Monday in November of each year and may continue in session until the last Saturday before the first Monday in January, thereafter. [Acts 1903, p. 78; Act Feb. 25, 1915, ch. 24, § 3.]

For special provisions relating to this district and the sixty-fifth district, see subdivision 34 of this article.

42. The Forty-second Judicial District of Texas shall be composed of the Counties of Taylor, Callahan, Stephens, Shackelford, and Eastland, and the terms of the district court shall be held annually therein as follows:

Eastland—One term of said court in the Forty-second Judicial District shall begin in the county of Eastland on the first Monday in January, and on the fifteenth Monday after the first Monday in January and on the first Monday in July, and on the fifteenth Monday after the first Monday in July, and may continue in session four weeks. [Act March 1, 1917, ch. 52, § 1.]

Taylor—That the terms of District Court shall be held annually in Taylor county, Texas, as follows: One term shall begin in the county of Taylor on the fourth Monday after the first Monday in January, and on the nineteenth Monday after the first Monday in January, and on the fourth Monday after the first Monday in July, and on the nineteenth Monday after the first Monday in July, and may continue in session four weeks. [Act May 17, 1917, 1st C. S., ch. 17, § 1.]

Stephens—One term shall begin in the county of Stephens on the eighth Monday after the first Monday in January, and on the eighth Monday after the first Monday in July, to remain in session three weeks. [Act March 1, 1917, ch. 52, § 1.]

Callahan—One term shall begin in the county of Callahan on the eleventh Monday after the first Monday in January, and on the eleventh Monday after the first Monday in July, and may continue in session four weeks. [Id.]

Shackelford—One term shall be held in the county of Shackelford on the twenty-third Monday after the first Monday in January, and on the twenty-third Monday after the first Monday in July, and may continue in session three weeks. [Acts 1903, p. 25; Act March 1, 1917, ch. 52, § 1.]

That all process issued or served before this Act takes effect, including recognizances, bail bonds and appeal bonds, returnable to the district court of any of the counties of said Judicial District, shall be considered and held returnable to said courts in accordance with the terms as prescribed by this Act, and all process is hereby legalized, and all grand juries and petit juries selected and drawn under existing laws in any of the counties of said Judicial District shall be considered and held lawfully selected and drawn for the next term of the district court of the respective counties held after this Act takes effect, and all such process is hereby legalized and validated. [Id., § 2.]

**Explanatory.**—Act March 1, 1917, ch. 52, amends section 42, art. 30, title 5, Rev. Civ. St., so as to read as above. Section 3 repeals all laws in conflict. Section 4 declares an emergency and provides that the act shall take effect July 1, 1917.

Act May 17, 1917, 1st C. S. c. 17, in its title alone purports to amend section 1, c. 52, general laws 35th Legislature, so as to provide for the holding of four terms of court in Taylor county. Became a law July 1, 1917.

44.

Cited, *Bolton v. United States Fidelity & Guaranty Co.* (Civ. App.) 166 S. W. 1194.

46. The Forty-sixth Judicial District of the State of Texas shall be composed of the following counties, to-wit:

Wilbarger, Hardeman, Foard, Collingsworth, Childress and Hall, and terms of court shall be held therein each year as follows:

In the County of Wilbarger, on the first Mondays in February and September, and may continue in sessions four weeks.

In the County of Hardeman, on the fourth Monday after the first

Mondays in February and September, and may continue in session four weeks.

In the County of Foard, on the eighth Mondays after the first Mondays in February and September, and may continue in session two weeks.

In the County of Collingsworth, on the tenth Mondays after the first Mondays in February and September, and may continue in session three weeks.

In the County of Childress, on the thirteenth Mondays after the first Mondays in February and September, and may continue in session four weeks.

In the County of Hall, on the seventeenth Mondays after the first Mondays in February and September, and may continue in session until all the business is disposed of. [Acts 1911, S. S. p. 100; Act Feb. 18, 1915, ch. 15, § 1.]

That all process issued or served before this Act goes into effect, returnable to the District Court in said Judicial District, shall be returnable to said court as fixed by the terms of this Act; and said process is hereby legalized and validated and all Grand and Petit Jurors selected and drawn under existing laws in any of the counties of said Judicial District, shall be considered legally drawn and selected for the next term of the District Court of the respective counties held after this Act takes effect, and all appearance bonds and recognizances taken in and for said court shall bind the parties therein obligated to appear at the next term of such court held under this Act. [Id., § 2.]

49. That the Forty-ninth Judicial District of Texas shall hereafter be composed of the counties of Webb, Zapata and Dimmit, and the districts courts shall be held therein in each year as follows:

In the County of Dimmit, on the first Monday in September and February, and may continue in session four weeks.

In the County of Zapata, on the fourth Monday after the first Monday in September and February, and may continue in session one week.

In the County of Webb as follows: One term beginning on the fifth Monday after the first Monday in September and, may continue in session eight weeks; one term beginning on the thirteenth Monday after the first Monday in September and may continue in session eight weeks; one term beginning on the fifth Monday after the first Monday in February, and may continue in session eight weeks; one term beginning on the thirteenth Monday after the first Monday in February and may continue in session eight weeks.

That the present district judge and district attorney of said Forty-ninth Judicial District shall continue as judge and district attorney respectively of said Forty-ninth Judicial District for the terms for which they were elected and until their successors shall be duly elected and qualified.

That all process, recognizances, writs, and bonds issued, served, executed, or entered into, prior to the taking effect of this Act and returnable to the terms of said court as heretofore fixed by law in the several counties composing said district are hereby made returnable to the terms of said court in the several counties, as fixed by this Act and all process heretofore returnable, as well as all bonds and recognizances heretofore entered into in any of said courts shall be valid and binding as if no change had been made by this Act in the times of holding said terms of court.

That all grand and petit jurors selected in any of said counties shall be legal jurors for the terms of said court fixed by this Act. [Acts 1913, S. S. p. 12; Act March 22, 1915, ch. 98; Act June 4, 1915, 1st C. S., ch. 25; Act March 20, 1917, ch. 91, § 2.]

Explanatory.—Section 4 repeals all laws in conflict. Section 5 provides that the act shall take effect Aug. 1, 1917.

50. That the Fiftieth Judicial District of the State of Texas shall be composed of the counties of Baylor, Knox, King, Cottle, Motley, and Dickens and the terms of court shall be held therein each year as follows:

In the county of Baylor on the first Mondays in January and July, and may continue in session six weeks.

In the county of Knox on the sixth Mondays after the first Mondays in January and July, and may continue in session six weeks.

In the county of King on the twelfth Mondays after the first Mondays in January and July, and may continue in session two weeks.

In the county of Cottle on the fourteenth Mondays after the first Mondays in January and July, and may continue in session four weeks.

In the county of Motley on the eighteenth Mondays after the first Mondays in January and July, and may continue in session three weeks.

In the county of Dickens on the twenty-first Mondays after the first Mondays in January and July, and may continue in session three weeks. [Acts 1911, p. 212, §§ 7, 8; Act March 28, 1917, ch. 109, § 1.]

*Explanatory.*—The act amends section 7 of chapter 107, general laws 32nd Legislature. Took effect 90 days after March 21, 1917, date of adjournment.

51. The Fifty-first Judicial District of this State shall be composed of the counties of Tom Green, Irion, Schleicher, Coke and Sterling, and the district courts shall be held therein as follows:

In the County of Tom Green on the first Monday in January and may continue in session ten weeks, and on the eighteenth Monday after the first Monday in January, and may continue in session until the last Saturday in August, and the first Monday in September, and may continue in session eight weeks.

In the County of Irion on the tenth Monday after the first Monday in January, and the eighth Monday after the first Monday in September, and may continue in session two weeks.

In the County of Schleicher on the twelfth Monday after the first Monday in January and the tenth Monday after the first Monday in September, and may continue in session two weeks.

In the County of Coke on the fourteenth Monday after the first Monday in January, and the twelfth Monday after the first Monday in September, and may continue in session two weeks.

In the County of Sterling on the sixteenth Monday after the first Monday in January and the fourteenth Monday after the first Monday in September, and may continue in session two weeks. [Acts 1909, p. 56; Act March 9, 1917, ch. 67, § 2.]

For special provisions relating to this district and the 38th, 63rd, 70th, and 83rd districts, see subdivision 33 of this article.

53. The County of Travis shall constitute the Fifty-third Judicial District, and the District Court shall be held therein for the trial of civil cases as follows: On the first Monday in October, January, March and May in each year, and may continue in session until the business is disposed of; provided, the May term shall not continue longer than the third Saturday in July, unless continued longer by the judge thereof by an order duly entered; and the October term shall not continue longer than the last Saturday before the 25th of December each year, unless continued longer by the judge thereof by an order duly entered. [Acts 1913, 1st C. S. p. 17; Act Feb. 18, 1915, ch. 17, § 2.]

For special provisions relating to this district, see subdivision 26 of this article.

*Note.*—By Act Feb. 18, 1915, a criminal district court for Travis and Williamson counties is created, with jurisdiction in criminal and divorce cases, and the jurisdiction in those subjects is taken away from the regular district court. See Vernon's Code Cr. Proc. 1916, arts. 97vv-97zzz.

54. McLennan County [and Falls County] shall constitute the Fifty-fourth Judicial District. [Acts 1911, 1st C. S. p. 79; Act Jan. 29, 1915, ch. 3, § 3.]



The terms of the Fifty-fourth Judicial District shall be held as follows:

[In the County of Falls on the first Mondays in January, and the first Mondays in June and the January term of said Court may continue in session nine weeks and the June term nine weeks.] In the County of McLennan on the Second Mondays in March and the fourth Mondays in September and may continue in session until the business is disposed of. [Id., § 8.]

For special provisions relating to this district and the seventy-fourth district, see subdivision 19 of this article.

Note.—By Act Feb. 7, 1917, c. 9, § 10, post, subd. 82 of this article, Falls County is taken out of the 54th district, and the provisions of Acts 1915, regular session, ch. 3, §§ 3, 8, repealed so far as Falls county is concerned.

62. That the terms of the court in the Sixty-second Judicial District of the State of Texas, composed of the counties of Hunt, Delta and Lamar, shall be held therein each year as follows:

In the county of Hunt, beginning on the first Monday in December, and may continue in session eight weeks, and on the third Monday in May, and may continue in session ten weeks. In the county of Lamar, beginning on the ninth Monday after the first Monday in December, and may continue in session eight weeks, and on the first Monday in August, and may continue in session eight weeks. In the county of Delta, beginning on the seventeenth Monday after the first Monday in December, and may continue in session three weeks, and on the ninth Monday after the first Monday in August, and may continue in session three weeks. [Acts 1905, p. 75; Act March 1, 1915, ch. 27, § 1.]

That all process issued out of the District Court of the counties of said district before this Act takes effect is hereby made returnable to the terms of said court, as fixed by this Act, and all bonds heretofore executed, and recognizances entered of record in said court shall bind the parties for their appearance, or to fulfill the obligation of such bonds and recognizances at the terms of said court as fixed by this Act, and all process heretofore returned, as well as all bonds and recognizances heretofore taken in the Districts Courts of the Sixty-second Judicial District shall be as valid as if no change had been made in the times of holding said courts in the counties of said district. [Id., § 2.]

That should the District Court in any of the counties of said district be in session under existing laws when this Act takes effect, the same shall continue and end its terms under such existing laws, and all process, writs, judgments and decrees shall be valid, and shall not be effected by the change in the times of holding the courts in the district, by this Act. [Id., § 3.]

63. The Sixty-third Judicial District of Texas shall be composed of the counties of Jeff Davis, Presidio, Brewster, Terrell, Val Verde, Kinney, Maverick and Uvalde, and the district courts shall be held therein as follows:

In the county of Jeff Davis, on the second Monday in January and July and may continue in session two weeks.

In the county of Presidio on the third Monday after the first Monday in January and July and may continue in session three weeks.

In the county of Brewster on the sixth Monday after the first Monday in January and July and may continue in session for three weeks.

In the county of Terrell on the ninth Monday after the first Monday in January and July and may continue in session for two weeks.

In the county of Kinney on the eleventh Monday after the first Monday in January and July, and may continue in session for two weeks.

In the count of Maverick, on the thirteenth Monday after the first Monday in January and July and may continue in session for three weeks.

In the county of Uvalde on the sixteenth Monday after the first Monday in January and July and may continue in session for four weeks.

In the county of Val Verde on the twentieth Monday after the first Monday in January and July and may continue in session until the business is disposed of. [Acts 1913, 1st C. S. p. 34; Act March 9, 1917, ch. 67, § 3; Act April 9, 1917, ch. 209, § 1.]

The district court in the Sixty-third Judicial District for Val Verde county for the term commencing as now provided on the sixteenth Monday after the first Monday in January, 1917, shall be holden at that time, as now provided; and thereafter said court shall be holden at the times prescribed herein in Section two of this Act. [Id., § 5.]

**Explanatory.**—For special provisions relating to this district and districts 38, 51, 70, and 83, see subdivision 38 of this article. Section "two" above referred to does not appear on the printed session laws, the designation of the section having been omitted as the result of a clerical error in preparing the bill. It appears as a part of section 1 of the act, the first part of which relates to the 38th judicial district. The portion of the section relating to the 63d district is set forth above in the next preceding paragraph.

64. That the terms of court in the Sixty-fourth Judicial District of the State of Texas, composed of the Counties of Hale, Floyd, Briscoe, Castro, Swisher, Lamb and the unorganized County of Bailey, shall be held therein each year as follows:

In the County of Hale on the second Monday in January and first Monday in August, and may continue in session seven weeks.

In the County of Floyd on the seventh Monday after the second Monday in January and first Monday in August, and may continue in session five weeks.

In the County of Briscoe on the twelfth Monday after the second Monday in January and first Monday in August, and may continue in session two weeks.

In the County of Swisher on the fourteenth Monday after the second Monday in January and first Monday in August, and may continue in session four weeks.

In the County of Castro on the eighteenth Monday after the second Monday in January and first Monday in August, and may continue in session two weeks.

In the County of Lamb on the twentieth Monday after the second Monday in January and first Monday in August, and may continue in session two weeks. [Acts 1911, 1st C. S. p. 102; Act March 28, 1917, ch. 117, § 1.]

The unorganized county of Bailey is hereby attached to the County of Castro for judicial and all other purposes. [Id., § 2.]

That all process issued out of the District Court of the counties of said district before this Act takes effect is hereby made returnable to the terms of said court, as fixed by this Act, and all bonds heretofore executed, and recognizances entered of record in said court shall bind the parties for their appearance, or to fulfill the obligation of such bonds and recognizances at the terms of said court as fixed by this Act, and all process heretofore returned, as a well as all bonds and recognizances heretofore taken in the District Courts of the Sixty-fourth Judicial District shall be as valid as if no change had been made in the time of holding said courts in the counties of said district. [Id., § 3.]

That should the District Court in any of the counties of said district be in session under the existing laws when this Act takes effect, the same shall continue and end its terms under such existing laws, and all process, writs, judgments and decrees shall be valid, and shall not be effected by the change in the times of holding the courts in the district, by this Act. [Id., § 4.]

**Explanatory.**—Section 5 repeals all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

65. That the Sixty-fifth Judicial District of Texas be, and the same is hereby, created, to be composed of the County of El Paso, in the State of Texas. [Act Feb. 25, 1915, ch. 24, § 1.]

The terms of said court shall be as follows:

Beginning on the first Monday in January of each year and may continue in session until the last Saturday before the first Monday in March, thereafter; beginning on the first Monday in March of each year and may continue in session until the last Saturday before the first Monday in May, thereafter; beginning on the first Monday in May of each year and may continue in session until the last Saturday before the first Monday in July thereafter; beginning on the first Monday in September of each year and may continue in session until the last Saturday before the first Monday in November, thereafter; beginning on the first Monday in November of each year and may continue in session until the last Saturday before the first Monday in January, thereafter. [Id., § 2.]

The Governor of this State shall, upon the taking effect of this Act, appoint a judge of the Sixty-fifth Judicial District, who shall hold the office of judge of said court until the election and qualification of his successor at the next general election. [Id., § 5.]

The said District Court for the Sixty-fifth Judicial District of Texas hereby created shall have jurisdiction over all judgments and proceedings had in the Special District Court for El Paso County, Texas, heretofore created by the Thirty-third Legislature of the State of Texas, the same as if the District Court for the Sixty-fifth Judicial District were a continuation of said Special District Court, and all cases, tried in said Special District Court before its expiration, appealed to the Court of Civil Appeals or the Supreme Court, in the event the same are reversed, shall be returned to said Sixty-fifth Judicial District Court hereby created, and a mandate issued by order of the clerk of the Court of Civil Appeals or the Supreme Court in said cases shall be returnable to the said Sixty-fifth Judicial District Court hereby created, and the provisions of this Act shall apply to all cases tried in said Special District Court before its expiration in which writs of error have been applied for, or may be applied for, within the time prescribed by law. [Id., § 9.]

Upon the taking effect of this Act and the appointment and qualification of the judge of said Sixty-fifth Judicial District Court, it shall not be necessary for said judge to wait until the first day of the ensuing term thereafter to organize his court and summon a jury; but he shall open said court on the first Monday after he shall have been appointed and qualified for the trial, during the remainder of said term, of such cases as may be transferred to said court for trial from the other District Courts of said county, and he may cause to be summoned jurors for service from the list of those eligible for jury service in the manner provided by law except as to the time of such selection. [Id., § 10.]

For special provisions relating to this district and to the forty-first district, see subdivision 34 of this article.

66. The terms of the District Court in the Sixty-sixth Judicial District of Texas, comprising the County of Hill, shall be holden in said County of Hill as follows: Beginning on the first Mondays in January, March, May, July, September and November of each year. Each term of said court may continue in session for a period of seven weeks, or until the business is disposed of, save and except the term beginning annually on the first Monday in July may continue in session for the period of five weeks, or until the disposal of the business. [Acts 1905, p. 37; Act March 29, 1915, ch. 139, § 1.]

**Explanatory.**—The act amends sec. 4 of ch. 31, Acts Reg. Sess. 29th Leg., which is in Rev. Civ. St., 1911 edition, page 39, title 5, article 30, section 66. The act took effect 90 days after March 20, 1915, date of adjournment.

68.

Cited, *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (Civ. App.) 178 S. W. 731.

70. The Seventieth Judicial District of the State of Texas shall be composed of the counties of Midland, Ector, Winkler, Andrews, Martin, Glasscock, Reeves, Ward, and the unorganized counties of Crane and Loving, and the district courts shall be holden therein as follows:

In the County of Midland on the first Monday in February and September and may continue in session three weeks.

In the County of Ector on the third Monday after the first Monday in February and September and may continue in session two weeks.

In the County of Winkler on the fifth Monday after the first Monday in February and September, and may continue in session one week.

In the County of Andrews on the sixth Monday after the first Monday in February and September, and may continue in session one week.

In the County of Martin on the seventh Monday after the first Monday in February and September, and may continue in session for two weeks.

In the County of Glasscock on the ninth Monday after the first Monday in February and September, and may continue in session two weeks.

In the County of Reeves on the eleventh Monday after the first Monday in February and September, and may continue in session six weeks.

In the County of Ward on the first Monday in January and on the seventeenth Monday after the first Monday in February, and may continue in session three weeks.

The unorganized County of Loving is hereby attached to Reeves County for judicial and all other purposes, and the unorganized County of Crane is hereby attached to Ector County for judicial and other purposes. [Acts 1913, p. 4; Act Jan. 29, 1917, ch. 4, § 3; Act Feb. 12, 1917, ch. 12, § 3; Act March 9, 1917, ch. 67, § 4; Act Sept. 17, 1917, ch. 3, § 1.]

That all process issuing out of the district courts of any of the counties named in this Act issued or served before this Act takes effect, including recognizances and bonds returnable to the district court of any such respective counties, shall be considered as returnable to such respective courts in accordance with the terms and time of holding same as prescribed in and fixed by this Act; and all such process is hereby legalized. And all grand and petit juries drawn and selected under existing laws for any of the counties of said districts shall be considered lawfully drawn and selected for the next term of the respective district courts held after this Act takes effect and all such process is hereby legalized and validated. [Act Sept. 17, 1917, ch. 3, § 2.]

That if any court in any county of said judicial districts shall be in session at the time this Act takes effect, such court affected hereby shall continue in session until the term thereof shall expire under the provisions of existing laws; thereafter the terms of court of said county shall conform to the requirements of this Act. [Id., § 3.]

That all laws and parts of laws in conflict with the provisions of this Act shall be and the same are hereby repealed. [Id., § 4.]

For special provisions relating to this district and districts 38, 51, 63, and 83, see subdivision 38 of this article.

The acts of March 9, 1917, Feb. 12, 1917, and Jan. 29, 1917, are superseded by the present act.

74. That McLennan County shall constitute the Seventy-fourth Judicial District. [Act Jan. 29, 1915, ch. 3, § 2.]

The Judges of said Courts shall thereafter be elected as provided by the Constitution and Laws of the State for the election of District Judges. [Id., § 7.]

The Governor shall appoint a suitable person as Judge of the Seventy-fourth Judicial District as herein constituted, who shall hold such

office until the next general election and until his successor shall have been elected and qualified. [Id., § 6.]

The terms of the Seventy-fourth Judicial District shall be held as follows:

Beginning on the second Mondays in February, April, June, August, October and December of each year, and may continue until the business thereof is disposed of. [Id., § 8.]

For special provisions relating to this district and to the fifty-fourth district, see subdivision 19 of this article.

75. The Seventy-fifth Judicial District of Texas shall hereafter be composed of the following named counties, to-wit: Hardin, Chambers, Montgomery and Liberty and Tyler, which last named county is hereby removed from the First Judicial District and placed in said Seventy-fifth District and the terms of the district courts in and for said Seventy-fifth Judicial District shall be begun and holden therein as follows:

In the County of Hardin, on the first Monday of January and July of each year, and may continue in session five weeks.

In the County of Tyler, on the fifth Monday after the first Monday in January and July of each year, and may continue in session five weeks.

In the County of Chambers, on the tenth Monday and the twenty-second Monday after the first Monday in January, and the fourteenth Monday after the first Monday in July of each year, and may continue in session two weeks.

In the County of Montgomery, on the twelfth Monday after the first Monday in January, and the tenth Monday after the first Monday in July of each year, and may continue in session six weeks.

In the County of Liberty, on the seventeenth Monday after the first Monday in January and July of each year, and may continue in session six weeks. [Act April 7, 1915, ch. 155, §§ 2, 6, 7, 9; Act Feb. 13, 1917, ch. 23, § 2.]

All process issued in the First Judicial District and returnable to its terms as heretofore established in Tyler County and all recognizances and bonds returnable to said court shall be valid and returnable to the Seventy-fifth Judicial District Court sitting in Tyler County and all such process are hereby legalized; and all subpoenas and other process made returnable to said court shall be treated and considered as returnable to the term of the said Seventy-fifth Judicial Court in said Tyler County as herein provided; and all grand and petit jurors drawn and selected under existing laws shall be considered lawfully drawn and selected in said Tyler County for the next term of the Seventy-fifth Judicial District Court as herein provided for and such process, is legalized and validated, and all process, recognizances and bonds heretofore issued or which may hereafter be issued before this Act takes effect returnable to the district court in Tyler County, shall be valid and considered returnable to the next term of court sitting after this Act takes effect and the succeeding term as provided by law. This act shall not affect the term of any court in session at the time it goes into effect and said court so in session shall continue until the expiration of the term or the same be adjourned under existing laws, and thereafter the terms of said court shall conform to the provisions of this Act. [Id., § 7.]

For special provisions relating to this and the ninth district, see subdivision 9 of this article.

**Note.**—The 75th district was created by Act April 7, 1915, c. 155, § 2, to expire March 31, 1917. The district is made permanent by the act above set forth. The former act, repealed by this act, provided for a judge and district attorney for said district.

76. That the 76 Judicial District of Texas shall hereafter be composed of the following counties: Titus, Franklin, Camp, Morris and Marion; and the terms of the District Courts therein each year shall be held as follows:

In the County of Titus, beginning on the first Monday in January and may continue in session six weeks; and on the 22nd Monday after the first Monday in January, and may continue in session six weeks.

In the County of Franklin, beginning on the 6th Monday after the first Monday in January, and may continue in session four weeks; and on the fourth Monday in August, and may continue in session four weeks.

In the County of Camp, beginning on the tenth Monday after the first Monday in January, and may continue in session four weeks; and on the fourth Monday after the fourth Monday in August, and may continue in session four weeks.

In the County of Morris, beginning on the fourteenth Monday after the first Monday in January, and may continue in session four weeks; and on the eighth Monday after the fourth Monday in August, and may continue in session four weeks.

In the County of Marion, beginning on the eighteenth Monday after the first Monday in January, and may continue in session four weeks; and on the twelfth Monday after the fourth Monday in August, and may continue in session four weeks. [Act Feb. 9, 1915, ch. 5, § 2; Act Feb. 23, 1917, ch. 41, § 1.]

All processes issued or served before this Act goes into effect, including recognizances and bonds, returnable to the District Court of any of said counties in each of said Judicial Districts shall be considered as returnable to said courts in accordance with the terms as described by this act, and all such process is hereby legalized and all grand and petit juries drawn and selected under existing laws in any of the counties of either of said Judicial Districts, shall be considered lawfully drawn and selected for the next terms of the District Court of their respective counties, held in accordance with this act, and after this Act takes effect, all such process is hereby legalized and validated; provided, that if any court in any county of either of said Judicial Districts, shall be in session at the time this Act takes effect, such court or courts affected hereby shall continue in session until the term thereof shall expire under the provisions of existing laws, and thereafter the said courts of said county or counties shall conform to the requirements of this Act. [Id., § 2.]

The clerks of the District Courts of Marion, Morris, Titus and Franklin Counties, duly elected and now acting, shall be the clerks of the Seventy-sixth Judicial District sitting in their respective counties, until the next general election and until their successors are elected and duly qualified. [Act Feb. 9, 1915, ch. 5, § 4.]

The Governor of Texas, immediately upon the taking effect of this Act, shall appoint a suitable and legally qualified person as District Judge of the Seventy-sixth Judicial District, who shall hold his office until the next general election and until his successor is elected and duly qualified. [Id., § 5.]

The Governor of Texas, immediately upon the taking effect of this Act, shall appoint a suitable and legally qualified person as District Attorney for the Seventy-sixth Judicial District, who shall hold his office until the next general election and until his successor is elected and duly qualified. [Id., § 6.]

The District Court of the Seventy-sixth Judicial District shall have such jurisdiction and powers as are conferred by the Constitution and existing laws of the State of Texas, and such as shall hereafter be given by law. [Id., § 8.]

For special provisions relating to this district, see subdivision 5 of this article.

**Explanatory.**—Became a law Feb. 23, 1917. Section 2a repeals all laws in conflict.

77. That the Seventy-seventh Judicial District of Texas is hereby created and shall be composed of the counties of Limestone and Free-

stone, and the terms of the District Court shall be held therein in each year as follows:

In the county of Limestone beginning on the first Monday in January, March, May, July, September and November, and each term may continue in session four weeks.

In the county of Freestone beginning on the first Monday in February, April, June, August, October and December, and each term may continue in session four weeks. [Act Feb. 12, 1915, ch. 8, § 3.]

That there shall be organized grand juries at the January, May and September terms of said court in Limestone county, and at the February, June and October terms of said court in Freestone County, and at such other terms of the said court in each county as may be determined and ordered by the Judge thereof. [Id., § 4.]

The Governor of the State of Texas is hereby authorized and empowered to appoint some person having the qualifications provided by law for District Judge, for the Judge of the District Court of the Seventy-seventh District, who shall hold his office until the next general election for State offices in the State of Texas, and until his successor is elected and qualified, as is provided by law. He shall receive the same salary that is now provided, or may hereafter be provided, to be paid to the District Judges, and in like manner. [Id., § 4a.]

That the office of District Attorney is hereby created for the Seventy-seventh Judicial District, and the present District Attorney of the Thirteenth Judicial District, elected and now acting for said District shall hold his office in the Seventy-seventh Judicial District until the time for which he was elected shall expire, and until his successor is duly elected and qualified. [Id., § 6.]

For special provisions relating to this district, see subdivision 13 of this article.

78. Wichita County shall hereafter constitute the 78th Judicial District and the District Court in said district shall hold its terms as follows: beginning on the first Mondays in March and September and shall continue in session until the Saturday night next preceding the beginning of the following term unless the business of the terms shall be sooner disposed of: provided that nothing in this Act shall be construed to in any way affect the time and terms of the courts of the 30th Judicial District in said county as the same is now constituted. [Act Feb. 10, 1915, ch. 6, § 1.]

The district courts of the 78th and 30th Judicial districts shall have concurrent jurisdiction of all cases, civil and criminal and appellate, over which the district courts of the state have jurisdiction under the constitution and laws of the State of Texas, co-extensive with the limits of Wichita County; provided however that no grand jury shall be drawn for the 78th district court unless the judge thereof, in his discretion shall decide that it is necessary and shall make a special order for the same upon the minutes of said court; provided further that the Judge of the 78th district shall have the authority, at any time he may think it necessary to recall, reassemble and reimpanel the grand jury last impaneled of the 30th District Court for Wichita County and the grand jury so reimpaneled and reorganized shall constitute a legal grand jury for the 78th district court the same as of originally drawn, summoned and organized in said court. [Id., § 2.]

The Judges of the 30th and the 78th District Courts for Wichita County may each, in his discretion, at any time or upon agreement of the parties or where the Judge may believe the administration of justice will be facilitated thereby, transfer any cause, civil or criminal, from the dockets of their respective courts to the docket of the other district court for Wichita County and shall note such transfer on the docket; whereupon the Clerk of the District Court shall enter said cause upon the docket of the other district court to which such cause has been trans-

ferred and such case shall there be tried or disposed of as if originally filed in said court; provided that no transcript of the record shall be necessary to the jurisdiction of the court to which such case has been transferred [and jurisdiction of the court to which such case has been transferred] and no formal proceeding shall be necessary in such case to show such transfer. [Id., § 3.]

As soon after this Act shall take effect as practicable the Clerk of the District Court for Wichita County shall make up the dockets for said 78th District Court in the following manner: he shall enter upon said dockets such cases as may be transferred by the Judge of the 30th Judicial District and all such cases as may be transferred to such court by agreement of the parties and if, after all such cases are transferred, there remains upon the docket of the 30th District Court for said County more than 40 per cent of the total number of cases pending in said county then he shall transfer enough of the oldest cases on the dockets to make up 60 per cent of the pending business for the said 78th District Court: After the beginning of the first term of the 78th District Court the Clerk shall make up the dockets of each court by filing each case in the court having the first appearance day after the time of filing the petition in which ten days service may be had; provided that all criminal cases shall be docketed in the court which receives the indictment or information upon which such cases are based and all appeals in probate cases from the county probate court of Wichita County shall be to the court holding the first term after notice of appeal is given. [Id., § 4.]

All writs, process, bonds and recognizances, civil or criminal, issued, executed, entered into or effective in the district court of Wichita County prior to the taking effect of this Act and returnable or cognizable in or to said court as it has been heretofore fixed by law are hereby made returnable to and cognizable in either the 30th district court for Wichita County or the 78th District Court as the same may acquire jurisdiction by the terms of this Act and they shall be as valid and binding in law as if originally issued, made, filed or entered into in the court acquiring jurisdiction by the terms of this Act. [Id., § 5.]

The Clerk of the District Court for Wichita County shall be the Clerk of the 78th District Court and the District Attorney for the 30th Judicial District of Texas shall prosecute the pleas of the State in all criminal causes cognizable in said court and his per diem accounts approved by the Judge of said court shall be paid the same as if approved by the Judge of the 30th Judicial District Court. [Id., § 6.]

As soon as this Act takes effect, the Governor, shall appoint a suitable person as Judge of the 78th Judicial District of Texas, who shall hold his office until the next general election in November A. D. 1916, and until his successor is elected and qualified. He shall possess the constitutional qualifications for District Judges and shall receive the same salary as other District Judges in this State. [Id., § 7.]

79. The Seventy-ninth Judicial District of Texas is hereby created and shall be composed of the counties of Starr, Hidalgo, Brooks, Jim Hogg, Duval, and Jim Wells, and the terms of court of the district shall be held therein each year as follows:

In the county of Starr on the first Monday in February of each year, and may continue in session three weeks; on the first Monday in September in each year, and may continue in session three weeks.

In the county of Hidalgo on the third Monday after the first Monday in February of each year, and may continue in session six weeks; on the third Monday after the first Monday in September, and may continue in session four weeks.

In the county of Brooks on the ninth Monday after the first Monday in February of each year, and may continue in session four weeks; on



the seventh Monday after the first Monday in September and may continue in session four weeks.

In the county of Jim Hogg on the thirteenth Monday after the first Monday in February of each year, and may continue in session two weeks; on the eleventh Monday after the first Monday in September, and may continue in session two weeks.

In the county of Duval on the fifteenth Monday after the first Monday in February of each year, and may continue in session four weeks; on the thirteenth Monday after the first Monday in September, and may continue in session until December 31 of each year.

In the county of Jim Wells on the nineteenth Monday after the first Monday in February of each year, and may continue in session four weeks; on the first Monday in January of each year, and may continue in session until the first Monday in February of each year.

That all process, writs and bonds issued, served or executed prior to the taking effect of this Act and returnable to the terms of said court in each of the said counties composing said judicial district, and all process heretofore returnable, as well as all bonds and recognizances heretofore entered into, in any of said counties shall be as valid and binding as if no change had been made by this Act in the times of holding said terms of court. [Act March 12, 1915, ch. 48, § 2.]

The Governor, immediately upon the taking effect of this Act, shall appoint a suitable person as district judge of the Seventy-ninth Judicial District, and a suitable person as district attorney for the Seventy-ninth Judicial District, respectively, each of whom shall hold his office until the next general election, and his successor is duly elected and qualified. [Id., § 4.]

For special provisions affecting this district, see subdivision 28 of this article. This act took effect 90 days after adjournment of the legislature, on March 20, 1915.

80. That the Eightieth Judicial District of Texas is hereby created and shall be composed of the counties of Harris and Waller, and the terms of the district court shall be held therein in each as follows:

In the county of Harris, beginning on the first Monday in January, February, March and September, and on the second Monday in May, June, July, November and December of each year, and may continue in session four weeks.

In the county of Waller, beginning on the first Monday in April and October of each year and may continue in session five weeks. [Act June 3, 1915, 1st C. S., ch. 19, § 2.]

The Governor of the State of Texas is hereby authorized and empowered to appoint some person having the qualifications provided by law for district judge as the Judge of the District Court of the Eightieth Judicial District of Texas, who shall hold his office until the next general election for state offices in the State of Texas, and until his successor is elected and qualified, as is provided by law. He shall receive the same salary that is now provided, or may hereafter be provided, to be paid to district judges, and in like manner. [Id., § 3.]

That the clerk of the District Court of Harris County, as that office is now constituted, and his successor in office, shall be the clerk of the District Court of the Eightieth Judicial District of Texas in Harris County, and shall perform all the duties pertaining to the clerkship of said court, as well as the duties imposed upon him as the clerk of other district courts of Harris County, and for such additional service, shall receive twelve hundred dollars per year, as additional compensation to be collected out of the fees allowed by law. [Id., § 5.]

That the other civil district courts of Harris County and the district court of the Eightieth Judicial District, in the County of Harris, shall have concurrent jurisdiction with each other throughout the limits of

Harris County, in all matters, civil, of which jurisdiction is given to the district courts by the Constitution and laws of the State. [Id., § 6.]

The District Court of the Eightieth Judicial District shall have such jurisdiction and powers as are conferred upon district courts by the Constitution and existing laws of the State of Texas, and such as shall hereafter be given by law, but said district court shall have only civil jurisdiction in Harris County. [Id., § 12.]

For special provisions applicable to this district and district 23, see subdivision 23 of this article.

81. The Eighty-first Judicial District of Texas is hereby created and shall be composed of the counties of Frio, LaSalle, Atascosa, Wilson and Karnes, and the district courts shall be held therein as follows:

In the County of Frio, on the first Monday in September and February, and may continue in session three weeks.

In the County of LaSalle, on the third Monday after the first Monday in September and February, and may continue in session three weeks.

In the County of Atascosa, on the sixth Monday after the first Monday in September and February, and may continue in session five weeks.

In the County of Wilson, on the eleventh Monday after the first Monday in September and February, and may continue in session six weeks.

In the County of Karnes, on the seventeenth Monday after the first Monday in September and February, and may continue in session five weeks.

That all process, writs, recognizances and bonds issued, served, executed, or entered into, prior to the taking effect of this Act, and returnable to the terms of said court, as heretofore fixed by law, in the several counties, composing said district, are hereby made returnable to the terms of said court in the several counties as fixed by this Act, and all process heretofore returnable, as well as all bonds and recognizances heretofore entered into in any of said courts, shall be valid and binding as if no change had been made by this Act in the times of holding said terms of court.

All grand and petit jurors selected in any of said counties shall be legal jurors for the terms of said court fixed by this Act.

The present district attorney of the Thirty-sixth Judicial District of Texas, who resides in Wilson County, Texas, shall act and be the district attorney of the Eighty-first Judicial District of Texas, as herein created, and shall hold office until the next general election and until his successor is duly elected and qualified.

The Governor of Texas is hereby authorized and empowered to appoint a suitable person as district judge of the Eighty-first Judicial District hereby created, who shall hold his office until the next general election and until his successor is duly elected and qualified. [Act March 20, 1917, ch. 91, § 3.]

**Explanatory.**—Section 4 repeals all laws in conflict. Sec. 5 provides that the act shall take effect Aug. 1, 1917.

82. That the Eighty-second Judicial District of Texas is hereby created and shall be composed of Falls County. [Act Feb. 7, 1917, ch. 9, § 1.]

That the terms of the district court in said Eighty-second Judicial District shall be held at the following times: Beginning on the first Monday in the months of January, March, May, September, and November of each year, and each term may continue in session until and including the Saturday next preceding the beginning of the next succeeding term unless the business of the term shall be sooner disposed of; provided that in case a term of district court shall be in session in Falls County as a part of the Fifty-fourth Judicial District at the time this Act takes effect the judge of the Fifty-fourth Judicial District shall continue

to hold said term until such term is adjourned or expires under existing laws. [Id., § 2.]

That the terms of the district court in said Fifty-fourth Judicial District shall be held at the following times, to-wit: Beginning on the first Monday in the months of January, March, May, September and, November, and each of said terms may continue in session until and including the Saturday next preceding the beginning of the next succeeding term, unless the business of the term shall be sooner disposed of; provided that in case a term of said Fifty-fourth District Court shall be in session in McLennan County at the time this Act takes effect the judge of the said Fifty-fourth Judicial District shall continue to hold said term until such term is adjourned or expires under existing laws. [Id., § 3.]

Grand juries in said Eighty-second Judicial District shall be organized at the May and November terms of said court, and at such other terms as the judge of said district may determine and order. Grand juries in the Fifty-fourth Judicial District shall hereafter be empanelled at the March and September terms of court therein and at such other terms as the judge of said district may determine and order. [Id., § 4.]

The district court of the Eighty-second Judicial District shall have all such powers and jurisdiction as district courts now have or which may hereafter be conferred upon them by and under the laws and Constitution of the State of Texas, and said district court of the Eighty-second Judicial District shall have such further jurisdiction as may at any time be transferred to it from the county court of Falls County by act or acts of the Legislature. [Id., § 5.]

All prosecutions, suits, actions, causes, and proceedings of whatever nature, civil or criminal, filed or pending in the district court of Falls County as constituted prior to the taking effect of this Act shall continue on the dockets and be tried and disposed of by the district court of said county as constituted by this Act, the same as if originally filed or instituted in said court as constituting the Eighty-second District. All writs and process issued in connection with all prosecutions, suits, actions, causes, and proceedings of whatever nature, civil or criminal, in the district court of Falls County prior to the taking effect of this Act shall be returnable to and effective in said court as constituted by this Act, and all bonds and recognizances filed and entered into in said district court of Falls County prior to the taking effect of this Act shall be valid, continuing and cognizable in and by the district court of said county as constituting the Eighty-second Judicial District; provided all such writs and process issued and made returnable to the June term, A. D. 1917, of the district court of Falls County shall be returnable to the September term, A. D. 1917, of the district court of said county as constituting the Eighty-second Judicial District. [Id., § 6.]

An official court reporter for said Eighty-second Judicial District shall be appointed by the judge thereof, the said official court reporter to have the qualifications, to be subject to the duties and regulations, and entitled to the same compensation as official court reporters for district courts of this State are now or may hereafter be subject to and entitled under the General Laws of the State. [Id., § 7.]

The Governor shall appoint a suitable person as judge of the Eighty-second Judicial District, as herein constituted, who shall hold such office until the next general election and until his successor shall have been elected and qualified. [Id., § 8.]

The judge of the Eighty-second Judicial District shall receive the same salary, payable by the State of Texas in the same manner as other district judges of said State do now or shall hereafter receive under the Constitution and laws of Texas. [Id., § 9.]

That such part of Section 3, of Chapter 3, of the General Laws of 1915, enacted at the Regular Session of the Thirty-fourth Legislature of Texas, as constitutes Falls County a part of the Fifty-fourth Judicial

District, and such part of Section 8 of said Act of 1915 as provides for the holding of terms of court in Falls County as a part of said Fifty-fourth Judicial District, are hereby repealed save and except that said repeal shall not become operative in case a term of court shall be in session in Falls County at the time this Act takes effect, until such term shall be adjourned sine die by the judge of said Fifty-fourth Judicial District or expires under existing laws as prescribed in Section 2 of this Act. All other laws and parts of laws in conflict with or inconsistent with this Act are hereby repealed. [Id., § 10.]

83. That the Eighty-third Judicial District of the State of Texas is hereby created and shall be composed of the counties of Edwards, Crockett, Sutton, Reagan, Upton, and Pecos, and the district courts shall be holden therein as follows:

In the County of Edwards on the last Monday in January and August and may continue in session four weeks.

In the County of Sutton on the third Monday after the first Monday in February and September, and may continue in session three weeks.

In the County of Crockett on the sixth Monday after the first Monday in February and September, and may continue in session three weeks.

In the County of Reagan on the ninth Monday after the first Monday in February and September and may continue in session two weeks.

In the County of Upton on the eleventh Monday after the first Monday in February and September and may continue in session two weeks.

In the County of Pecos on the thirteenth Monday after the first Monday in February and September and may continue in session until the business is disposed of. [Act March 9, 1917, ch. 67, § 5.]

The Governor shall, immediately after the passage of this Act, appoint a suitable person qualified under the Constitution of the State of Texas as a judge of the Eighty-third Judicial District as herein constituted, who shall hold such office until the next general election, and until his successor shall have been elected and qualified. [Id., § 6.]

The Governor shall, immediately after the passage of this Act, appoint a suitable person qualified under the Constitution and laws of the State of Texas as district attorney of the Eighty-third Judicial District as herein constituted, who shall hold such office until the next general election, and until his successor shall have been elected and qualified; the district attorney of said district shall thereafter be elected as provided by the Constitution and laws of the State of Texas for the election of the district attorney. [Id., § 7.]

For special provisions relating to this district and districts 38, 51, 63, and 70, see subdivision 38 of this article.

84. [There is no 84th judicial district.]

85. The Counties of Robertson and Brazos, now constituting part of the Twentieth Judicial District are here now declared to constitute the Eighty-fifth Judicial District, and the terms of District Court in said counties shall be held as follows: In the County of Robertson on the first Monday in the months of January, April and July, and the second Monday in the month of November in each year, and each term may continue in session for five weeks. The terms of the District Court in Brazos County shall be held on the second Monday in the months of February and May and third Monday in the month of September, and each term may continue in session for six weeks. [Act March 26, 1916 [1917], ch. 96, § 3.]

There shall be organized grand juries at the January and July terms of said court in Robertson County, and at the February and September terms of said court in Brazos County, and at such other terms of the said court of each county as may be determined and ordered by the Judge thereof. [Id., § 4.]

The Governor of the State of Texas is hereby authorized and empowered to appoint some person having the qualifications provided by law as District Judge for the judge of the District Court of the Eighty-fifth Judicial District, who shall hold his office until the next general election for State officers in the State of Texas, and until his successor is elected and qualified as provided by law, and he shall receive the same salary as is now provided or may hereafter be provided, to be paid to District Judges and in like manner. [Id., § 5.]

The District Court of said Eight-Fifth Judicial District shall have all the powers and jurisdiction as District Courts now have or which may hereafter be conferred upon them by and under the laws and constitution of the State of Texas, and the District Court of said Robertson and Brazos Counties shall have and exercise all such other jurisdiction as is here now provided for in this Act. [Id., § 10.]

*Note.*—For special provisions relating to this district and the 20th district, see subdivision 20 of this article. Act March 26, 1917, ch. 96, §§ 11-18, diminishes the jurisdiction of the county courts of Brazos and Robertson counties and increases that of the district court.

86. The Eighty-sixth Judicial District be and the same is hereby created and shall be composed of the counties of Kaufman, Van Zandt, and Rockwall; and the terms of the District Court shall be held therein each year as follows:

In the County of Van Zandt: Beginning on the first Monday in January of each year and continuing in session six weeks; on the thirteenth Monday after the first Monday in January of each year and continuing in session six weeks, and on the first Monday in September of each year and continuing in session six weeks.

In the County of Kaufman: Beginning on the sixth Monday after the first Monday in September of each year and continuing in session seven weeks; beginning on the twenty-third Monday after the first Monday in January of each year and continuing in session until the last Saturday in August, and beginning on the tenth Monday after the first Monday in September of each year and continuing in session until the last Saturday in December.

In Rockwall County: Beginning on the nineteenth Monday after the first Monday in January of each year and continuing in session four weeks, and beginning on the sixth Monday after the first Monday in September of each year and continuing in session four weeks. [Act March 10, 1917, ch. 70, § 7.]

That immediately after the passage of this Act, the Governor shall appoint a suitable person possessing the qualifications prescribed for district judges in this State as judge of the Eighty-sixth Judicial District, who shall hold his office until the next general election for State and county officers and until his successor, shall be elected and qualified, and shall receive such compensation as is now provided by law for district judges. And the County Attorney of Van Zandt County shall represent the State in criminal cases in said county and receive the same fees and compensation as is now provided by law for the County Attorney of Kaufman County. [Id., § 10.]

For special provisions relating to this district and districts 7, 14, and 40, see subdivision 7 of this article.

Article 30 cited, *Sanders v. Bledsoe* (Civ. App.) 173 S. W. 539.

**Art. 31. Where apportionment law amended—Rule as to return of writs and process, as to grand and petit jurors, appearance bonds and recognizances, and witnesses.**

Cited, *Gulf, C. & S. F. Ry. Co. v. Bogy* (Civ. App.) 178 S. W. 577.

## TITLE 7

## ARBITRATION

## CHAPTER ONE

## ARBITRATION IN GENERAL

Art.		Art.	
57.	Agreement to be in writing and name of arbitrators, etc.	65.	Appeal from an award.
63.	Award to be written out, filed and entered as judgment.	70.	Right to other mode of arbitration not affected.

**Article 57. [48] [43] Agreement to be in writing and name arbitrators, etc.**

**Necessity of writing.**—An agreement to submit a controversy to arbitration which had not been reduced to writing did not deprive the courts of jurisdiction of such controversy; no steps having been taken to carry it into effect. *Hill v. Neese* (Civ. App.) 160 S. W. 314.

**Art. 63. [54] [49] Award to be written out, filed and entered as judgment.**

**Objections to award.**—Where it is sought to set aside an award by arbitrators on grounds of fraud, partiality or mistake, the facts constituting objection to award must be specifically averred. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

**Competency of arbitrator as witness.**—An arbitrator is a competent witness to show what was in controversy before the arbitrators, what matters entered into their decision, and whether they were fair and impartial. *Holcomb v. Blankenship* (Civ. App.) 180 S. W. 918.

**Art. 65. [56] [51] Appeal from an award.**

**Right of appeal.**—Where the determination of a matter is referred to a special tribunal, to act as an arbitrator and not in due course of law, the determination of such tribunal is final and cannot be appealed from, even though the person constituting the tribunal is the judge of a court, and the matter is decided in accordance with the usual rules of procedure. *State v. Haldeman* (Civ. App.) 163 S. W. 1020.

Acts 31st Leg. (2d Called Sess.) c. 28, making an appropriation for the payment of a claim against the state for extra work and materials furnished the state for a public building, made the establishment of the claim by any district court a condition precedent to payment. Held, that a district judge, in deciding upon such a claim, was not acting as a special commissioner or arbitrator whose judgment would be final. *Id.*

In view of arts. 56-70, held that, when an award is entered, party cannot appeal unless the right is reserved in the agreement to arbitrate. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

**Art. 70. [61] [56] Right to other mode of arbitration not affected.**

**Master in chancery.**—In view of article 2156 and this article, it is within the power of the court to appoint a master in chancery by consent of parties. *San Benito Cameron County Drainage Dist. v. Farmers' State Guaranty Bank* (Civ. App.) 192 S. W. 1145.

## TITLE 8

## ARCHIVES

Chap.

1. Archives of the general land office.

Chap.

2. Other public archives.

## CHAPTER ONE

## ARCHIVES OF THE GENERAL LAND OFFICE

**Article 82.** [62] [57] What shall be considered archives of the general land office.

**What constitutes archives or public documents.**—A letter addressed to the Commissioner of the General Land Office and forming a part of the records of the Land Office is admissible as an archive when more than 30 years old. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

## CHAPTER TWO

## OTHER PUBLIC ARCHIVES

**Article 90.** [70] [65] Certain books, records, etc., declared to be archives.

**Surveyor's report.**—Under articles 3694, 5397, and this article, report of state surveyor of survey made by him held admissible in trespass to try title between private parties. *Denton v. English* (Civ. App.) 171 S. W. 248.

Where such document also contained argument and opinions, they were not admissible. *Id.*

## TITLE 9

## ASSIGNMENTS FOR CREDITORS

Art.	Art.
91. General assignments, how made and construed; preferences void.	98. Proof of claim, when and how made.
93. Assignment for creditors accepting, etc., and discharging assignor.	102. Verified claims shall be allowed by assignee unless contested.
95. How and when consenting creditors may accept.	106. Final report and discharge of assignee.

### Article 91. [71] General assignment, how made and construed; preferences void.

1. **Nature and requisites in general.**—Where a tenant farmer orally agreed with his landlord that the latter should pay for completing and sell the tenant's cotton crop and apply the proceeds to the tenant's debt to the landlord for advances to make it, accounting for any excess, the transaction was within this article, requiring general assignments by insolvent debtors for the benefit of creditors to be in writing. *Kimbrough v. Bevering* (Civ. App.) 182 S. W. 403.

6. **Instruments operating as assignments.**—A conveyance by a debtor to a trustee to take possession of the property and sell it, pay preferred creditors and a part to remaining creditors, and return the remainder, held not a general assignment, but a preferential deed of trust. *Goldman v. Spann* (Civ. App.) 173 S. W. 1014.

In an action against defendant on the ground that he had assumed payment of his son's debt, evidence held to justify a finding that a certain tract of land was conveyed to defendant for the purpose of paying such debt, and retained by him for that purpose. *Bell v. Swim* (Civ. App.) 178 S. W. 850.

14. **Property included and sufficiency of description—Exempt property.**—A business homestead, if exempt at the date of a general assignment, does not pass to the assignee by virtue of that instrument. *McDowell v. Northcross* (Civ. App.) 162 S. W. 13.

Neither a business nor a residence homestead, though afterwards abandoned as such, will pass under a general assignment, if not abandoned until after execution. *Id.*

### Art. 93. [73] Assignment for creditors accepting, etc., and discharging assignor.

Cited, *First State Bank of Teague v. Hadden* (Civ. App.) 158 S. W. 1168.

### Art. 95. [75] How and when consenting creditors may accept.

**Necessity of acceptance.**—A trustee in a preferred deed of trust may not sue for a wrongful attachment, where the creditors did not accept the conveyance. *Goldman v. Spann* (Civ. App.) 173 S. W. 1014.

**Form of acceptance.**—Where a creditor of a debtor making a statutory general assignment filed its claim with the assignee within four months after notice, and attached to the claim a letter from it addressed to its attorney, stating, "You are authorized to file claim with assignee and accept whatever it may pay," the creditor sufficiently accepted the assignment in writing. *First State Bank of Teague v. Hadden* (Civ. App.) 158 S. W. 1168.

Where a creditor filed his claim with the assignee within four months, and inclosed the claim in a letter from its authorized attorney to the assignee, which recited "Please file this account and advise when we can expect payment," he accepted the assignment. *Id.*

**Waiver of written acceptance.**—Where an assignee in a statutory general assignment for creditors received claims of creditors and allowed the same, and made the notation thereon that the claims were allowed subject to statutory acceptance, but did not return them to the creditors or notify them of the memorandum made thereon, he waived written acceptance by the creditors. *First State Bank of Teague v. Hadden* (Civ. App.) 158 S. W. 1168.

### Art. 98. [78] Proof of claim, when and how made.

**Affidavit.**—An affidavit which avers that the statement in a note given by the assignor is true, and that the debt is just, is sufficient. *First State Bank of Teague v. Hadden* (Civ. App.) 158 S. W. 1168.

Requirement that claim be supported by affidavit that there are no "credits or offsets" held satisfied by one that all just "offsets" have been allowed. *Lang v. Collins* (Civ. App.) 190 S. W. 784.

**Sufficiency of proof.**—As regards sufficiency of creditors' statement of claim and supporting affidavit filed with assignee for benefit of creditors, substantial compliance with the statute is enough. *Lang v. Collins* (Civ. App.) 190 S. W. 784.

The requirement of a "distinct" statement held satisfied by one claiming a certain amount for legal services. *Id.*

Statement of claim filed with assignee for benefit of creditors is of the "particular nature" of the claim, where disclosing it is for legal services. *Id.*



**Art. 102. [82] Verified claims shall be allowed by assignee unless contested.**

**Objections by non-accepting creditors.**—This article relates solely to cases where one creditor contests the validity of another consenting creditor's claim. *First State Bank of Teague v. Hadden* (Civ. App.) 158 S. W. 1168.

**Art. 106. [86] Final report and discharge of assignee.**

**Not subject to general limitation laws.**—Suit by heirs of assignors for benefit of creditors to recover the balance held by the assignees held not subject to the defense of laches, nor, in view of this article, to the general law of limitations. *Bass v. McCord* (Civ. App.) 178 S. W. 998.

## TITLE 10

## ASYLUMS

Chap.	1. The Lunatic Asylums.	Chap.	4. State Home for Lepers.
	2. Pasteur Hospital.		5. State Tuberculosis Sanatorium.
	3. The Deaf and Dumb and the Blind and other Asylums.		6. State Hospital for Crippled and Deformed Children.

## CHAPTER ONE

## THE LUNATIC ASYLUMS

Art.	107a. Northwest Texas Insane Asylum.	Art.	107p. Convict labor for work.
	107b. Board for selection of site.		4. ADMISSION AND DISCHARGE OF PATIENTS
	107c. Appointment of board of managers.		134. Who may be admitted.
	107d. Support and general management.		5. OF JUDICIAL PROCEEDINGS IN CASES OF LUNACY
	107e. Construction of buildings.		150. Apprehension of lunatics.
	107f. Establishment of hospital for negro insane.		151. The writ and its requisites and execution.
	107g. Board of managers.		152. Commission appointed.
	107h. Superintendent.		156. Proceedings and report of commission.
	107i. Transfer of negro insane to hospital.		159. Judgment.
	107j. Support and management.		161. Conveyance to asylum and discharge therefrom.
	107k. Officers to be white persons.		
	107l. Erection of buildings.		
	107m. Same; capacity of hospital.		
	107n. Lands of penitentiary set aside for hospital.		
	107o. Board to select site and let contracts for buildings.		

**Article 107a. Northwest Texas Insane Asylum.**—That there shall be constructed, established and maintained an asylum for the care, treatment and support of white insane persons of this State. It shall be known as the Northwest Texas Insane Asylum. The asylum shall be located at some point north of the Texas and Pacific Railway between El Paso and Ft. Worth and west of the Gulf, Colorado & Santa Fe Railway between Ft. Worth and Gainesville, and at a place where at least five hundred acres of land can be secured. [Act April 2, 1917, ch. 183, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 107b. Board for selection of site.**—The Governor, the Lieutenant Governor, and the Attorney General shall be constituted a board to select a site for the said asylum. Said board shall select the site for said asylum and shall make such selection with a view to its accessibility and convenience to the greatest number of inhabitants, the supply of water, building material, fuel, fertility of soil and healthfulness, and the same shall contain at least five hundred acres of land. Said board shall take title to the land so selected by them in the name of the State for the use and benefit of said asylum, provided, however, that the Attorney General's Department shall first approve the title to the said land so selected by the said board. [Id., § 2.]

**Art. 107c. Appointment of board of managers.**—That the Governor shall appoint, by and with the consent of the Senate, a Board of Managers for said asylum with such powers and duties as are now provided for managers of other lunatic asylums in Title 10 of the Revised Civil Statutes of Texas. [Id., § 3.]

See art. 4042a, Vernon's Sayles' Civ. St. 1914.

**Art. 107d. Support and general management.**—The support and general management of the said asylum shall be the same in every re-

spect as is provided for asylums in Title 19[10] of the Revised Civil Statutes of Texas. [Id., § 4.]

**Art. 107e. Construction of buildings.**—There shall be constructed upon said grounds so selected permanent, suitable, substantial and fire-proof buildings, sufficient to accommodate at least one thousand inmates; said buildings to be provided with modern improvements for furnishing water, heat, ventilation and sewerage; and the Governor immediately after this Act goes into effect, and after the selection of the site for said asylum, and after the title to said land shall have been approved by the Attorney General, shall advertise for plans and specifications for said buildings for thirty days in not more than two daily newspapers published in this State; and he, together with the Lieutenant Governor and the Attorney General, shall constitute a board for the purpose of having said buildings erected and shall have full power and authority to do and perform all things necessary to carrying out the purpose of this Act. Provided that all buildings authorized by this Act and for which an appropriation is hereby made, shall be of fire-proof construction, and that part of all plans and specifications for the erection of said buildings relating to fire protection shall be subject to the approval of the State Fire Insurance Commission. [Id., § 5.]

**Explanatory.**—Sec. 6 makes an appropriation of \$400,000 for site, expenses in procuring site, and for buildings.

**Validity of appropriations.**—Acts 26th Leg. c. 5, providing for the erection of buildings at the insane asylum, held not a sufficient pre-existing law to warrant the Legislature, under Const. art. 3, § 44, in making an appropriation to pay a contractor for extra work and materials furnished in excess of the amount of the appropriation. *State v. Halde-man* (Civ. App.) 163 S. W. 1020.

Where a contractor, employed to erect a public building, performed extra work and furnished additional materials, the Legislature, under Const. art. 3, § 53, is without authority to make an appropriation for the payment of such work and services. *Id.*

Where a public contractor did extra work and furnished additional materials without any warrant in law for his compensation, the Legislature cannot, under Const. art. 3, § 49, declaring that no debt shall be created on behalf of the state, except to supply casual deficiencies of revenues, defend the state, and pay existing debts, make an appropriation to pay the contractor; there being no pre-existing debt as a basis. *Id.*

**Art. 107f. Establishment of Hospital for Negro Insane.**—That there shall be constructed, established and maintained a hospital for the care, treatment and support of all insane persons in this State of African blood or of African descent. It shall be known as the hospital for negro insane. The hospital shall be located at Rusk, Texas, and on the property there situated and owned by the State of Texas, and now held and in part used by the penitentiary system of the State. [Act April 4, 1917, ch. 198, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 107g. Board of managers.**—As soon as this act becomes effective and operative the Governor shall appoint a board of managers for said hospital, in accordance with the provisions of Title 10 of the Revised Civil Statutes of the State of Texas, who shall have the power, and authority and shall receive the compensation and shall perform the duties provided in said law, and in accordance with the general laws of this State. Said board of managers shall, in addition to the duties and powers given them in said laws, have the authority, and it shall be their duty to employ, with the consent of the Governor, the State Architect, if his services are available, and if not, some other architect to prepare plans and specifications for the erection, remodeling, change, repair or alteration of such building or buildings and the installing of such equipment as may be necessary to construct or alter or install as may be proper or necessary to carry out the provisions of this Act. Said board of managers, under the control and direction of the Governor, Comptroller of Public Accounts, and State Treasurer, shall have the power and it is made their duty to select the site for said hospital on the property belonging to the State at Rusk, Texas, and all or any part of said property

or such portion thereof; as may be so selected by them under the control and direction of the Governor, Comptroller of Public Accounts and State Treasurer, is hereby set aside to and for said hospital. [Id., § 2.]

**Art. 107h. Superintendent.**—The board of managers for said hospital, appointed by the Governor, shall appoint a superintendent of said hospital, whose duties, qualifications, terms of office and emoluments shall be the same as are now or may hereafter be provided by law for the superintendent of the State Lunatic Asylum at Austin, Texas. [Id., § 3.]

**Art. 107i. Transfer of negro insane to hospital.**—As soon as practicable after this act becomes effective, all negro insane persons in this State, now inmates of any jail or insane asylum in this State shall be transferred to the Hospital for Negro Insane, and hereafter all insane persons of African blood entitled by law to be admitted or admitted to the asylums of this State, shall be sent to said hospital at Rusk, Texas. [Id., § 4.]

**Art. 107j. Support and management.**—The support and general management of the said hospital shall be the same and equal in every respect as that which are now provided or as may hereafter be provided for the other asylums for the insane in the State of Texas. [Id., § 5.]

**Art. 107k. Officers to be white persons.**—All boards of managers, superintendents, officials and physicians shall be white persons, and as many of the other employes and attendants as practicable shall be white persons. [Id., § 6.]

**Art. 107l. Erection of buildings.**—The board of managers under the control and direction of the Governor, Comptroller of Public Accounts and State Treasurer, shall cause to be erected fireproof buildings or have remodeled existing buildings selected by them so that they will be of such character so that such buildings erected or remodeled shall be of substantial, permanent and suitable character sufficient to accommodate at least one thousand inmates; said buildings to be provided with modern improvements for furnishing water, heat, ventilation and sewerage and otherwise in keeping with modern ideas of the suitable character for buildings and appliances to obtain best results in the treatment and care of insane persons. The board of managers, with the consent of the Governor, may select a competent architect to supervise the erection, remodeling and equipping of all said buildings and other improvements, all of which shall be made and erected under the direction, management and supervision of the superintendent of said hospital and of the supervising architect to be appointed by the board with the consent of the Governor, which supervising architect shall be under the control of the State Architect, the salary and compensation of such supervising architect shall be deducted from the appropriations made herein for said hospital, and is not to exceed \$2500 per annum. Bids to erect said or such buildings, alter, remodel or repair such buildings, and install such other improvements shall be let to the lowest responsible bidder or bidders, the bids being so arranged that the different buildings and units of the same and installation may be bid upon by items or units; the contractor or contractors shall enter into a good and sufficient bonds to be approved by the Governor, all awards to bidders to be made with his approval, and payable to the State of Texas in a sum double the amount of the contract, conditioned that he or they will do the work contracted for according to the plans and specifications furnished by the architect, and use such materials in the construction remodeling or repair of such buildings, equipment and improvements as may be called for in said plans and specifications and comply in every respect with all the conditions of said contract and pay for all labor and material: eighty per

cent of the value of the materials to be paid when actually delivered on the grounds, and the same per cent for labor when done, payable every two weeks, to be only payable on the certificate of the supervising architect, approved by the State Architect and the Governor, and the remaining twenty per cent to be paid when said buildings, equipment or other improvements are completed to the entire satisfaction of the Governor, supervising architect and State Architect and received by them; provided, that the Comptroller shall not issue any warrants except upon itemized statements sworn to by the contractor or contractors and approved by said supervising architect and the Governor as a voucher for same, which shall be filed with the Comptroller. The architect, if other than the State Architect, preparing plans and specifications, and the supervising architect, shall each execute a bond payable to the State of Texas at Austin, Texas, in a sum to be fixed by the Governor, and to be approved by him, with good and sufficient sureties, conditioned that said architect or architects shall be liable and bound to pay to the State of Texas all such damages as it may sustain by reason of defective plans and specifications, or any wilful failure or negligent performance of duty. [Id., § 7.]

See notes under art. 107e.

Explanatory.—Sec. 8 makes an appropriation of \$200,000, for buildings and improvements.

**Art. 107m. Same; capacity of hospital.**—That in the provisions made in the erection or remodeling of buildings due care and thought should be given, and such improvements should be made so that the capacity of the hospital may be added to and enlarged from time to time as necessity may arise in the future. [Id., § 9.]

**Art. 107n. Lands of penitentiary set aside for hospital.**—So much of the lands of the East Texas penitentiary at Rusk, Texas, as may be requisite and needful, as well as any improvements now situated thereon, for such buildings, grounds, parks, for pasturage, orchards and for growing agricultural products are hereby set aside for the use of said hospital. [Id., § 10.]

**Art. 107o. Board to select site and let contracts for buildings.**—The Governor, Comptroller of Public Accounts and State Treasurer shall constitute a board to determine what, if any, property now owned by the State at Rusk, Texas, and used in whole or in part by the penitentiary system, shall be set apart to and used permanently by the hospital; and the Governor, together with the State Comptroller of Public Accounts and the State Treasurer shall let the contract or contracts for the construction or remodeling of said buildings, equipment or other improvements. [Id., § 11.]

**Art. 107p. Convict labor for work.**—The commissioners of the penitentiary are hereby directed and required to furnish said board of managers with a sufficient number of able-bodied convicts to prepare the grounds for such hospital buildings and to do the excavating and other work for the construction of said buildings, and to prepare and deliver all such materials as may be required in the construction and equipment of said buildings, and to do and perform all other work in the erection and construction of such buildings for which convicts may be found suitable and competent. [Id., § 12.]

#### 4. ADMISSION AND DISCHARGE OF PATIENTS

**Art. 134. [112] [91] Who may be admitted.**

Cited, *Loving v. Hazelwood* (Civ. App.) 184 S. W. 355.

## 5. JUDICIAL PROCEEDINGS IN CASES OF LUNACY

**Art. 150. [128] [106] Apprehension.**

Arts. 150-165, cited, *White v. White* (Civ. App.) 183 S. W. 369.

**Discretion as to issuance of warrant.**—While county judge has discretion to issue warrant where affidavit of lunacy is made, justice of peace has not. *Suhre v. Kott* (Civ. App.) 193 S. W. 417.

**False imprisonment and malicious prosecution.**—It is actionable to falsely and maliciously file an affidavit that another is insane, and affiant cannot excuse his conduct on the ground that he was authorized by law to make the affidavit. *Suhre v. Kott* (Civ. App.) 193 S. W. 417.

In action for malicious prosecution by filing affidavit that plaintiff was insane, it was no justification that justice before whom affidavit was made and who issued warrant for plaintiff's arrest exercised judicial discretion. *Id.*

Where prosecution for lunacy was had before commission afterwards declared unconstitutional, discharge of alleged insane person by county judge was termination of the prosecution in his favor. *Id.*

**Habeas corpus to determine constitutionality of statute.**—See *Ex parte Singleton*, 72 Tex. Cr. R. 122, 161 S. W. 123.

**Art. 151. [129] [107] The writ.**

**Bond.**—See notes under art. 161.

**Art. 152. Commission appointed.**

**Jury trial.**—There being under statute a right to jury trial in lunacy proceedings at date of adoption of Const. art. 1, § 15, providing that "right of trial by jury shall remain inviolate," Acts 33d Leg. c. 163, substituting a commission of doctors for a jury in such proceedings, is invalid. *White v. White* (Civ. App.) 183 S. W. 369. But see same case in Supreme Court (196 S. W. 508) holding that the act is not unconstitutional.

The commission to try lunacy charges provided for by Acts 33d Leg. c. 163, is not a jury within the constitutional guarantee of right to a trial by jury. *Loving v. Hazelwood* (Civ. App.) 184 S. W. 355.

**Art. 156. Proceedings and report of commission.**

Cited, *White v. White* (Civ. App.) 183 S. W. 369.

**Art. 159. Judgment.**

**Effect of judgment.**—In a suit to set aside a conveyance on the ground of the grantor's insanity, a copy of a judgment finding him insane, rendered a year after the conveyance, is not admissible. *Rowan v. Hodges* (Civ. App.) 175 S. W. 847.

**Art. 161. Conveyance to asylum and discharge therefrom.**

**Bond.**—A bond for the care of a lunatic made payable to the county judge instead of to the state held not sustainable as a statutory bond under Rev. St. 1895, art. 140. *Watkins v. Minter* (Sup.) 180 S. W. 227.

A bond for the care of a lunatic given on valid consideration voluntarily and of the free accord of the principal and his sureties, held a good common-law obligation. *Id.*

Where a bond for the custody of a lunatic constitutes a valid obligation upon which the obligee may sue for the use of any one injured as the result of failure to restrain the lunatic, a person for whose use such suit might be maintained can himself prosecute it. *Id.*

The bond given to secure the release of an adjudged lunatic under the void act of 1913 cannot be given effect as a common-law bond rendering the sureties liable for injuries caused by the lunatic. *Loving v. Hazelwood*, 184 S. W. 355.

The partial failure of consideration for a bond under the void act of 1913 for the release of a lunatic renders the whole bond void. *Id.*

## CHAPTER TWO

## PASTEUR HOSPITAL

**Article 167. Indigent persons treated at expense of state; county to pay traveling and living expenses; nonindigent persons to pay their own expenses.**—All indigent persons afflicted with hydrophobia in this State shall be treated at the expense of the State at the pasteur hospital or department of the asylum for the treatment of hydrophobia at Austin, but the county in which such indigent persons reside, shall pay the traveling expenses of such person to and from Austin and the necessary living expenses of such person while in Austin undergoing said treatment, such expenses to be paid upon order of the commissioners court of the county in which such person resides when satisfactory showing is made to said court as to indigency and the reasonableness and the necessity of the ex-

pense. All nonindigent persons shall be kept, treated and maintained at said hospital at their own expense or that of the relatives, friends or guardians. [Act March 30, 1917, ch. 151, § 1.]

**Explanatory.**—The act amends art. 167, tit. 10, ch. 2, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**CHAPTER THREE**

**THE DEAF AND DUMB, AND THE BLIND, AND OTHER ASYLUMS**

<p>Art. 172. Boards, how appointed and constituted.</p> <p>187½. New building site to be acquired; name of institution.</p> <p>187½a. Board of trustees.</p> <p>187½b. Board, how constituted.</p> <p>187½c. Title to land, how taken.</p> <p>188. Appointment of oculist and qualifications.</p> <p>189. Removal of oculist.</p>	<p>1. GENERAL PROVISIONS</p> <p>a. BOARD OF TRUSTEES</p> <p>2. PARTICULAR PROVISIONS</p> <p>a. TEXAS SCHOOL FOR THE BLIND</p>	<p>Art. 189a. Conveyance of certain property to University of Texas.</p> <p>c. ORPHAN ASYLUM</p> <p>202. Superseded.</p> <p>g. STATE COLONY FOR THE FEEBLE MINDED</p> <p>232a. Colony established.</p> <p>232b. Purpose of colony.</p> <p>232c. Board of managers; qualifications; compensation; authority; erection of buildings; superintendent; employés.</p> <p>232d. Accommodations for inmates.</p> <p>232e. Rules and regulations.</p> <p>232f. Expenses of inmates to be paid by parents or guardians.</p> <p>232g. Feeble minded persons defined.</p>
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**1. GENERAL PROVISIONS**

*a. Board of Trustees*

**Article 172. [144] [122] Boards, how constituted.**

See arts. 187½-187½c, post, creating a special board for the Texas School for the Blind.

**2. PARTICULAR PROVISIONS**

*a. Texas School for the Blind*

**Art. 187½. New building site to be acquired; name of institution.**—That a new building site shall be acquired as a site of the Texas School for the Blind, consisting of not less than forty acres of land, and modern and commodious buildings shall be erected thereon, as nearly fireproof as possible, with such other improvements and equipment as may be necessary for a first-class school for the blind, and the name of this new institution shall hereafter be known as the "Texas School for the Blind." Before the purchase of said land it shall be the duty of the Attorney General to examine and pass upon the title to same. [Act June 3, 1915, 1st C. S., ch. 18, § 1.]

Took effect 90 days after May 28, 1915, date of adjournment. See notes under art. 107e.

**Art. 187½a. Board of trustees.**—That the Board of Trustees of the Blind Asylum shall become and be known, upon the taking effect of this Act, as the "Board of Trustees of the Texas School for the Blind," and as such shall continue to act for the unexpired parts of their respective terms for which they are appointed, and whenever any duty, power or function is by law, or may hereafter be by law placed upon the Board of Trustees of said Blind Asylum, the same shall be construed to be placed upon and shall be executed by the Board of Trustees of the Texas School for the Blind. [Id., § 2.]

**Art. 187½b. Board how constituted.**—The Governor, the Lieutenant Governor and the Attorney General of Texas shall constitute a board

whose duty it shall be to carry out the provisions of this Act, of which board the Governor shall be chairman and the superintendent of the Texas School for the Blind shall be secretary of said board. [Id., § 3.]

**Art. 187½c. Title to land, how taken.**—The board provided for herein shall take the title to any real estate acquired under this Act to "The Board of Trustees of the Texas School for the Blind," and their successors, as trustees for the use and benefit of the State of Texas. [Id., § 4.]

**Art. 188. [160] [137] Appointment of oculist and qualifications.**

Cited, *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

**Art. 189. [161] [138] Removal of oculist.**

Cited, *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

**Art. 189a. Conveyance of certain property to University of Texas.**—That the title to the property near the intersection of Nineteenth Street and East Avenue in the City of Austin, Travis county, Texas, belonging to the State Blind Asylum consisting of the grounds and buildings now occupied by the said Blind Asylum, be and the same is hereby vested in the University of Texas for a period not to exceed ten years, and the Chairman of the Board of Trustees of said Blind Asylum is empowered and directed upon completion of the new buildings for said Blind Asylum now in course of erection in Austin, Texas. [Act May 25, 1917, 1st C. S., ch. 39, § 1.]

#### *c. Orphan Asylum*

**Art. 202. [170]**

Superseded by art. 7085b, post.

#### *g. State Colony for the Feeble Minded*

**Art. 232a. Colony established.**—There is hereby established at some suitable place in the vicinity of Austin, where suitable farm lands may be secured, a farm colony on the cottage plan for the training and custodial care of the feeble minded of the State, to be known as the State Colony for the Feeble Minded. [Act March 22, 1915, ch. 90, § 1.]

Act took effect 90 days after March 20, 1915, date of adjournment.

**Art. 232b. Purpose of colony.**—It shall be the purpose of this colony to educate by such special methods as the best modern science has discovered the feeble minded children of the State that are capable of being educated, and to provide suitable work and supervision for the adult feeble minded who are not able to protect and support themselves at large as law abiding citizens, to the end that these unfortunates may be prevented from reproducing their kind and society relieved of the heavy economic and moral losses arising from the existence at large of these unfortunate persons. [Id., § 2.]

**Art. 232c. Board of managers; qualifications; compensation; authority; erection of buildings; superintendent; employés.**—The Colony for the Feeble Minded shall be under the control and management of a board of five managers, two ex-officio members and three to be appointed by the Governor, with the advice and consent of the Senate. The ex-officio members shall be the State Superintendent of Public Instruction and the ranking professor of child psychology in the department of education of the University of Texas. Of the managers first appointed by the Governor, one shall hold office until February 1, 1917, one until February 1, 1919, and one until February 21, 1921. All subsequent appointments, except to fill vacancies, shall be for a term of six years. Appointments to fill vacancies shall be for the remainder of the unexpired term.

The members of said board shall be public spirited citizens interested in measures of social betterment, one of whom shall be a physician, and at least one of whom shall be a woman. Each member of the board, ex-



cept the ex-officio members, shall receive five dollars per day while engaged in the performance of his duties as such member, and all members shall be entitled to their necessary traveling expenses, to be paid out of the funds appropriated for the support of the colony, when properly itemized and approved by the board.

The said board of managers shall have authority to purchase or receive as gift such lands as may be needed, and shall also have authority, and it shall be their duty, to advertise, if necessary, for plans and specifications for the buildings to be erected, and to contract for the erection of the same, requiring the contractor to furnish bond for the erection of said buildings in accordance with the contract.

The board of managers shall employ a superintendent and fix his salary and his duties, and for cause deemed sufficient by the board, may, after giving him an opportunity to be heard, remove him. The board shall also determine the number and fix the salary of other officers and employes connected with the colony, but the power to appoint and remove from the subordinate positions is vested in the superintendent, upon whom the responsibility for the details of management is placed. The superintendent shall be a man of education, with training and experience in the work of institutions of this kind. [Id., § 3.]

**Art. 232d. Accommodations for inmates.**—In carrying out the provisions of this Act the board of managers shall provide accommodations for only such number of inmates from year to year as can be advantageously cared for with the appropriations granted for that year, giving preference, first, to girls and women of child bearing age, and to those of both sexes who are most likely to profit by the special education and training. [Id., § 4.]

**Art. 232e. Rules and regulations.**—The detailed manner and condition of admission, transmittal and dismissal shall be provided by the board of managers, subject to the provisions of this Act. [Id., § 5.]

**Art. 232f. Expenses of inmates to be paid by parents or guardians.**—In all cases in which the parent or guardian of a feeble minded person is financially able to pay the expenses of support and [training in the colony, in whole or in part, he shall be required to do so, but in all other cases there shall be no fees or charges]. [Id., § 6.]

**Explanatory.**—The words in brackets do not appear in the session laws as published, but do appear in the enrolled bill.

**Art. 232g. Feeble minded persons defined.**—A feeble minded child, as defined in this Act, is one of such feeble mental or moral powers as to be unable to profit by the ordinary methods of education as employed in the common schools, and a feeble minded adult is one who is unable under ordinary circumstances to protect and support himself as a law abiding citizen because of lack of mental power. [Id., § 7.]

## CHAPTER FOUR

### STATE HOME FOR LEPERS

Art. 232½. Commission to select site; report; location and other requirements; repeal; compensation of commissioners.	Art. 232½c. Isolation, confinement, and treatment of lepers.
232½a. Erection of buildings; cost; equipment.	232½d. Superintendent; qualifications; salary; powers and duties.
232½b. Expenditures, how made.	232½e. Disbursements, how made.
	232½f. Appropriation.
	232-239. Superseded.

**Article 232½. Commission to select site; report; location and other requirements; repeal; compensation of commissioners.**—The Governor of Texas shall as soon as practical after the taking effect of this bill ap-

point a commission to consist of the State Health Officer and two other citizens of the State of Texas, for the purpose of selecting a site for the erection of an institution to be known as the State Home for Lepers. Such commission shall report within thirty days to the Governor their selection, which selection shall consist of not less than one hundred acres of land, which said site shall not be less than two miles distant from any town or city within this State and not less than one mile distant from any residence; said site shall upon selection by the commission as aforesaid be purchased for the State and shall cost not to exceed \$10,000.00. The Land Commissioner is hereby authorized upon request of the board, to award to the State any school land for the location of this home they may select, at the price fixed upon it by the land office; provided nothing herein shall be construed as repealing any law now in force except as herein provided. Said members of said commission shall each be paid five dollars per day and necessary expenses for the time actually consumed in the service required by this Section of this law. [Act May 19, 1917, 1st C. S., ch. 24, § 1.]

Took effect 90 days after May 17, 1917, date of adjournment. Sec. 9 repeals all laws in conflict.

**Art. 2321½a. Erection of buildings; cost; equipment.**—As soon as practicable after the selection and purchase of such site, the said commission shall designate the exact location of the ground, and the character and plans for all necessary buildings, including a home for the superintendent of such Home for Lepers, and an administration building. The inmates buildings to be on the cottage plan, and shall have plans and specifications made therefor and shall advertise for thirty days in at least one newspaper of general circulation in this State and one newspaper published in the county where such home is to be located, for bids for the erection of such buildings, and shall award the contract to the lowest and best bidder, provided the total amount of said bid for all the buildings shall not exceed one Twenty-five thousand dollars; and the said commission shall also purchase all necessary furniture and equipment for said buildings, not to exceed in cost fifteen thousand dollars. [Id., § 2.]

**Art. 2321½b. Expenditures, how made.**—All payments of money required under the provisions of Section 1 [art. 2321½] and Section 2 [art. 2321½a] of this Act shall be made by warrant on the State Treasury drawn by the State Comptroller based on vouchers signed by the commission provided for in Section 1 and approved by the Governor. [Id., § 3.]

**Art. 2321½c. Isolation, confinement, and treatment of lepers.**—Any person within this State found to be suffering with the disease of leprosy shall be isolated and removed to said State Home for Lepers, upon certificate of the county health officer of the county where such leper may be and of the State Health Officer to the effect that such person is so suffering.

Upon the certificate of said health Officer and county health officer as herein provided for, the county judge of the county where such leper may be shall issue his warrant commanding the sheriff of such county to seize such leper and convey him to the Home for Lepers as herein provided. All necessary expenses for conveying such leper to the Home for Lepers shall be paid for by the county wherein said Leper may be found.

Such person after having been conveyed to the Home for Lepers, as herein provided for, shall be confined therein and cared for and treated at the expense of this State during life, unless sooner discharged on account of being cured. Provided, however, that any person found suffering from leprosy within this State, who shall not have been a resident of this State for a period of one year, shall be returned to the State

from whence he came, and the expense of such return shall be paid by the county in which such leper is found. [Id., § 4.]

**Art. 232½d. Superintendent; qualifications; salary; powers and duties.**—As soon as such Home for Lepers is completed and ready for occupancy, and every four years thereafter, the Governor shall appoint a superintendent for the State Home for Lepers, who shall be a graduate of a reputable school of medicine, who shall be authorized to practice medicine within this State, and he shall receive a salary of Three Thousand Dollars per annum; said superintendent shall hold office for four years after his appointment and until his successor qualifies, which superintendent shall employ such nurses, assistants and servants as shall be necessary, and shall pay for same such salaries as may be fixed by such superintendent and approved by the Governor; provided that said superintendent shall live at said State Home for Lepers and be in active management and control of said Home subject to the limitations of this Act, and shall not engage in private practice. [Id., § 5.]

**Art. 232½e. Disbursements, how made.**—All payments of money necessary under the provisions of Section 5 of this Act [art. 232½d] shall be made by Warrant on the State Treasury drawn by the Comptroller based upon vouchers signed by the superintendent of the Home for Lepers and approved by the Governor. [Id., § 6.]

**Art. 232½f. Appropriation.**—There is hereby appropriated from the general revenue of this State the sum of twenty-five thousand dollars or as much thereof as may be necessary for the purpose of carrying into effect this Act, and to purchase such site and erect and equip such building as herein provided for, and for the maintenance of such institution for the fiscal year ending August 31, 1918, and August 31, 1919. [Id., § 8.]

**Arts. 233–239.**

Superseded. See arts. 232½–232½f, ante.

## CHAPTER FIVE

### STATE TUBERCULOSIS SANITORIUM

<p><b>Art.</b> 239t. By-laws, rules, and regulations; physicians and salaries; superintendents and employes.</p> <p>239v. Fraternal societies may erect and maintain buildings for accommodation of their members on state</p>	<p><b>Art.</b> sanatorium grounds; expense of maintenance; inmates; unoccupied quarters may be used by state.</p> <p>239w. Plan and location of buildings.</p> <p>239x. Classification of patients and rules of admission, etc.</p>
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**Article 239t. By-laws, rules and regulations; physicians and salaries; superintendents and employes.**

This article is in part superseded by Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixing the salary of the superintendent of the sanatorium at Carlsbad at \$2,500.

**Art. 239v. Fraternal societies may erect and maintain buildings for accommodation of their members on state sanatorium grounds; expense of maintenance; inmates; unoccupied quarters may be used by state.**—The Board of Control of the State Tuberculosis Sanatorium as Carlsbad, Texas, be and they are hereby authorized and empowered, on request of charitable fraternities or societies, in this State, such as Free Masons, Odd Fellows, Knights of Pythias and the like, acting through their properly authorized officers, boards or committees, to permit the erection, furnishing and maintenance by such fraternities or societies upon the grounds of said Sanatorium, of dormitories, cottages, tents or other sleeping and housing accommodations as may be desired by any

such fraternity or society, for the proper and comfortable housing, sleeping, treatment and caring for any member or members of such fraternity or society or for any members of their families or for the widows and children of deceased members of such fraternity or society, who may be afflicted with tuberculosis and which accommodations so erected shall be reserved for the preferential use of such members and members of their families and of the widows and children of deceased members of the respective fraternity or society so erecting, furnishing and maintaining such accommodations hereunder; provided that the State shall be at no expense whatever in the erection, furnishing or maintenance of such accommodations, and provided the charity fraternity or society entering a patient or patients, shall provide such prorata part for the maintenance of such patient or patients as may be found just and equitable pending the next succeeding appropriation to be made by the Legislature of Texas for the maintenance of said Tuberculosis Sanitorium, and provided further that children under this section shall mean any person, under twenty-one years of age, the child of a deceased member of such fraternity or society, and further provided that such accommodations or any part of them not being used nor required by those entitled to such preference, as hereinbefore provided, may be used and occupied by other patients in said sanitorium, at the discretion of the Superintendent thereof and without any charge therefor against the State. [Sec. 22.] [Act April 2, 1917, ch. 186, § 1.]

The act amends chapter 77, general laws, 32nd Leg., approved March 17, 1911, as amended by Act March 31, 1913, by adding thereto sections 22, 23, and 24. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 239w. Plan and location of buildings.**—All matters pertaining to the location, construction, style or character of buildings, term of their existence and all other questions arising in connection with the granting of the permission to erect and maintain the accommodations herein contemplated, shall be arranged and agreed upon in writing by and between the board of control of said sanitorium, on the part of the State of Texas, and the properly authorized officers, board or committee of each respective charitable fraternity or society and such written agreement in each case shall be recorded at length upon the minutes of said board of control and be duly reported to the State health officer in the next succeeding quarterly or annual report, accompanied with all documents pertaining to the matter, or full copies thereof. [Sec. 23.] [Id.]

**Art. 239x. Classification of patients and rules of admission, etc.**—The members of such charitable fraternities or societies, members of their families and the widows and children of deceased members thereof, shall be classified as indigent public patients, nonindigent public patients or private patients, according to the facts, the same as other patients of said sanitorium are classified and shall be admitted, maintained, cared for and treated in said sanitorium upon the same terms and conditions and under the same regulation as all other patients therein, save and except that they shall at all times have the preference right to occupy the accommodations erected and maintained hereunder by their several and respective fraternities or societies, when not already filled with others having the same preferential right. [Sec. 24.] [Id.]

## CHAPTER SIX

## STATE HOSPITAL FOR CRIPPLED AND DEFORMED CHILDREN

Art.  
239½. Hospital established; gift to state accepted; name; inmates.  
239½a. Management and control; lease of building; what children admitted.

Art.  
239½b. Rules and regulations.  
239½c. Appropriations; use and expenditure.

**Article 239½. Hospital established; gift to state accepted; name; inmates.**—That there is hereby established a State Hospital for crippled and deformed children. The gift to the State by the Texas Public Health Association of the Walter Colquitt Memorial Children's Hospital, also known as the children's ward of the John Sealy Hospital, on the premises of the University of Texas, at Galveston, Texas, is hereby accepted by the State, and this hospital shall be the State Hospital for crippled and deformed children. The term "crippled or deformed children," as used in this Act shall include children suffering from disease from which they may become crippled or deformed. [Act Feb. 20, 1915, ch. 18, § 1.]

**Art. 239½a. Management and control; lease of building; what children admitted.**—Said hospital shall be under the control and management of the Board of Regents of the University of Texas and said board is hereby authorized and empowered to lease said hospital building to the city of Galveston in the same manner as the John Sealy Hospital buildings, and to require that provision be made in such hospital for the care and treatment of crippled or deformed children, who may be benefitted or cured by treatment in said hospital, and for such other cases or patients as may be required in the interest of scientific study by the faculty and students of the Medical Department of the University of Texas.

Said Board of Regents or the board of managers of said hospital, may also receive in said hospital any sick or afflicted children who are not crippled or deformed, and who are not suffering from any communicable diseases, provided that the beds occupied by such children are not needed for the use of crippled or deformed children. [Id., § 2.]

**Art. 239½b. Rules and regulations.**—The said Board of Regents or board of managers of said hospital shall adopt such rules and regulations as said boards may deem proper and necessary for the admission, discharge, care and treatment of such children. The said Board of Regents or the board of managers of said hospital may require the parents or guardians of patients, when able to do so and otherwise the home counties or cities of such patients, to pay all or part of the expense of the care and treatment of patients. And said boards may refuse to admit to said hospital as patients any except crippled or deformed children. [Id., § 3.]

**Art. 239½c. Appropriations; use and expenditure.**—The Legislature shall make suitable provision in the general appropriation bill, or otherwise to pay for the proper care and treatment of children afflicted with surgical tuberculosis, and the Board of Regents or board of managers of said hospital shall give free care and treatment to such children to the extent of the appropriation therefor. Said Board of Regents are also authorized to accept donations for the support of crippled or deformed patients and for the improvement of the hospital and building. [Id., § 4.]

## TITLE 11

## ATTACHMENT AND GARNISHMENT

Chap.  
1. Attachment.

Chap.  
2. Garnishment.

## CHAPTER ONE

## ATTACHMENT

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242.	Not to issue until suit begun.	258.	Replevy by the defendant.
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244.	Plaintiff must give bond with security.	267.	Attachment creates a lien.
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254.	Property subject to attachment.		

**Article 240. [186] [152] Attachments may be issued by whom.**

Cited, *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Sup.) 180 S. W. 101.

**In general.**—An attachment must stand or fall according to the facts existing at the date of its issuance, and cannot be based on a subsequent event. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

**Co-defendants.**—Though more than one defendant is sued, it is not necessary that an attachment should apply to more than one of them. *House v. Rouse* (Civ. App.) 183 S. W. 379.

**Affidavits.**—Failure to swear to an affidavit for attachment against a nonresident will not render the judgment foreclosing the attachment lien void. *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

Failure to make affidavit for attachment will not defeat the court's jurisdiction as to a nonresident where the writ is issued and levied on his property. *Id.*

— **Truth of facts alleged.**—The validity of an attachment does not depend on the truth of the facts stated in the affidavit therefor, but on the fact that they are so stated. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

— **Construction with and conformity to pleadings.**—Petition seeking recovery in simple debt on note against guarantor, held not at variance with attachment affidavit alleging plaintiff's property to have been obtained by false pretenses. *Slaughter v. Morton* (Civ. App.) 185 S. W. 905.

— **Indebtedness and amount.**—In an original attachment proceeding against a nonresident, under this article, plaintiff must prove both debt and the attachment lien. *Arnold v. Pike* (Civ. App.) 191 S. W. 207.

— **Residence.**—That personal service of citation had been made upon defendant did not prevent issuance of attachment predicated upon fact of her nonresidence, under this article. *Stringfellow v. Patterson* (Civ. App.) 192 S. W. 555.

— **Removing and disposing of property.**—Evidence that when a debtor was asked to pay the claim of plaintiff in attachment he refused and said he would not pay if sued, was admissible to show that he was about to dispose of his property to defraud his creditor, whether communicated to the plaintiff in attachment prior to the making of his affidavit therefor or not. *Pate v. Vardeman* (Civ. App.) 158 S. W. 1183.

**Due process of law.**—The enforcement of a judgment obtained against property of a nonresident on levy of an attachment is not a deprivation of property without due process. *Baker v. Hahn* (Civ. App.) 161 S. W. 443.

**Art. 242. [188] [154] Not to issue until suit begun.**

**Institution of suit—Pleadings.**—Where the affidavit and bond for attachment were sufficient, the fact that the petition was subject to general demurrer will not render the attachment void. *Baker v. Hahn* (Civ. App.) 161 S. W. 443.

Where an action against a nonresident is commenced by attachment, a default judgment on a petition, not stating a cause of action, will not warrant a foreclosure of the attachment. *Id.*

— **Effect of amendment.**—Where the affidavit and bond for attachment were sufficient, the petition, though subject to general demurrer, may be amended without suing out a new writ of attachment. *Baker v. Hahn* (Civ. App.) 161 S. W. 443.

Filing of amended petition setting up a new cause of action abates an attachment on the original petition. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

**Notice of proceedings.**—Where jurisdiction, in a suit against a nonresident, is sought to be obtained by attachment, due process of law requires that the owner have an op-

portunity to be heard, and to that end shall be notified in some manner beyond the notice arising from the seizure of the property. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

**Art. 243. [189] [155] Attachment may issue on debt not yet due, but no judgment until debt becomes due.**

Cited, *Kanaman v. Hubbard* (Civ. App.) 160 S. W. 304.

In general.—Under this article it is immaterial that the debt was not all due when the attachment was issued. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

**Art. 244. [190] [156] Plaintiff must give bond with security.**

**Wrongful attachment in general.**—Evidence held not to sustain a finding that an attachment was wrongfully issued and levied. *Rowe v. Crutchfield* (Civ. App.) 168 S. W. 444.

That an attachment was levied and quashed does not justify a finding that it was wrongfully issued and levied. *Id.*

In action for wrongfully attaching stock of goods owned by a firm, evidence that the managing partner was not trying to defraud creditors by holding discount sale held to support verdict for plaintiffs, though other partner did not testify as to his intention. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

Defendant, damaged by an attachment wrongfully sued out, is protected by the attachment bond. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

An attachment is wrongfully issued if based upon affidavit stating, untruthfully, that defendant is justly indebted to plaintiff. *Comer v. Powell* (Civ. App.) 189 S. W. 88.

An attachment, wrongfully levied upon real estate with knowledge that the owners were negotiating a sale thereof which they completed without knowledge of the levy, is actionable, although the contract was not completed prior to the levy. *Hoover v. First Nat. Bank* (Civ. App.) 192 S. W. 1149.

An ordinary attachment levy upon real estate will not authorize recovery of damages since any depreciation in the property's value between the levy and release is not regarded as due to the attachment. *Id.*

An attachment may be wrongful if the grounds on which it is based are untrue, although defendant landowner owes a past due debt. *Id.*

In action on notes of corporation alleging individual defendant to be surety, evidence held to support finding that issuance and levy of attachment on his safe was made in good faith. *Pennock v. Texas Builders' Supply Co.* (Civ. App.) 193 S. W. 760.

— **Defenses.**—Where exempt property was wrongfully attached, including a crop of growing cotton on a homestead, the debtor's voluntary consent that the attached property be sold and the proceeds applied to the debt waived the tort arising out of the wrongful attachment and constituted a satisfaction of the trespass to the homestead. *Pate v. Vardeman* (Civ. App.) 158 S. W. 1183.

It is no defense to a claim for actual damages from wrongful attachment that the plaintiff in attachment had probable cause to believe that ground for attachment existed. *Fisher v. Scherer* (Civ. App.) 169 S. W. 1133.

— **Amount recoverable for wrongful attachment.**—A defendant is not entitled to damages as of course upon the mere issuance and levy of an attachment, but, to recover even nominal damages, some actual damage must be shown. *Rowe v. Crutchfield* (Civ. App.) 168 S. W. 444.

The measure of damages for wrongful attachment is ordinarily the value of the goods attached, with interest from the date of seizure. *Fisher v. Scherer* (Civ. App.) 169 S. W. 1133.

In action for wrongful attachment, judgment obtained against plaintiff in the attachment suit, if valid, held admissible on the question of damages. *Fruitt v. English* (Civ. App.) 173 S. W. 1172.

In an action for wrongful attachment of cotton, the measure of damages was the value of the cotton when levied upon, with interest, less the amount of the judgment in the attachment suit against the attachment debtor. *Id.*

Where plaintiff attached defendant's property, defendant cannot, in action for wrongful attachment, recover damages for the loss of an advantageous sale, having later made a sale at the same price. *Dawson v. Falfurrias State Bank* (Civ. App.) 181 S. W. 553.

The general rule that one injured by a wrongful attachment cannot recover for loss of business or future profits applies only where the measure of damages is the value of property taken, and not where the recovery is for detention of property or interruption of its use. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

A writ of attachment, wrongfully issued and levied on property, entitles the owner thereof to at least nominal damages, although the property be not exempt. *Comer v. Powell* (Civ. App.) 189 S. W. 88.

Ordinarily, the measure of damages for wrongful attachment is the value of the goods attached, with interest from the date of seizure. *Taylor Bros. Jewelry Co. v. Kelley* (Civ. App.) 189 S. W. 340.

In suit for automobile wrongfully attached and sold as property of another, or for its value, plaintiff might recover it, together with reasonable value of its use on basis of rental value. *Id.*

In suit for automobile wrongfully attached and sold as property of another, held, that there was no evidence upon which to base a finding of \$2 per day rental value. *Id.*

Where a wrongful attachment prevented real estate owners from consummating a sale, the measure of damages is the difference between the contract price and the property's market value when sold on mortgage foreclosure while the attachment was still in force. *Hoover v. First Nat. Bank* (Civ. App.) 192 S. W. 1149.

— **Exemplary damages.**—In an action for wrongful attachment on the ground that the debtor was about to dispose of his property with intent to defraud his creditors, evidence that he stated, prior to the attachment, that if sued he would not pay at

all, was admissible on the issue of his right to recover exemplary damages. *Pate v. Vardeman* (Civ. App.) 158 S. W. 1183.

A party attaching and selling exempt property is liable for the actual value thereof, and for exemplary damages if the facts justify such damages. *Smith v. McBryde* (Civ. App.) 173 S. W. 234.

#### Art. 247. [193] [159] Attachment abated for want of affidavit or bond.

**Abatement of writ—False affidavit.**—Falsity of allegations in attachment affidavit held not to entitle defendant to abatement of the writ, though they might entitle him to damages on the bond. *Ford v. Johnston* (Civ. App.) 184 S. W. 303.

#### Art. 250. [196] [162] Form of the writ.

**Amendment of writ.**—Where a writ of attachment was properly dated and the date of its issuance was indorsed on the back and signed by the issuing justice, the writ could be amended by having the justice's signature affixed to the face of the writ if necessary. *Rule Mercantile Co. v. Opry* (Civ. App.) 163 S. W. 331.

#### Art. 251. [197] [163] Writ to be dated, tested and lodged with sheriff, etc.

Cited, *Rule Mercantile Co. v. Opry* (Civ. App.) 163 S. W. 331.

#### Art. 254. [200] [166] Property subject to attachment.

**Trusts and assignments.**—One not holding the legal title of real estate, but to whom the record owner has promised a portion of proceeds obtained from a proposed sale thereof, has an attachable interest in the property. *Hoover v. First Nat. Bank* (Civ. App.) 192 S. W. 1149.

**Attachment of judgment.**—Under this article an attachment cannot be levied on a judgment in favor of the attachment defendant. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

**When lien attaches.**—Under this article and art. 3740, an attachment lien attaches to the proceeds of an execution sale on a judgment in favor of the attachment defendant as soon as they come into the hands of the sheriff. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

#### Art. 256. [202] [168] Personal property to remain in the hands of officer, unless.

**Liability of plaintiff for acts of officer.**—Plaintiff causing issuance of writ of attachment held not liable for injuries to the attached property caused by the negligence or misconduct of the sheriff or his bailee in which he does not participate. *Kanaman v. Hubbard* (Civ. App.) 160 S. W. 304.

#### Art. 258. [204] [170] Replevy by the defendant.

**Liability of sureties.**—Plaintiff may recover against sureties on the replevy bond executed by defendant. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

Under art. 1843 held, that replevy bond, if not enforceable against nonresident defendant, can at least be enforced by judgment against sureties. *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Sup.) 180 S. W. 101, answer to certified questions conformed to (Civ. App.) 181 S. W. 567.

**Filing bond as appearance.**—Under this article and art. 1885, filing of bond to replevy attached property held not such an appearance as authorizes judgment without the service of process personally or by publication. *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Sup.) 180 S. W. 101, answer to certified questions conformed to (Civ. App.) 181 S. W. 567.

#### Art. 265. [211] [177] Requisites of the return.

**Amendment.**—The Court of Appeals cannot issue certiorari to correct the return as made by the constable showing the value of the property attached in order to make it conform to his intentions. *Fuller, Hanna & Co. v. Rogers* (Civ. App.) 184 S. W. 322.

#### Art. 267. [213] [179] Attachment creates a lien.

Cited, *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

**Priority.**—Under this article held, that the subsequent record of a deed to one purchasing from defendant in an attachment suit prior to the attachment would not affect the respective rights of the parties. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

**Bankruptcy of debtor.**—Third persons questioning the right of an attaching creditor may attack his lien on the ground that, within four months after attachment, the debtor was adjudicated a bankrupt. *Dyke v. Farmersville Mill & Light Co.* (Civ. App.) 175 S. W. 478.

**Foreclosure of lien.**—A recital in the judgment that the lien was foreclosed did not render the judgment void but would be treated as a notation preserving the lien. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

#### Art. 268. [214] [180] Judgment of foreclosure.

**Judgment.**—Under this article and art. 267, providing that where land is attached in a justice's court no decree foreclosing the lien is necessary, held, that a recital in the judgment that the lien was foreclosed did not render the judgment void but would be treated as a notation preserving the lien. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

— **Non-resident.**—Where an action against a nonresident is commenced by attachment, a default judgment on a petition, not stating a cause of action, will not warrant a foreclosure of the attachment. *Baker v. Hahn* (Civ. App.) 161 S. W. 443.

Ordinarily where an action is brought against a nonresident by attachment of prop-



erty within the state, judgment will not be rendered until jurisdiction and service has been procured for the required length of time before the court convenes for the term at which judgment is rendered. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

A judgment foreclosing an attachment against a nonresident is not bad because neither the notice served nor the copy of the petition delivered to the nonresident showed the attachment. *Findlay v. Lumsden* (Civ. App.) 171 S. W. 818.

Failure to swear to an affidavit for attachment against a nonresident will not render the judgment foreclosing the attachment lien void. *Hester v. Baskin* (Civ. App.) 134 S. W. 726.

#### Art. 269. [215] [181] Judgment when property is replevied.

**Default judgment.**—The execution and filing of a replevy bond with a surety is no such an appearance by the defendant whose property was attached as will authorize judgment by default against defendant and its surety on the replevy bond. *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Civ. App.) 181 S. W. 567.

#### Art. 270. [216] [182] Order of court when attachment quashed; pending appeal, property may be replevied.

Cited, *Jones & Nixon v. First State Bank of Hamlin*, 106 Tex. 572, 173 S. W. 202.

## CHAPTER TWO

### GARNISHMENT

Art.		Art.	
271.	Writ of garnishment, who may issue and when.	284.	Form of commission.
272.	Bond to be executed in certain cases.	287.	Form of writ in such cases.
273.	Application for the writ, etc.	292.	Judgment of the court in such cases.
274.	Proceeding by, shall be docketed, etc.	293.	Judgment against garnishee when he is indebted.
275.	Requisites of writ when incorporated company, etc., is garnishee.	294.	For effects.
276.	Form of writ.	295.	Attachment against garnishee for refusing to deliver effects.
279.	Effect of service of, defendant may replevy.	296.	Judgment against incorporated companies, etc., for shares, etc.
280.	Answer to, must be under oath, in writing and signed.	299.	Traverse of answer of garnishee, by plaintiff.
281.	Garnishee to be discharged on answer, when.	301.	Trial of issue on controverted answer.
282.	Judgment by default, when.	307.	Costs in garnishment proceedings.
283.	Residing in another county and failing to answer proceedings against.	308.	Garnishee discharged from liability to defendant.

#### Article 271. [217] [183] Writ of garnishment, who may issue and when.

**In general.**—Where a valid garnishment merely reaches a debt due by the garnishee, the writ will not be aided by the appointment of a receiver, or the issuance of injunction restraining the assignment of the debt. *Gulf Nat. Bank v. Bass* (Civ. App.) 177 S. W. 1019.

Where garnishee and defendant treated fund garnished by plaintiff as trust fund to be awarded to those who would come in and establish their priority in the garnishment suit, the proceedings being consolidated, the validity of plaintiff's garnishment was immaterial. *Reinertsen v. E. W. Bennett & Sons* (Civ. App.) 185 S. W. 1027.

**Institution of suit.**—Affidavit for distress warrant against defendant and a statutory bond executed the same day held to commence a suit, so that application for writ of garnishment filed following day would not be quashed on ground that no suit had been instituted. *Walton & Stockton v. Corpus Christi Nat. Bank* (Civ. App.) 185 S. W. 369.

**Amendment changing parties to action.**—Where the original suit in which a writ of garnishment was sued out was brought against an alleged corporation, and after service of the writ the petition was amended, so as to make the action one against an individual instead of a corporation, the garnishment proceedings were thereby discharged. *Pickering Mfg. Co. v. Gordon* (Civ. App.) 166 S. W. 899.

**Parties.**—In garnishment against buyer from tenant of crop raised on rented premises, landlord and party who threshed crop were proper parties to make possible an equitable adjustment, and court could and should have granted relief necessary. *Farmers' Elevator Co. v. Advance Thresher Co.* (Civ. App.) 189 S. W. 1018.

**Attachment basis of proceeding.**—Garnishment of debt due nonresident by resident debtor is recognized by statutes and decisions as being suit in rem against attached debt, effect of which is to subject it to payment of amount due plaintiff, though general rule is that situs of debt and obligation is at domicile of creditor. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

**Property in possession of defendant.**—That the debtor had the right to resume possession of live stock which was pastured in another's field at the time they were garnished by the creditor would not prevent them from being garnished while in the field of the bailee. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

**Property or fund in possession of garnishee.**—See *Hall v. Nunn Electric Co.* (Civ. App.) 183 S. W. 13.

A trust fund is not ordinarily the subject of garnishment. *Oglesby v. Durr* (Civ. App.) 173 S. W. 275.

Under Bulk Sales Law, § 1, post, art. 3971, a purchaser who did not comply with the statute is a trustee for the seller's creditors, and they may reach the debt by garnishment, though the goods have been sold and the proceeds disposed of. *Owosso Carriage & Sleigh Co. v. McIntosh & Warren* (Sup.) 179 S. W. 257.

The purchasers from one who sells without compliance with the Bulk Sales Law are liable in garnishment to his creditors for the goods or their proceeds if resold. *Mayfield Co. v. Harlan & Harlan* (Civ. App.) 184 S. W. 313.

A garnishee cannot be held for the value of machinery left on its land, but not in its possession, by the debtor. *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (Civ. App.) 185 S. W. 332.

Funds deposited to the credit of mule buyer by his principal held subject to garnishment under a judgment against the mule buyer; the garnishee bank paying checks drawn by buyer out of proceeds of loan to him, instead of such funds. *Winfield State Bank v. First Nat. Bank* (Civ. App.) 190 S. W. 220.

**Property in custodia legis.**—Whether money pledged with the sureties on a bail bond to secure them is subject to garnishment depends on whether the pledgee's rights will be prejudiced thereby, and not on whether the property is in custodia legis. *Waggoner v. Briggs* (Civ. App.) 166 S. W. 50.

In the absence of statutory authority, funds deposited with a state treasurer by an insurance company, in trust for the policy holders, are in custodia legis and not subject to garnishment. *Oglesby v. Durr* (Civ. App.) 173 S. W. 275.

One who would garnish assets derived from or through an executor or administrator must show that the original title by which the executor or administrator holds has changed, and that he now holds the property in some capacity other than as a representative of the decedent. *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

**Claims by third persons.**—Where, in plaintiff's garnishment, others were allowed to intervene, held that such interveners could not question validity of plaintiff's garnishment, but only defendant and the garnishee might attack it. *Reinertsen v. E. W. Bennett & Sons* (Civ. App.) 185 S. W. 1027.

Where court has no jurisdiction over action, it has no jurisdiction over intervention proceedings. *Id.*

Party claiming prior right to fund garnished may intervene, having the cases consolidated and issues determined at one time. *Id.* See, also, notes under art. 7769 et seq.

**Indebtedness of garnishee.**—A judgment which had been affirmed on condition that plaintiff file a remittitur was not, before a motion for rehearing was overruled, final, so as to be subject to garnishment. *Dodson v. Warren Hardware Co.* (Civ. App.) 162 S. W. 952.

A negotiable note is not subject to garnishment, and, where the only proof was the execution of the note to a third person for the price of land and the garnishee's duly abstracted judgment against such third person, there was nothing to take it out of the rule. *Guillot v. Wallace* (Civ. App.) 168 S. W. 978.

Where an indebtedness to C. was transferred by him to another long before writs of garnishment were served on the debtor, the indebtedness was no longer subject to garnishment as the property of C., though the debtor did not know of the transfer. *Amarillo Nat. Bank v. Panhandle Telephone & Telegraph Co.* (Civ. App.) 169 S. W. 1091.

Where Y. kept his bank account in the name of Y. Engineering Co., and the money was his own, and was checked out only for his personal and individual uses, the account was subject to garnishment as his money. *Citizens' Bank & Trust Co. v. Rogers* (Civ. App.) 170 S. W. 258.

A defendant against whom a judgment which is final has been rendered is subject to garnishment. *Barcus v. O'Brien* (Civ. App.) 171 S. W. 492.

A judgment from which the debtor gave notice of appeal, but thereafter abandoned the appeal, and on which execution had been issued, was final, so as to authorize garnishment against the judgment debtor, though 12 months had not elapsed since its rendition. *Id.*

A judgment creditor of a corporation may, by garnishment, enforce liability for unpaid balance upon subscription to its capital stock. *Nesom v. City Nat. Bank* (Civ. App.) 174 S. W. 715.

Uncertain and unliquidated damages, resulting from breach of a contract, are not subject to garnishment. *Hall v. Nunn Electric Co.* (Civ. App.) 183 S. W. 13.

Where a landowner contracted for the boring of well to furnish 1,100 gallons of water per minute, and the well actually furnished 500 or less, such landowner was not subject to garnishment by the creditor of the contractors. *Id.*

Plaintiff in garnishment steps into shoes of his judgment debtor, and if nothing is owing the latter, the former is entitled to nothing. *Id.*

**Plaintiff's judgment.**—Under subd. 3, held, that an answer alleging that the original judgment was void for want of jurisdiction of defendant therein was a good defense. *Nesom v. City Nat. Bank* (Civ. App.) 174 S. W. 715.

Where court rendering original judgment had jurisdiction of defendant's person and subject-matter of suit, garnishee cannot question conclusiveness of judgment as between plaintiff and defendant for mere irregularities not rendering it void. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

**Affidavits.**—Where the affidavit and writ of garnishment described plaintiff as the W. company, a firm composed of persons named, it sufficiently appeared that plaintiff was a partnership and not a corporation, since a "firm" is a partnership. *Dodson v. Warren Hardware Co.* (Civ. App.) 162 S. W. 952.

Affidavit for writ of garnishment held not defective as made by partnership instead of by an agent or member thereof. *Id.*

In an action by writ of garnishment, in the absence of proof or admission by defendant that plaintiffs had secured a judgment against their debtor, or, if they had done

so, that it was unsatisfied, plaintiffs' affidavits for garnishment, stating that they had recovered judgment and that it was unsatisfied to the best of the knowledge and belief of plaintiffs' counsel, did not authorize judgment against the garnishee. *A. G. Schwab & Son v. Norwood* (Civ. App.) 183 S. W. 807.

An affidavit for a writ of garnishment, otherwise sufficiently identifying the original cause, is not invalid for omitting the name of the defendant in the original cause. *Dickinson v. First State Bank of Blackwell* (Civ. App.) 185 S. W. 674.

It is no ground for quashing a writ of garnishment that the affidavit therefor states a less amount than is claimed in the original suit, as, for instance, that it fails to demand interest. *Id.*

Falsity of facts alleged in affidavit for garnishment is not ground for motion to quash. *Cawthon v. First State Bank of Salado* (Civ. App.) 193 S. W. 783.

When all statutory requirements of affidavit for garnishment are met, it is immaterial that other allegations were made, and therefore a false allegation as to time when suit was brought is immaterial, since the statute does not require the affidavit to state when the suit was brought. *Id.*

If affidavit for garnishment was not made long enough before issuing the writ to create the inference that the state of facts had not continued, the mere fact that it was filed prior to the issuance of the writ is no ground for quashing the affidavit and writ of sequestration. *Id.*

### Art. 272. [218] [184] Bond when no attachment has issued and no judgment has been rendered.

**Bond.**—A garnishment bond is sufficient if more than double the amount of the demand of the complaint and affidavit, though less than double the amount named in the writ. *Dickinson v. First State Bank of Blackwell* (Civ. App.) 185 S. W. 674.

— **Damages.**—Where plaintiff claimed that the wrongful garnishment of certain corporate stock resulted in his inability to exchange the stock for certain vendor's lien notes, his claim for the value of such notes and interest was a proper element of damage. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

Loss of prospective profits in plaintiff's business as the alleged result of the wrongful issuance and service of a garnishment cannot be recovered as actual damages, but may be considered in determining punitive damages. *Id.*

Attorney's fees and expenses in attending court to procure relief against a garnishment wrongfully sued out are not damages. *Heidemann v. Martinez* (Civ. App.) 173 S. W. 1166.

Exemplary damages are not recoverable for wrongfully suing out garnishment, unless sued out without probable cause and maliciously. *Id.*

Damages for wrongful garnishment do not include an amount lost through inability to ship cotton seed, whereby the garnishment defendant would have realized profits. *Stafford v. Patterson & Nelson* (Civ. App.) 184 S. W. 1095.

### Art. 273. [219] [185] Application for the writ, etc.

**Sufficiency of application in general.**—In an action by a partnership an application for a writ of garnishment signed by the partnership, by the members thereof by a manager, was duly signed by an "agent" for the partnership. *Walton & Stockton v. Corpus Christi Nat. Bank* (Civ. App.) 185 S. W. 369.

**Name and residence of garnishee.**—Application and affidavit for garnishment, alleging that garnishee, a corporation, had a local agent in Miami, Roberts county, held to sufficiently state the residence of the garnishee. *C. E. Harris & Co. v. C. B. Cozart Grain Co.* (Civ. App.) 178 S. W. 733.

An allegation that a corporation does business in a county, and that a named person is its president, is not equivalent to an allegation of residence in the county within this article. *Freeman v. Port Arthur Rice & Irrigation Co.* (Civ. App.) 188 S. W. 444.

**Effects.**—In view of arts. 5502 and 5504, the word "effects," as used in this article, would include live stock in the hands of a bailee. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

### Art. 274. [220] [186] Case shall be docketed, etc.

Cited, *Hall v. Nunn Electric Co.* (Civ. App.) 183 S. W. 13.

**Failure to docket correctly.**—While garnishment proceedings should be docketed separately from the original suit, that the clerk indorsed on the affidavit and writ the docket number of the original suit was a mere irregularity not affecting the validity of the judgment. *Dodson v. Warren Hardware Co.* (Civ. App.) 162 S. W. 952.

**Effects.**—The word "effects" includes live stock in the hands of a bailee. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

### Art. 275. [221] [187] Requisites when writ is against incorporated or joint stock company to subject shares, etc.

**Defects in writ.**—Under arts. 275, 276, 284, 287, writ issued to garnishee held faulty and calculated to mislead the garnishee. *Jones Hardware & Furniture Co. v. Gunter* (Civ. App.) 184 S. W. 342.

### Art. 276. [222] [188] Form of writ.

**Defects in form.**—Under arts. 275, 276, 284, 287, writ issued to garnishee held faulty and calculated to mislead the garnishee. *Jones Hardware & Furniture Co. v. Gunter* (Civ. App.) 184 S. W. 342.

It is the affidavit which is the foundation of the suit against the garnishee, and its allegations govern if the writ is at variance with them. Where the affidavit described the garnishee as a corporation of which W. C. S. was president, the return of the writ of garnishment, showing service on W. C. S. was sufficient. The writ need not state the amount of the demand, and if it does so erroneously, the statement may be treated as surplusage. Thus a writ naming the amount as \$752, when the affidavit and complaint

named \$742, is not therefore invalid, the error being on the part of the clerk, for which plaintiff was not responsible. *Dickinson v. First State Bank of Blackwell* (Civ. App.) 185 S. W. 674.

### Art. 279. [225] [191] Effect of service of writ; defendant may replevy.

**Effect of service—Debts not matured.**—Where garnishment created no lien because of the debtor's nonperformance of his contract with the garnishee, the debtor's assignment of his claim after the garnishment process, held to cut off the rights of the garnishing creditor. *Hall v. Nunn Electric Co.* (Civ. App.) 183 S. W. 13.

**Lien or rights acquired.**—Where a debtor gave to his wife money to pay rent and she deposited it in the bank in her own name and gave a check on the account to the landlord for an amount in excess of the deposit, but before the check was presented the account was garnished, the rights of the landlord were superior as to such deposit to the garnishing creditor. *Burns & Bell v. Lowe* (Civ. App.) 161 S. W. 942.

Garnishing creditors occupy no better position with reference to the fund garnished than did their debtors at the time of the service of the writ. *Id.*

Garnishment on bank impounded such sum or effects as debtor had in bank; plaintiff standing in no better position than the debtor, and being entitled to funds subject to re-duction by any sum owing bank from debtor. *Farmers' & Merchants' State Bank of Teague v. Setzer* (Civ. App.) 185 S. W. 596.

A garnishor's rights are determined by his priority in point of time. *Reinertsen v. E. W. Bennett & Sons* (Civ. App.) 185 S. W. 1027.

**Debts due from defendant to garnishee.**—Where a depositor was garnished in a suit against a third person, the right of the depositor to sums debited by the bank from its account and paid to the third person might be adjudicated. *Western Nat. Bank of Ft. Worth v. Texas Christian University* (Civ. App.) 176 S. W. 1194.

Where money of a judgment debtor comes into the hands of a garnishee, it may apply the funds to debts due it. *L. C. Malone Lumber Co. v. Davis Co.* (Civ. App.) 181 S. W. 849.

Where bank collected depositor's note, and credited proceeds to him on his account, the bank could, on being garnisheed, apply deposit to payment of depositor's debt due it. *Farmers' & Merchants' State Bank of Teague v. Setzer* (Civ. App.) 185 S. W. 596.

In garnishment against bank, evidence held insufficient to justify finding that, when debtor placed note in bank for collection, there was no understanding that, when collected, proceeds should be applied to debt from him to bank. *Id.*

**Payments or transfers by garnishee.**—The act of a garnishee, in whose pasture the garnished horses were, in agreeing to their sale by the debtor was a constructive delivery of the horses to the debtor and then to his purchaser, contrary to the garnishment statute, and constituted a conversion of the property by the garnishee when considered in connection with the resale of the horses to the garnishee by prearrangement. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

A debtor cannot transfer an unmatured and accruing debt owing to him to some third person between the service of the writ of garnishment and the answer of the garnishee to give his transferee title. *Hall v. Nunn Electric Co.* (Civ. App.) 183 S. W. 13.

**Replevy by defendant.**—Where defendant replevied a bank deposit, which had been garnished under this article, held, that he and a surety on the replevy bond were estopped to claim that title to the deposit was in the surety and not in the defendant. *Davis v. McFall* (Civ. App.) 168 S. W. 453.

A judgment defendant, upon executing a replevy bond to release the lien of a garnishment, upon acceptance by the proper officer, is entitled to collect the garnished debt. *Sellers v. Puckett* (Civ. App.) 180 S. W. 639.

### Art. 280. [226] [192] Answer to the writ must be in writing, under oath and signed.

**Sufficiency of answer.**—In garnishment proceedings, where supplement, so called, and other portion of traverse were attached, and made part of each other by allegation, in absence of special exception as to order of pleading, or that they were attached, entire answer should be looked to by Court of Civil Appeals. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

**Defenses.**—The want of a valid judgment on which to base the garnishment must be pleaded by the garnishee in order to be available. *Citizens' Bank & Trust Co. v. Rogers* (Civ. App.) 170 S. W. 258.

Where the debt sought to be garnished is exempt as the proceeds of sale of a homestead, it is the duty of garnishee to set up the defense. *Russell v. Hamilton* (Civ. App.) 174 S. W. 705.

**Interpleading third persons.**—A garnishee, to protect himself from having to pay the debt twice, may interplead all claimants of the fund in his hands. *Barcus v. O'Brien* (Civ. App.) 171 S. W. 492.

The defendant in garnishment may voluntarily appear or be cited in by the garnishee, that he may protect his rights arising from the fact that his credit is exempt as the proceeds of a sale of a homestead. *Russell v. Hamilton* (Civ. App.) 174 S. W. 705.

The owner of a building may, in a proceeding by creditors of the contractor, implead all persons having claims to a sum deposited in a bank to be applied on the amount due the contractor. *Western Nat. Bank of Ft. Worth v. Texas Christian University* (Civ. App.) 176 S. W. 1194.

**Exceptions to answer.**—In garnishment, exception to answer, by person claiming to have purchased property after service of writ from person not shown to have owned it, held erroneously overruled. *Bigham Hardware & Furniture Co. v. Sparks Lumber Co.* (Civ. App.) 176 S. W. 1194.

**Construction, operation and effect.**—Where the action against the debtor and the garnishment proceedings are heard at the same time, the answer of the garnishee is ad-

missible in evidence as between plaintiff and garnishee. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

**Art. 281. [227] [198] Garnishee to be discharged on his answer, when.**

See *Jones Hardware & Furniture Co. v. Gunter* (Civ. App.) 184 S. W. 342.

**Art. 282. [228] [194] Judgment by default, when.**

**Relief against default.**—Garnishee corporation which without willful neglect and through oversight failed to answer writ held entitled to have default judgment set aside, with permission to answer. *Jones Hardware & Furniture Co. v. Gunter* (Civ. App.) 184 S. W. 342.

**Foreign corporation.**—Under this article a foreign corporation cannot enjoin execution under default judgment against it as garnishee, where it has a resident local agent. *Queen Ins. Co. v. Keller* (Civ. App.) 186 S. W. 359.

**Art. 283. [229] [195] When garnishee residing in another county fails to answer, commission to issue.**

**Waiver of privilege.**—Bank domiciled in J. county, which on petition in garnishment in cause originating in H. county filed an answer, thereby waived the privilege under this article of answer in the county of its residence. *Gulf Nat. Bank v. Johnson* (Civ. App.) 177 S. W. 1000.

A garnishee having appeared by answer, which was stricken, no commission was required to take his answer. *Jones Hardware & Furniture Co. v. Gunter* (Civ. App.) 184 S. W. 342.

**Art. 284. [230] [196] Form of commission.**

**Defects in writ.**—Under arts. 275, 276, 284, 287, writ issued to garnishee held faulty and calculated to mislead the garnishee. *Jones Hardware & Furniture Co. v. Gunter* (Civ. App.) 184 S. W. 342.

**Art. 287. [233] [199] Form of writ to be issued by commissioner for garnishee residing in another county.**

**Defects in writ.**—Under arts. 275, 276, 284, 287, writ issued to garnishee held faulty and calculated to mislead the garnishee. *Jones Hardware & Furniture Co. v. Gunter* (Civ. App.) 184 S. W. 342.

**Art. 292. [238] [204] Proceedings on return of certificate of such refusal to answer.**

**Relief from default.**—Under arts. 281 and 292, garnishee corporation which without willful neglect and through oversight failed to answer writ held entitled to have default judgment set aside, with permission to answer. *Jones Hardware & Furniture Co. v. Gunter* (Civ. App.) 184 S. W. 342.

**Art. 293. [239] [205] Judgment against the garnishee when he is indebted.**

**Right to judgment.**—Where money was pledged to the sureties on a bail bond to secure them against liability, and at the time judgment was rendered against the sureties as garnishees the condition of the bond had been performed, the money was subject to garnishment under arts. 293, 294, 3744. *Waggoner v. Briggs* (Civ. App.) 166 S. W. 50.

Under this article judgment plaintiff was entitled to judgment against a garnishee who admitted that a firm of which he was a member was indebted to judgment defendant. *Sellers v. Puckett* (Civ. App.) 180 S. W. 639.

There can be no valid judgment against garnishee until there is one against original defendant. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

**Division of fund between different garnishing creditors.**—A county court can divide money due an insolvent corporation between two garnishing creditors, at least against the objection of the corporation's president, who held a fictitious assignment of the debt from the corporation, for which he had paid no consideration. *Brooks v. Ed. Steves & Sons* (Civ. App.) 191 S. W. 1166.

**Judgment in consolidated action.**—Where a garnishee admitted owing C. a specified sum, but alleged that N. was setting up title to a judgment recovered by C. on such indebtedness, and a proceeding against N., in which he set up title in himself, was consolidated, the court properly refused to render judgment against the garnishee on its answer. *Amarillo Nat. Bank v. Panhandle Telephone & Telegraph Co.* (Civ. App.) 169 S. W. 1091.

**Effect of judgment.**—A party to a garnishment proceeding in justice court, who appeared and controverted the truth of the garnishee's answer, was bound by the judgment, and could have errors reviewed only by appeal or writ of error, and not by a suit to enjoin collection of the judgment, where the judgment was not absolutely void. *Epler v. Hillely* (Civ. App.) 166 S. W. 87.

A justice court judgment in a garnishment case was not void because of an alleged defect in the service of the citation in the original suit, since the validity of the judgment in that suit was in issue and determined in the garnishment case. *Id.*

Judgment against owners of land in justice court, in favor of one who had supplied materials to contractors working on such land, held conclusive upon failure of the owners to appeal therefrom, and not open to collateral attack, as by having its enforcement enjoined in suit to enforce mechanics' liens by the contractors against the owners and materialman. *Waples Painter Co. v. Ross* (Sup.) 176 S. W. 47, reversing judgment (Civ. App.) 141 S. W. 1027.

**Art. 294. [240] [206] Judgment against the garnishee for effects.**

**Possession by garnishee.**—Under arts. 294, 295, where contractors for irrigation well left machinery on premises, contemplating it should be connected, but landowner claimed no property, and did not take control for any purpose, he did not have possession subjecting him to writ of garnishment by judgment creditor of contractors. *Hall v. Nunn Electric Co.* (Civ. App.) 183 S. W. 13.

**Art. 295. [241] [207] Remedy when garnishee refuses to deliver effects found to be in his possession.**

See *Hall v. Nunn Electric Co.* (Civ. App.) 183 S. W. 13.

**Art. 296. [242] [208] Judgment against incorporated companies, etc., for shares of stock or interest.**

**Evidence of ownership.**—In garnishment proceeding on judgment against C., admissions by C.'s daughter and her husband that she owned no interest in corporate stock standing in her name held erroneously excluded. *Bigham Hardware & Furniture Co. v. Sparks Lumber Co.* (Civ. App.) 176 S. W. 1194.

**Art. 299. [245] [211] Plaintiff may traverse answer of garnishee.**

**Construction of answer.**—In garnishment proceedings, where supplement, so called, and other portion of traverse were attached, and made part of each other by allegation, in absence of special exception as to order of pleading, or that they were attached, entire answer should be looked to by trial court. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

**Art. 301. [247] [213] Trial of issue on controverted answer.**

**Evidence.**—Original judgment against defendant was admissible as evidence in garnishment proceedings against his debtor. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

While a garnishment suit is docketed separately from the main suit, it is ancillary to and a part of the main suit, and the court on appeal from judgment in the garnishment suit will take judicial notice of the proceedings in the main suit. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

**Art. 307. [253] [219] Costs.**

Cited, *Hall v. Nunn Electric Co.* (Civ. App.) 183 S. W. 13.

**Allowance of costs.**—Plaintiff in garnishment held not entitled to recover attorney's fees against the garnishees; the only attorney's fees allowable being those authorized by statute to the garnishee. *Waggoner v. Briggs* (Civ. App.) 166 S. W. 50.

Where not controverted, the garnishee, under its answer, was entitled to be discharged with costs upon payment of the surplus remaining in its hands after discharging the debt due from the judgment debtor. *L. C. Malone Lumber Co. v. Davis Co.* (Civ. App.) 181 S. W. 849.

In a vendor's garnishment proceeding against the insurer of realty, where the answer of the garnishee was not denied, and it was discharged from the garnishment upon its answer, although judgment went against it for the purchaser, such garnishee was entitled to recover of the vendor its costs, including a reasonable attorney's fee, under this article. *Stratton v. Westchester Fire Ins. Co. of New York* (Civ. App.) 182 S. W. 4.

Garnishee is entitled to statutory attorney fee where it admitted indebtedness to defendant and sought protection of court only to determine conflicting claims. *National Fire Ins. Co. of Hartford, Conn., v. McEvoy Furniture Co.* (Civ. App.) 192 S. W. 270.

**Reasonable compensation.**—The garnishee would be entitled, in a proper case, to reasonable compensation for the cost of keeping horses garnished pending the suit. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

**Art. 308. [254] [220] Garnishee discharged from liability to defendant.**

**Right to discharge.**—Under arts. 307 and 308, held that, where not controverted, the garnishee, under its answer, was entitled to be discharged with costs upon payment of the surplus remaining in its hands after discharging the debt due from the judgment debtor. *L. C. Malone Lumber Co. v. Davis Co.* (Civ. App.) 181 S. W. 849.

**Conclusiveness of judgment.**—A judgment for the creditor in garnishment proceedings, brought to subject the insurance money which represented the debtor's homestead, would not bind the debtor, where he was not a party thereto, so as to prevent him from afterwards asserting his constitutional right to the exemption of the money representing his homestead. *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

An adjudication upon the garnishee's answer is final as to defendant in the principal action only as to property rights which may be controlled by the Legislature, and would not affect property exempted by the Constitution, such as a homestead. *Id.*

Judgment of court of competent jurisdiction, amended after term to correct mistake in entering it on minutes, showing on its face to be valid, and importing verity, being in full force and unappealed from, protected a garnishee under it. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

## TITLE 12

## ATTORNEY AT LAW

Art. 318. Immigrant attorney granted license; reciprocal legislation.	Art. 334. Officers not allowed to appear as attorneys.
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**Article 318. [258] [223] Immigrant attorney granted license; reciprocal legislation.**—Any person who immigrates to this State from any other State in the United States, with a view of permanently residing herein, and who has been granted a license to practice law in the courts of record in the said State from which said person migrated, and has been actively engaged in the practice of law for five years next preceding the date of his removal to this State, shall, upon the filing with the clerk of the Supreme Court of Texas, his license properly authenticated from the State from which he migrated and a certificate that he is a man of good reputation for moral character and honorable deportment, given under the hand and seal of a judge of a court of record of the county of his former residence, be admitted to practice law in this State without license; and a license shall be issued to him; provided, that the State from which the said person migrated has such an Act or similar Act, but should said State not have such an Act or similar Act, then the said person shall file his certificate of good morals and honorable deportment and shall be examined in the same manner as a resident applicant. [Acts 1846, p. 245; Acts 1897, p. 17; Acts 1903, p. 60; Act March 20, 1915, ch. 91, § 1.]  
Took effect 90 days after March 20, 1915, date of adjournment.

**Art. 334. [271] [236] Officers not allowed to appear as attorney.**

**Effect of acting as attorney.**—The act of a judge in appearing and pleading as an attorney in a court of record does not of itself vacate his office. And, though a judge of the Court of Criminal Appeals has formed a law partnership and engaged in the practice of law, he is nevertheless a judge de facto so long as he continues to exercise the functions of judge. *Marta v. State* (Cr. App.) 193 S. W. 323.

## DECISIONS RELATING TO SUBJECT IN GENERAL

2½. **Duties and obligations of attorneys.**—The action of attorneys for the widow in selecting one to whom she shall waive her right to administer, and representing the person selected in his application for letters of administration, is not improper, so long as they did not advise him regarding her claim. *Kimmons v. Abraham* (Civ. App.) 153 S. W. 256.

Where M., a law partner of G., who was under contract to clear title to land in consideration of B. paying the costs and the owner deeding a two-thirds interest to the other two, became an attorney for the parties to the contract, he could purchase the interest of the owner subject to the contract. *Morris v. Brown* (Civ. App.) 173 S. W. 265.

Generally, an attorney must act towards his client with the most scrupulous good faith and fidelity, and must make known to the latter the exact status, so far as he is able, of the matter concerning which he is employed. *Laybourne v. Bray & Shifflett* (Civ. App.) 190 S. W. 1159.

The rule prohibiting an attorney once retained from acting for the opposing party applies only in case of conflicting interest, in the absence of a contract. *Id.*

3. **Retainer and authority.**—Rule that a principal must give notice of a limitation on the apparent authority of his agent does not apply to one employed only as an attorney at law to collect a debt as to his right to accept anything but money in payment. *Magill v. Rugeley* (Civ. App.) 171 S. W. 528.

An attorney held not authorized to alter in a material particular a judgment recovered by his client. *David v. First Nat. Bank of Claude* (Civ. App.) 172 S. W. 579.

Under a contract whereby an attorney was to clear the title of land, B. was to pay the costs, and the owner was to convey a two-thirds interest to the other two, the attorney was the agent of the other two parties. *Morris v. Brown* (Civ. App.) 173 S. W. 265.

A law partner held an attorney for his partner and two others with whom he had contracted, by participating in a suit relative to the contract. *Id.*

9. — **Notice to attorney.**—If the attorney representing the mortgagee in the execution of an instrument claimed to be a mortgage, had notice that the property was homestead property, such notice would be imputed to the mortgagee. *Mitchell v. Morgan* (Civ. App.) 165 S. W. 883.

That plaintiffs' attorney knew of a flaw in the title, and agreed with the vendor not to reveal it, held not to make his act binding upon the plaintiff in a sale of real estate. *Fordtran v. Cunningham* (Civ. App.) 177 S. W. 212.

10. — **Compromise and settlement.**—An attorney cannot bind his client in the settlement of a judgment unless he was specifically authorized so to act. *Price v. Logue* (Civ. App.) 164 S. W. 1048.

An attorney at law has no authority to accept anything but money in payment of a judgment recovered on a claim left with him for collection, without his client's express consent. That the attorney had an interest in the judgment, under an agreement with his client did not make him a joint owner, so as to entitle him to satisfy the judgment on receipt of trust certificates instead of money. *Magill v. Rugeley* (Civ. App.) 171 S. W. 528.

**13. — Agreements of counsel.**—A client is bound by the act of his attorney in signing a stipulation filed in an action in which the attorney is employed. *Commonwealth Bonding & Casualty Ins. Co. v. Beavers* (Civ. App.) 186 S. W. 859; *Same v. Branin* (Civ. App.) *Id.* 862.

If agreements of counsel relating to payment of jury fee in husband's action for divorce and to the passing of the case were in fact made by defendant's counsel, it was immaterial that defendant was without knowledge thereof. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

**14½. — Ratification of unauthorized acts.**—An attorney's unauthorized settlement of a judgment, by receiving certain trust certificates, held not ratified where the client, as soon as he learned of the settlement, refused to accept the certificates and placed the collection of the judgment in the hands of other attorneys. *Magill v. Rugeley* (Civ. App.) 171 S. W. 528.

The failure of the president of plaintiff bank to immediately repudiate the authority of an attorney who altered a judgment held not a ratification. *David v. First Nat. Bank of Claude* (Civ. App.) 172 S. W. 579.

The bank's suit on such judgment held not a ratification of the alteration, where the bank first moved to expunge the alteration and restore the judgment to its original form. *Id.*

**17½. Liability to third persons in general.**—Where an attorney contracted to collect notes transferred to his client to secure a judgment in her favor, and divide the proceeds between his client and plaintiffs after deducting his compensation, but failed to pay to plaintiffs their share of the proceeds, an action by the plaintiffs was properly brought against the attorney and not against his client. *Botsford, Deatherage, Young & Creason v. Hamner* (Civ. App.) 166 S. W. 378.

An attorney dismissing a suit upon buying the interest of the defendant in the suit held to hold the land in trust, subject to the rights of parties to a contract of which he had knowledge and for whom he was acting as attorney. *Morris v. Brown* (Civ. App.) 173 S. W. 265.

**18. Liability for aiding client to commit a fraud.**—Where attorneys wrongfully appropriated in behalf of a corporation proceeds of a secured note payable to plaintiff's order jointly owned by corporation and plaintiff, attorneys and corporation were joint tortfeasors, and were jointly and severally liable to plaintiff. *Beall v. Clack* (Civ. App.) 190 S. W. 774.

**19. Compensation.**—Where a trust fund is involved in litigation, reasonable attorney's fees to the trustee may be allowed out of the fund. *West Texas Bank & Trust Co. v. Matlock* (Civ. App.) 172 S. W. 162.

**25. — Reasonable value of services.**—An action on a note and mortgage securing it, given by an insane person for services to be performed by the payee, may be defeated by payment of reasonable compensation for the services. *Ferguson v. Fitze* (Civ. App.) 173 S. W. 500.

An attorney employed by an insane person, charged with crime, to defend him, may recover the reasonable value of the services. *Id.*

**28. Contracts for compensation.**—Where an attorney contracted to prosecute an action on notes, and after deducting his compensation pay the balance to plaintiffs and a judgment creditor of the payee, the refusal of plaintiffs to serve process in the action on the notes held not to authorize the attorney to forfeit the rights of plaintiffs under the contract. *Botsford, Deatherage, Young & Creason v. Hamner* (Civ. App.) 166 S. W. 378.

Ordinarily, expressions of opinions by attorneys as to probability of judgment secured by them being reversed on appeal, even if mistaken, are not such false representations as will entitle the client to avoid for fraud a contract for increased compensation based thereon. *Laybourne v. Bray & Shifflett* (Civ. App.) 190 S. W. 1159.

A contract between attorney and client for increased compensation, made after the relation of attorney and client has commenced, is presumptively void, where no additional services by the attorney are contemplated. *Id.*

**29. Compensation dependent on rendition of services.**—Where attorneys, obtaining from an insane client a note and mortgage securing it, for services to be performed, rendered no services, they could not recover on the note and mortgage. *Ferguson v. Fitze* (Civ. App.) 173 S. W. 500.

An attorney's agreement with the owner of a ranch in Mexico to act in recovering cattle or the value thereof, which the agreement recited were converted by a Mexican general, held not to entitle the attorney to compensation, where nothing was recovered by him. *Sanford v. Weller* (Civ. App.) 189 S. W. 1011.

**30. Contingent fees.**—Contract by which attorney acquiring an interest in land recovered for clients under a contract for contingent fees conveyed his interest to defendant company holding the legal title for such clients, but for which he was not acting upon agreement for a reconveyance, held not void as varying the original contract to secure greater compensation. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

A contract whereby a client assigned to his attorneys one-half his cause of action against a railroad for injuries sustained by reason of the alleged negligence of the railroad included an interest in the damage to the client's property, his horses and wagon, as well as personal injuries. *St. Louis, S. F. & T. Ry. Co. v. Thomas* (Civ. App.) 167 S. W. 784.

**31. — Creation of interest in litigation.**—Under a contract whereby an attorney and his partner were to sue for the recovery of land and to have an interest and part therein to the amount of a reasonable contingent fee of not less than three-fifths, and the legal title to the land recovered was conveyed to trustees for their clients, the at-



torney became the equitable owner of an interest in the land. *Phoenix Land Co. v. Ex-all* (Civ. App.) 159 S. W. 474.

Claim for extra compensation for services by one of the partners of a law firm held on the facts shown not chargeable against the other's interest in land recovered under a contract with the firm for a contingent fee. *Id.*

Where the attorney of an injured servant suing for damages was assigned one-half the amount which might be recovered, the transfer being made before the filing of the petition, the attorney's interest was contingent upon collection, and was a mere assignment of funds to be collected. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

**32. — Client's right to compromise.**—Where the parties to an action, before filing a power of attorney transferring to the attorneys an interest in the suit, had compromised all matters at issue under an agreement requiring a pending appeal to be dismissed, appellees, who had no notice of the attorneys' interest when the compromise agreement was made, could require appellants to dismiss the appeal. *Marschall v. Smith* (Civ. App.) 158 S. W. 1047.

An assignment by a client of one-half interest in his cause of action to his attorneys, by which he deprives himself of the right to compromise and settle so much thereof as is embraced within the assignment, is not contrary to public policy. *St. Louis, S. F. & T. Ry. Co. v. Thomas* (Civ. App.) 167 S. W. 784.

Where a client assigned one-half interest in a personal injury case against a railroad company to his attorneys, a compromise by the client with the railroad company, which knew of the attorneys' rights, affected only the one-half interest of the client, and the attorneys could prosecute the original action to a conclusion for the one-half interest assigned to them. *Id.*

Defendant's request that the fact that defendant had compromised with the client could not be considered in determining its liability to the attorneys was properly refused because not including a direction that the amount of the settlement should not be considered in determining the measure of damages. *Id.*

Where defendant settled with injured person, such person's attorneys, who were to have one-half the sum collected, held entitled to recover from the defendant only one-half the amount paid client and her doctor. *Texas & N. O. R. Co. v. Marshall & Marshall* (Civ. App.) 184 S. W. 643.

**35. Evidence.**—In action by plaintiff to recover attorney fees from corporation in which he was stockholder, evidence held to sufficiently support verdict for defendant. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

## TITLE 13

## ATTORNEYS—DISTRICT AND COUNTY

Chap.

1. District attorneys.
2. County attorneys.

Chap.

3. General provisions applicable to both district and county attorneys.

## CHAPTER ONE

## DISTRICT ATTORNEYS

Art.

339. What district shall elect district attorneys.

340a. Salary and fees.

342. District attorney in certain districts shall appoint assistant; qualifications; bond, etc., powers and duties; tenure.

Art.

343. Salary of assistant.

344. Removal of assistant.

344a. Assistant district attorney for sixth judicial district.

344b. Same; salary.

**Article 339.** [276] [241] **What districts shall elect district attorneys.**—The following judicial districts in the State shall each, respectively, elect a district attorney, viz.: First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Twelfth, Thirteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, Thirty-first, Thirty-second, Thirty-third, Thirty-fourth, Thirty-fifth, Thirty-sixth, Thirty-seventh, Thirty-eighth, Thirty-ninth, Forty-sixth, Forty-seventh, Fiftieth and Fifty-first, also the Twenty-sixth and the Fifty-third districts combined, and the criminal district composed of Galveston and Harris Counties. [Acts 1901, p. 127; Act April 6, 1915, ch. 151, § 1.]

**Explanatory.**—Took effect 90 days after March 20, 1915, date of adjournment. This act, though purporting to give a complete list of the counties in which district attorneys are to be elected, does not include many changes wrought by prior special acts creating new or changing old districts, in which provision is made for a district attorney. All these acts will be found under the various subdivisions of art. 30, ante. See notes under art. 7235, post.

**Art. 340a. Salary and fees.**—That in any county having a population in excess of 100,000 inhabitants according to the census of the United States of 1910, the district attorney of such county is entitled to receive a salary of \$500.00 as provided for in the Constitution of Texas, and all fees, commissions and perquisites earned by such office; provided, that the salary and fees contemplated shall not exceed the sum of six thousand (\$6000.00) dollars in one year. [Act March 9, 1917, ch. 64, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 342. District attorney in certain districts shall appoint assistant; qualifications of appointee; bond and oath; powers and duties; tenure.**—From and after the passage of this Act the district attorney shall appoint one assistant district attorney in districts in which there is situated a city of twenty-eight thousand population or over according to the United States census of 1910; provided the district attorney shall furnish data to the district judge of his district that he is in need of an assistant and that the district attorney is himself unable to attend to all of the duties required of him by law, and that it is necessary to the best interests of the State that an assistant district attorney be appointed. Every person so appointed shall be a qualified resident attorney of the district in which said appointment is made and shall give bond and take the oath of office required of district attorneys by this State, and shall have the power and authority to perform all the acts and duties of district attorneys under the law of this State, and said appointment shall be for such

time as the district attorney shall deem best in the enforcement of the law, not to be less than one month. [Acts 1909, p. 94; Act March 30, 1917, ch. 167, § 1.]

**Explanatory.**—The act amends chapter 48, Acts regular session 31st Legislature 1909, so as to read as set forth above and in the two following articles. The act of 1909 was carried into the Revised Civil Statutes of 1911 as articles 342, 343, and 344. The new act works a supercession of those articles. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 343. Salary of assistant.**—Said assistant district attorney shall be paid for the time of actual service rendered at the rate of the sum of \$2500.00 per annum, by the Comptroller of the State of Texas, and said amounts to be paid in monthly payments, upon certificates of district clerk and district judge of said district, that said assistant district attorney has performed his duties and is entitled to pay. [Acts 1909, p. 94, § 2; Act March 30, 1917, ch. 167, § 2.]

**Art. 344. Removal of assistant.**—The district attorney of any such district at any time he deems said assistant unnecessary, or that the person appointed is not attending to his duties as required by law, may remove said person from office by merely writing to the district judge of the said district to that effect. [Acts 1909, p. 94, § 3; Act March 30, 1917, ch. 167, § 3.]

**Art. 344a. Assistant District Attorney for Sixth Judicial District.**—The District Attorney of the Sixth Judicial District of Texas, be and he is hereby authorized to appoint an Assistant District Attorney, whose qualifications shall be the same as now required by law for District Attorney, and who before entering upon the discharge of his duties as such Assistant shall enter into bond in the sum of Five Thousand (\$5,000.00) Dollars, conditioned the same as bonds of District Attorneys, and to be approved by the District Judge of said District and shall take the oath of office as required by law and who shall have such authority as the District Attorney of said District. [Act March 28, 1917, ch. 102, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 344b. Same; salary.**—Said Assistant District Attorney shall receive a salary of not exceeding Two Thousand (\$2,000.00) Dollars per year to be paid out of excess fees of said office as the same accrues under the law. [Id., § 2.]

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## CHAPTER TWO

### COUNTY ATTORNEYS

**Article 347. [281] [245a] May appoint assistants.**

**Designation of office.**—Under this article an affidavit taken by one named as "assistant county attorney" cannot be quashed on the ground that he was a deputy and not an assistant. *Pierson v. State* (Cr. App.) 180 S. W. 1080.

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## CHAPTER THREE

### GENERAL PROVISIONS APPLICABLE TO BOTH DISTRICT AND COUNTY ATTORNEYS

<p>Art. 356a. Shall give opinion, etc., to county and precinct officers.</p> <p>363. Shall pay over money collected in thirty days, less commissions.</p>	<p>Art. 366. Shall institute proceedings against officers, when, etc.</p>
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**Article 356a. Shall give opinion, etc., to county and precinct officers.**

**Extra compensation.**—Under Const. art. 5, § 21, and Rev. St. art. 356a, an order of the commissioners' court employing a county attorney for one year at the salary of \$1,200 for services in preparing and issuing road bonds held invalid as an attempt to in-

crease the compensation of the attorney for services he was required by law to perform. *Jones v. Veltmann* (Civ. App.) 171 S. W. 287.

The commissioners' court has no authority to employ and compensate the county attorney at a yearly salary to defend suits that may be brought against the county, although it may employ him to represent it in a pending suit. *Id.*

The fact that the legal compensation of a county attorney affords no remuneration for the service required of him does not authorize the commissioners' court to pay him further compensation in violation of law, or the courts to sustain an order for such compensation; but relief must be sought from the Legislature. *Id.*

Where the only services rendered by a county attorney in connection with certain bonds had been paid for, an order of the commissioners' court that he be paid a certain sum for services in connection with those bonds is contrary to Const. art. 3, § 53, prohibiting extra compensation to an officer after the services have been rendered. *Id.*

**Art. 363. [297] [257] Shall pay over money collected in thirty days.**

**Commissions.**—Under this article a county attorney is entitled to the commission therein specified for money collected by him in a suit against county tax collector for shortage in his account with state. *State v. Bratton* (Civ. App.) 192 S. W. 814.

**Art. 366. [300] [260] Shall institute proceedings against officers, when, etc.**

See *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

**Authority to prosecute action in name of state.**—Under this article a county attorney has authority to represent the state and prosecute an action in its name for collection of a shortage in the accounts of county tax collector, regardless of article 4419, giving like authority to Attorney General. *State v. Bratton* (Civ. App.) 192 S. W. 814.

TITLE 14

BANKS AND BANKING

Chap.

- 1. Banks.
- 2. Bank and trust companies.
- 4. Savings departments.

Chap.

- 5. Bank deposit guaranty law.
- 6. General provisions.

CHAPTER ONE

BANKS

Art.

- 373. No certificate of incorporation valid unless, etc.
- 376. Powers of corporation.
- 376a. Demand deposit defined.
- 377. Cash reserve of banks not holding

Art.

- membership in federal reserve bank.
- 377a. Cash reserve of banks holding membership in federal reserve bank.
- 378. Duties of directors.

**Article 373. No certificate of incorporation valid, unless, etc.**

See art. 1146 and notes.

**Art. 376. Powers of Corporation.**

**Sale of stock held as executor.**—While a bank ordinarily may not own a railroad, it may sell and dispose of its capital stock held by it as executor. *Continental Trust Co. v. Brown* (Civ. App.) 179 S. W. 939.

**Ultra vires acts.**—Banks, which with a natural person formed a firm to deal in cotton, were liable to such person for his share of profits, or, if he were an agent, for any compensation due him, though the formation of the firm was ultra vires as to them. Where such natural person procured insurance, in the name of the firm on cotton purchased by it, the banks were liable upon an implied contract for premiums; the insurance contract being distinct from the partnership agreement, and not being in itself ultra vires. *Dexter v. First Guaranty State Bank* (Civ. App.) 180 S. W. 1172.

**Art. 376a. Demand deposits defined.**—Demand deposits within the meaning of this Act [Arts. 377, 377a, post] shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days, and all savings accounts and certificates of deposit which are subject to not less than thirty days notice before payment. [Act Oct. 19, 1914, 3d C. S. ch. 3, § 2.]

**Art. 377. Cash reserve of banks not holding membership in Federal Reserve bank.**—Every banking corporation chartered under the laws of this State with a capital stock of less than Twenty-five Thousand (\$25,000.00) Dollars, and which does not become a member of a Federal Reserve bank under the laws of the United States, shall at all times have an amount of cash on hand and cash due from other banks equal to at least twenty per cent. of the aggregate amount of its demand deposits, eight-twentieths of which shall be actual cash in the bank; and all banks, not located in a Central Reserve City, having a capital stock of Twenty-five Thousand (\$25,000.00) Dollars or more, and which do not become members of a Federal Reserve bank under the laws of the United States, shall at all times have an amount of cash on hand and cash due from other banks, equal to at least fifteen per cent. of the aggregate amount of its demand deposits, six-fifteenths of which shall be actual cash in the bank. Whenever the reserve of any bank as hereinbefore required shall fall below the amount specified above for its class, then such bank shall not make any new loans or discounts until it shall by collection restore its awful reserve. Twelve-twentieths of the reserve fund, or any part thereof, of a bank with a capital stock of less than \$25,000.00, or nine-fifteenths of the reserve fund, or any part thereof, of a bank with a capital stock of \$25,000.00 or more, together with the current receipts may be kept on hand or on deposit payable on demand in any bank or banking association of the State of Texas, or any bank, banking association or trust company regularly chartered and operating under the laws of

any State or under the laws of the United States, approved by the Commissioner of Insurance and banking, and having a paid up capital stock of Fifty Thousand Dollars or more; but the deposit in any one bank or trust company shall not exceed twenty per cent. of the total deposits, capital and surplus of the bank making the deposit. [Acts 1905, S. S. p. 491; Acts 1907, p. 60, § 7; Act Oct. 19, 1914, 3d C. S. ch. 3, § 3.]

**Art. 377a. Cash reserve of banks holding membership in Federal Reserve bank.**—All banks and banking corporations chartered by the laws of this State which become members of a Federal Reserve bank under the Federal Reserve Act, shall as to their reserves be governed as follows:

(a) A bank not in a reserve or central reserve city as now or hereafter defined by the laws of the United States or designated by the Comptroller of the Currency of the United States shall hold and maintain reserves equal to twelve per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after the Secretary of the Treasury of the United States has officially announced the establishment of a Federal Reserve bank in the district of which is located the subscribing member bank, five-twelfths thereof and permanently thereafter four-twelfths;

In the Federal Reserve bank of its district for a period of twelve months after said date two-twelfths, and for each succeeding six months an additional one-twelfth until five-twelfths have been so deposited, which shall be the amount permanently required;

For a period of thirty-six months after said date the balance of the reserve may be held in its own vaults or in the Federal Reserve bank, or in National banks in reserve or central reserve cities as now defined by the laws of the United States.

After said thirty-six months period said reserve other than those hereinbefore required to be held in the vaults of the member bank and in the Federal Reserve bank, shall be held in the vaults of the member bank or in the Federal Reserve bank, or in both, *shall be held in the vaults of the member bank or in the Federal Reserve bank, or in both*, at the option of the member bank.

(b) A bank in a reserve city, as now or hereafter defined by the laws of the United States or designated by the Comptroller of the Currency, shall hold and maintain reserves equal to fifteen per centum of the aggregate amount of its demand deposits, and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after the date of the establishment of the Federal Reserve bank of which any bank chartered under the laws of this State may become a member, six-fifteenths thereof and permanently thereafter five-fifteenths;

In the Federal Reserve bank of its district for a period of twelve months after the date aforesaid at least three-fifteenths and for each succeeding six months an additional one-fifteenth until six-fifteenths have been so deposited, which shall be the amount permanently required;

For a period of thirty-six months after said date the balance of the reserve may be held in its own vaults, or in the Federal Reserve bank, or in National banks in reserve or central reserve cities as now defined by law;

After said thirty-six months period all of said reserves, except those hereinbefore required to be held permanently in the vaults of the member bank and in the Federal Reserve bank, shall be held in its vaults or in the Federal Reserve bank, or in both, at the option of the member bank.

(c) Provided, however, that notwithstanding the limitations in paragraphs (a) and (b) of this Section, State banks becoming members of a Federal Reserve bank shall have all the rights permitted them under the

Federal Reserve Act, as to reserve deposits with State banks and trust companies; provided, further that State banks becoming members of a Federal Reserve bank shall have authority to conform to the Federal Reserve Law now, or as hereafter enacted, and all rules and regulations promulgated relative thereto by lawful authority; and shall likewise be subject to all limitations of law and of such rules and regulations now or hereafter enacted or promulgated.

(d) The kind and character of money which may be held as reserve by banking corporations incorporated under the laws of this State which become members of a Federal Reserve bank, shall be the same as that required of National banks under the laws of the United States. [Id., § 4.]

#### Art. 378. Duties of directors.

**Issuance of notes.**—Where 7 of 15 directors of bank authorized conveyance of land to another who advanced money to discharge indebtedness of bank's former president, subsequent president, who was liquidating officer, could not under this article, lender demanding payment, bind bank by a note given to obtain funds to make payment. *Rodgers v. Central Bank & Trust Co.* (Civ. App.) 184 S. W. 620.

Where the assets of a bank are being liquidated, the liquidating officer, though its president, is not entitled to execute notes of the bank to take up former indebtedness. *Id.*

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## CHAPTER TWO

### BANK AND TRUST COMPANIES

#### Article 381. Articles of agreement; requisites.

Cited, *Elliott v. City of Brownwood* (Civ. App.) 166 S. W. 932.

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## CHAPTER FOUR

### SAVINGS DEPARTMENTS

**Article 435. Amount of deposits to be kept on hand.**—There shall be kept on hand at all times not less than fifteen per cent of the whole amount of such deposits in such savings department; one third of which shall be kept in actual cash in such savings department and two-thirds of which may be kept with reserve agents designated and approved for such purpose by the Commissioner of Insurance and Banking. [Acts 1909, 2 S. S. p. 406, § 13; Act April 9, 1917, ch. 205, § 7a.]

**Explanatory.**—The act amends art. 435 of ch. 4, tit. 14, Rev. St. 1911. Section 8 repeals all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

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## CHAPTER FIVE

### BANK DEPOSIT GUARANTY LAW

<p><b>Art.</b> 459. May enforce liability of stockholders if, etc.</p>	<p><b>Art.</b> 463. Notices to claimants and creditors.</p>
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#### Article 459. May enforce liability of stockholders; if, etc.

**Showing of necessity for enforcement of liability.**—In view of the national Banking Act, § 50, this article authorizes the commissioner of banking to enforce the individual liability of stockholders in insolvent state banks whenever, in his judgment, such proceeding is necessary, and he need not make a preliminary showing to the court of such necessity. *Collier v. Smith* (Civ. App.) 169 S. W. 1108.

**Liability of bank stockholder under Vernon's Sayles' Ann. Civ. St. 1914, arts. 459, 552,** is not secondary, limited to payment of debts and liabilities of bank at time it became insolvent, but primary, so it is unnecessary for commissioner of banks to allege and prove amount of insolvent bank's indebtedness. *Stringfellow v. Patterson* (Civ. App.) 192 S. W. 555.

**Art. 463. Notice to claimants and creditors.**—The Commissioner shall cause notice to be given, by advertisement in such newspapers as he may direct, weekly, for three consecutive months, calling on all persons who may have claims against such state bank to present the same to the Commissioner and make legal proof thereof, at a place designated in such notice within ninety days after the date of the first insertion of such published notice, which notice shall also contain a statement in larger type than that in which the body of such notice is printed, specifically stating that all such claims of guaranteed depositors must be presented and legal proof thereof made at the place designated within ninety days after the date of the first insertion of such published notice, and that no claim of guaranteed depositors presented after expiration of ninety days from such date, shall be entitled to payment of any portion thereof out of the Depositors' Guaranty Fund. The Commissioner shall mail a similar notice to all persons whose names appear as creditors upon the books of the State bank. [Acts 1909, 2 S. S. p. 406, § 9; Act April 9, 1917, ch. 205, § 4.]

**Explanatory.**—The act amends art. 463, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

## CHAPTER SIX

### GENERAL PROVISIONS

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| <p><b>Art.</b><br/>517e. Membership in Federal Reserve banks.<br/>517f. Conformity to Federal Reserve Act and regulations thereunder.<br/>517g. Amendments to charter may be filed with commissioner of insurance and banking; fee.<br/>517h. Oath of directors; increase or decrease of number of directors; hypothecation of qualifying shares held by director shall vacate office.<br/>518. Commissioner of insurance and banking; bond; seal; not to be interested, etc.; salary.<br/>521a. Salaries of bank examiners; traveling expenses and account thereof; classification of examiners; designation of examiner as general liquidating agent; salary, assessment against banks in liquidation.<br/>522. Commissioner to examine banks quarterly, etc.<br/>522a. Examination of members of Federal Reserve bank.<br/>523. Duties of commissioner in cases of certain derelictions, etc., of banks, etc.; duties of attorney general.</p> | <p><b>Art.</b><br/>523a. Insolvency of member of Federal Reserve bank; disposition of stock in Federal Reserve bank.<br/>530. Directors may appoint and remove officers, etc., authority of officers, etc.; acts without authority void.<br/>539. Loans limited.<br/>552. Stockholders' liability for debts of bank, etc., defined.<br/>562. Who may accept provisions of this title, and how.<br/>569a. Conformity by members of Federal Reserve bank with requirements imposed on National banks.<br/>570. Restrictions upon pledge of securities of bank; members of Federal Reserve bank; notice to commissioner.<br/>570a. Limitation of indebtedness.<br/>570b. Obligations incurred in financing movement of crops.<br/>574. Bonds of officers and employes of banks; form; filing with and approval by commissioner; directors may require other bonds.</p> |
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**Article 517e. Membership in Federal Reserve Banks.**—All banks or bank and trust companies incorporated under the laws of Texas shall have authority to become members of Federal Reserve Banks under such terms and limitations as may be prescribed by the laws of the United States and such rules and regulations relative thereto as may be promulgated by lawful authority. [Act Oct. 19, 1914, 3d C. S. ch. 3, § 1.]

Other provisions of this act are set forth ante, arts. 376-377a, and post, arts. 517f, 522a, 523a, 539, 569a-570b.

**Art. 517f. Conformity to Federal Reserve Act and regulations thereunder.**—Any bank incorporated under the laws of this State which becomes a member of a Federal Reserve bank shall have authority to conform to the Federal Reserve Act as the same now exists, or as it may hereafter be amended, and such rules and regulations as the Federal Reserve Board may prescribe in order to entitle it to membership in a Federal Reserve bank. [Id., § 11.]



**Art. 517g. Amendments to charter may be filed with commissioner of insurance and banking; fees.**—All amendments to charters of banks and banking and trust companies heretofore or hereafter incorporated under the General Banking Laws of the State of Texas shall be filed in the office of the Commissioner of Insurance and Banking and it shall not be necessary for the same to be filed in the office of the Secretary of State. When amendments are tendered the Commissioner of Insurance and Banking for filing he shall charge for filing of same and issuing a certified copy thereof the same fees as are now charged therefor by the Secretary of State. [Act April 9, 1917, ch. 205, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 517h. Oath of directors; increase or decrease of number of directors; hypothecation of qualifying shares held by director shall vacate office.**—In addition to the method of qualifying as director of a state bank or banking and trust company as heretofore required by law, each person so elected director shall hereafter make oath that he will diligently and honestly administer the affairs of such corporation and will not knowingly violate or willingly permit to be violated any of the provisions of the Banking Laws of this State and that he is the owner in good faith and in his own right of the number of shares of stock required by law to be owned by directors of said banking corporations, and that same is not hypothecated or pledged for debt, such oath subscribed by the director making it and certified by the officer before whom it is taken shall be filed permanently in the minutes of the corporation. Provided, however, that it shall not be necessary to amend the charter of any such banking corporation when it is desired to increase or decrease the number of directors, but that the stockholders shall have the right at any regular annual election of directors to elect such number as they may see fit, not less than five nor more than twenty-five, and such number so elected shall be the full number of directors for the ensuing year for which they are elected; provided, however, that when the number of directors is changed under this section a certified copy of the resolution changing the number shall be forwarded at once to the Commissioner of Insurance and Banking to be filed by him in the charter file of the corporation, but no charge shall be made by the Commissioner therefor; provided, further, that no director of any such bank shall, while he is such director, hypothecate or pledge that number of his shares of stock required by law in order to be a director; and the pledging or hypothecation of such stock shall automatically vacate his position as a director. [Id., § 2.]

**Art. 518. Commissioner of insurance and banking; bond; seal; not to be interested, etc.; salary.**

**Note.**—By Act June 5, 1917, 1st C. S. ch. 48, § 2, post, art. 7085b, the additional compensation of the commissioner for his banking duties is fixed at \$1,000.

**Art. 521a. Salaries of bank examiners; traveling expenses and account thereof; classification of examiners; designation of examiner as general liquidating agent; salary, assessment against banks in liquidation.**—The salary and full compensation for State Bank Examiners appointed by the Commissioner of Insurance and Banking shall hereafter be as follows: for the first year of service, the sum of Two Thousand Dollars; for the second year of service, the sum of Two Thousand Two Hundred Dollars; for the third year of service the sum of Two Thousand Four Hundred Dollars; for the fourth year of service, the sum of Two Thousand Six Hundred Dollars; for the fifth year of service, the sum of Two Thousand Eight Hundred Dollars; and for the sixth year of service the sum of Three Hunsand Dollars, which salary shall not be increased; and in addition to the salary above specified, they shall receive all necessary traveling expenses. An itemized account of such expenses shall be rendered monthly under oath by each Examiner and shall be approved by the Commissioner. Provided, however, that the

Commissioner of Insurance and Banking shall classify the Examiners on his force when this Act goes into effect in accordance with the year of service they have heretofore served in such offices, and shall count such years of service in determining the salaries which shall be paid such Examiners after this Act becomes effective. It is further, provided in this connection that the Commissioner of Insurance and Banking may designate any one of his Bank Examiners as a General Liquidating Agent for the purpose of liquidating any one or all state banks in process of liquidation, with his office in the Banking Department at Austin, Texas, and conducting the liquidation for and under the direction of the Commissioner of Insurance and Banking; and for such service such Bank Examiner acting as General Liquidating Agent for the Commissioner shall in addition to the salaries above provided for receive Five Hundred Dollars per annum for his services as General Liquidating Agent of the Department, provided that such Liquidating Agent shall never receive a total salary in excess of Three Thousand Dollars per annum. It is further provided that the entire salary of the General Liquidating Agent herein referred to may be assessed proportionately by the Commissioner against any bank or banks in liquidation and be collected and paid into the State Treasury, as fees for examinations are collected and paid into the Treasury; provided, however, that the amount which may be assessed against any one bank shall not exceed proportionately for the time the compensation herein fixed as the salary of a Bank Examiner for his first year's service. [Id., § 5.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 522. Commissioner to examine banks quarterly, etc.**

The provision as to the times at which examinations are to be made is modified by art. 522a.

Art. 522a is a cumulative provision on the subject of this article.

**Art. 522a. Examination of members of Federal Reserve bank.**—It shall be the duty of the Commissioner of Insurance and Banking, at least once in each quarter of each calendar year, to cause each banking corporation incorporated under the laws of this State, to be thoroughly and fully examined; provided, however, that as to such banking corporations as shall become members of a Federal Reserve bank, should the Federal Reserve Board or the Comptroller of the Currency insist upon making examination of such banking corporations by National bank examiners, then the Commissioner of Insurance and Banking shall be required to make or cause to be made but two regular examinations of such banking corporations during any one year; provided, further, that the Commissioner shall have the power to make special examinations of any State banking corporation at any time in his discretion.

The Commissioner of Insurance and Banking, or any State bank examiner, at his direction, shall be authorized at any time to forward to the Comptroller of the Currency, or the Federal Reserve Board, copies, or certified copies, of a State bank examiner's report of any regular or special examination made of any banking corporation which has or shall become a member of a Federal Reserve bank.

The provisions of this section shall be cumulative of any other laws now upon the statute books of this State in respect to this subject. [Act Oct. 19, 1914, 3d C. S., ch. 3, § 9.]

**Art. 523. Duties of commissioner in cases of certain derelictions, etc., of banks, etc.; duties of attorney general.**

**Issuance of notes.**—See art. 378, ante.

**Action by bank in hands of special agent.**—Under authority of the commissioner of banking, an action to realize on assets may be maintained in the name of a bank in the hands of a special agent appointed by such commissioner to wind up its affairs. Such action will not abate on change of commissioner. *McWhirter v. First State Bank of Amarillo* (Civ. App.) 182 S. W. 682.

**Art. 523a. Insolvency of member of Federal Reserve bank; disposition of stock in Federal Reserve bank.**—If any State bank which is a

member of a Federal Reserve bank shall be declared insolvent and a receiver appointed therefor or other agency for the liquidation of its affairs and the payment of its debts, the stock held by it in the said Federal Reserve bank may be cancelled without impairment of its liability and all cash paid subscriptions on said stock with one-half of one per cent per month from the period of last dividend, not to exceed the book value thereof; may be first applied to all the debts of said insolvent member bank to the Federal Reserve bank, and the balance, if any, paid to the receiver of the insolvent bank or other agency for its liquidation as provided for in Section six (6) of the Federal Reserve Act. [Id., § 7.]

**Art. 530. Directors may appoint and remove officers, etc.; authority of officers, etc.; acts without authority void.**

See notes following art. 574, post.

Cited, *King v. Boerne State Bank* (Civ. App.) 159 S. W. 433.

**Sale or indorsement of notes.**—The provision of this article forbidding sale or indorsement of a note by any bank officer unless authorized so to do by the board of directors refers only to a sale of notes received for money loaned. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

A bank which accepts and cashes a draft given in payment of a note bought from the president and cashier of the bank, purporting to act for it, is liable for fraud of the officers inducing the sale, though they acted without the authority required by this article. *Id.* See, also, notes at end of this chapter.

The cashier of a national bank has power to transfer notes and bills receivable, payable to the bank, without special authority from the directors. *Memphis Cotton Oil Co. v. Gist* (Civ. App.) 179 S. W. 1090.

**Art. 539. Loans limited.**—No incorporated bank or trust company chartered under the laws of this State shall loan its money, directly or indirectly, or permit any individual, corporation, company or firm to become at any time indebted or liable to it in a sum exceeding twenty-five per cent. of its capital stock actually paid in and surplus, or permit a line of loans or credits to any greater amount to any individual, corporation, company or firm, and \* \* \* all loans to members of any unincorporated company or firm shall be considered as if they were loans to such company or firm in determining the limitation here prescribed; and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as borrowed money; a permanent surplus, the setting apart of which shall have been certified to the Commissioner of Insurance and Banking and which cannot be diverted without due notice to and consent of said officer, may be taken and considered as a part of the capital stock for the purpose of this section, provided, however, that in no event shall any such loan exceed 25 per cent. of the authorized capital stock and certified surplus; provided, that the provisions of this section shall not be construed as in anywise to interfere with the rules and regulations of any clearing house association in this State in reference to the daily balances between banks; provided that this section shall not apply to balances due from correspondents subject to draft; and provided, further, that the discount of the following classes of paper shall not be considered as money borrowed within the meaning of this section, viz.:

(a) The discount of bills of exchange, drawn in good faith, against actual existing values.

(b) The discount of paper upon the collateral security of warehouse receipts, covering agricultural and manufactured products in store in elevators and warehouses; under the following conditions; first, that the actual market value of the property held in store and covered by such receipts shall at all times, exceed by at least twenty-five per cent, the amount loaned upon the same; second, that the full amount of such loans shall at all times be covered by policies of fire insurance issued by companies lawfully doing business in this State, to the extent of their ability to cover such loans; and all such policies shall be made payable in case of loss to the bank or holder of the warehouse receipts.

Any state banking corporation may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the im-

portation and exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up capital and surplus. [Acts 1909, 2 S. S. p. 425, § 53; Act Oct. 19, 1914, 3d C. S., ch. 3, § 8; Act April 9, 1917, ch. 205, § 7.]

**Explanatory.**—The act amends sec. 8, ch. 3, general laws 3d called session, 33d Legislature. Took effect 90 days after March 21, 1917, date of adjournment. The part omitted as shown by asterisks adds a criminal feature, and is set forth post as art. 529b, Penal Code.

#### **Art. 552. Stockholder's liability for debts of bank, etc., defined.**

**Assessment against stockholders.**—Liability of bank stockholder imposed by Vernon's Sayles' Ann. Civ. St. 1914, art. 552, is legal in character, not merely equitable, so that commissioner of banking can maintain suit thereon against one stockholder without bringing all others before court. Assessment at 100 per cent. created a debt, certain in amount, which was primary and not secondary obligation; so it is unnecessary for commissioner of banks to allege and prove amount of insolvent bank's indebtedness. *Stringfellow v. Patterson* (Civ. App.) 192 S. W. 555.

**Effect of agreement as to mode of payment of subscription.**—Where, after a bank has become insolvent and is being wound up, one is sued on his subscription to its stock, the fact that his subscription was on agreement that it should be paid from dividends is not available as a defense. *McWhirter v. First State Bank of Amarillo* (Civ. App.) 182 S. W. 682.

**Subscription obtained by fraud.**—The right of a subscriber to stock of a bank, induced by fraud of its agent, held, after insolvency, subordinate to subsequent depositors or creditors without knowledge of such fraud. *Davis v. Burns* (Civ. App.) 173 S. W. 476.

#### **Art. 562. Who may accept provisions of this title, and how.**

**Obligation of contracts—Impairment.**—Evidence held to support a finding that a special act, approved May 23, 1871 (Sp. Acts, 12th Leg. c. 264), providing for incorporation of a banking association, was not accepted so as to become a contract not subject to impairment, prior to April 18, 1876, the date of the provision of the Constitution prohibiting the formation of such corporations. *Davis v. Allison* (Civ. App.) 189 S. W. 968.

**Art. 569a. Conformity by members of Federal Reserve bank with requirements imposed on National banks.**—A State bank becoming a member of a Federal Reserve bank shall in addition be required to conform to the provisions of law imposed upon National banks respecting the limitations of liability which may be incurred by any person, firm or corporation to such banks, the prohibition against making purchases of or loans on stock of such bank, and the withdrawal or impairment of capital, the payment of unearned dividends and of such rules and regulations as the Federal Reserve Board may, in pursuance of the Federal Reserve Act prescribe. [Act Oct. 19, 1914, 3d C. S., ch. 3, § 5.]

**Art. 570. Restrictions on pledge of securities of bank; members of Federal Reserve bank; notice to Commissioner.**—It shall be unlawful for any bank to hypothecate or pledge as collateral security for money borrowed upon bills payable, certificates of deposit or otherwise, its securities to an amount greater than fifty per centum in excess of the amount borrowed thereon, or for any banking corporation to issue and execute any notes, bills or other evidences of indebtedness secured, or to be secured, by the pledge or hypothecation of any of its securities, which shall not contain a provision that in the event such banking corporation shall, for any cause, have its property and business taken possession of by the Commissioner at any time, before such pledge or hypothecation shall have been actually foreclosed, a grace of thirty days after date of such taking possession shall be allowed in which such bank or the Commissioner shall be permitted to redeem such securities so hypothecated or pledged by the payment of the amount due as principal and interest on such indebtedness; provided, however, that banking corporations, incorporated under the laws of this State, upon becoming members of a Federal Reserve bank shall not be required to insert the thirty days grace clause in their notes, bills or certificates of deposit made to a Federal Reserve bank, should a Federal Reserve bank decline to permit the insertion of such thirty days grace clause in a note, bill or certificate of deposit accepted by it from such member bank; and provided, further, that collateral to a greater extent than 50 per centum in excess of the

amount borrowed thereon may be hypothecated or pledged to secure money borrowed from a Federal Reserve bank, should it so require.

Should the securities of any State banking corporation be hypothecated or pledged to an amount in excess of fifty per centum greater than the amount borrowed thereon, it shall be the duty of the officers of such bank to immediately notify the Commissioner giving amount of money borrowed, and amount of securities hypothecated or pledged to secure same.

A State bank becoming a member of a Federal Reserve bank shall have the right to discount to a Federal Reserve bank, notes, drafts, and bills of exchange arising out of actual commercial transactions and to endorse the same with a waiver of demand, notice and protest and to do any other thing necessary under the Federal Reserve Act or rules and regulations relative thereto promulgated by lawful authority, in order to obtain all the benefits and privileges of membership in a Federal Reserve bank.

The lien and rights obtained by a Federal Reserve bank upon the discount to it of any such notes, drafts and bills of exchange shall be a first and preference lien thereon. [Acts 1909, 2 S. S., p. 423, § 37; Act Oct. 19, 1914, 3d C. S., ch. 3, § 6.]

**Art. 570a. Limitation of indebtedness.**—No banking corporation incorporated under the laws of this State shall at any time be indebted or in any way liable to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

- (a) Moneys deposited with or collected by it.
- (b) Bills of exchange or drafts drawn against money actually on deposit to the credit of the corporation or due thereto.
- (c) Liabilities to the stockholders of the association for dividends and reserve profits.
- (d) Liabilities incurred under the provisions of the Federal Reserve Act.
- (e) This section shall not apply to any guaranty executed by any trust company whose demand deposits are not in excess of its interest-bearing deposits, provided such trust company is not a member of a Federal Reserve bank.

(f) Provided further that upon a permit obtained in writing from the Commissioner of Banking any bank may borrow a sum not in excess of its unimpaired surplus in addition to its capital stock. [Id., § 10.]

**Art. 570b. Obligations incurred in financing movement of crops.**—Provided further, however, that State banks may, with the permission and under the direction and control of the Commissioner of Insurance and Banking, borrow or make discounts individually or collectively, or enter into any agreement or association for the purpose of obtaining funds to finance the movement of agricultural and farm products only; and when so doing, paper endorsed by them for such purpose shall not be considered as within limitation prescribed in this Act as to the amount of indebtedness which a State bank may incur. [Id., § 10a.]

**Art. 574. Bonds of officers and employés of banks; form; filing with and approval by commissioner; directors may require other bonds.**—All officers and employees of banks incorporated under the Banking Laws of this State who are active in the discharge of their duties or who draw salaries for their services and whose duties permit or require the handling of any of the funds of the bank shall, before entering upon the discharge of their duties, give a good and sufficient bond in such sum as may be fixed by the board of directors of any such bank the solvency and amount of such bond shall be subject to the approval of the Commissioner of Insurance and Banking, conditioned for the faithful performance of their duties and such pecuniary loss as the bank may sustain for money or other valuable securities embezzled, wrongfully ab-

stracted or willfully misapplied by any such officer or employee in the course of his employment as such or in the course of his employment in any other position in such bank, whether he be assigned, appointed, elected, re-elected or temporarily assigned to said position. All such bonds shall be upon forms prepared by the Commissioner of Insurance and Banking, and may be made in some incorporated surety company lawfully transacting business in the State of Texas. All such bonds shall immediately after their execution be forwarded to the Commissioner of Insurance and Banking and be filed by him as an archive of his office and a certified copy thereof shall be returned to the board of directors of such bank and be kept in their custody; provided, however, that the board of directors may require any other bond or bonds in addition to that herein required, at their discretion; provided, that only officers of banks who handle bank's money or draw a salary shall be required to give bond. [Acts 1909, 2 S. S., p. 423, § 35; Act April 9, 1917, ch. 205, § 6.]

**Explanatory.**—The act amends art. 574, Rev. Civ. St. Took effect 90 days after March 21, 1917, date of adjournment.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Deposits in general.**—Evidence, in an action against a bank to recover the amount of a deposit, held sufficient to sustain a finding that its officers knew or should have known the purpose for which the amount collected on plaintiff's draft was received by the bank. *First State Bank of Seminole v. Shannon* (Civ. App.) 159 S. W. 398.

Where a suit was brought in a foreign court to compel specific performance of a contract by plaintiff to purchase certain land, a judgment against plaintiff did not authorize a bank in which part of the price was deposited, and which was not a party, to pay over the money to the vendor. *Banco Minero v. Ross*, 172 S. W. 711, 106 Tex. 522.

In action against trust company to collect balance of alleged deposit, evidence held to show that there was sale of stock to trust company for consideration paid by deposit certificate. *Alamo Trust Co. v. Prudential Life Ins. Co. of Texas* (Civ. App.) 183 S. W. 787.

In action by wife against bank for funds paid it for husband for community property, writing "Payment stopped by injunction" across check given husband, held to afford bank adequate protection against double payment, rendering proper the refusal to require husband's executors to surrender it for cancellation. *Baber v. Galbraith* (Civ. App.) 186 S. W. 345.

In bank's suit on note evidence held insufficient to sustain finding that note was ever received on deposit by bank. *Guaranty State Bank v. Bland* (Civ. App.) 189 S. W. 546.

**Relation between bank and depositor.**—Money, when deposited in a bank, becomes the property of the bank. *First State Bank of Seminole v. Shannon* (Civ. App.) 159 S. W. 398.

A general or special deposit in a bank held to create the relation of debtor and creditor, arising upon an implied contract between the parties. *Id.*

Where a check is deposited in a bank to the credit of the payee's general account, the bank becomes the owner thereof and may sue the maker, on payment being refused on a mere claim of fraud, though the depositor had ample funds on deposit to cover the amount of the check. *Chrisman v. Lumberman's Nat. Bank* (Civ. App.) 163 S. W. 651.

An agreement by a bank to permit a depositor to make an overdraft on the bank was equivalent to a loan to the depositor, so as to place the depositor in the position of having a credit with the bank. *Sagerton Hardware & Furniture Co. v. Gamer Co.* (Civ. App.) 166 S. W. 428.

Ordinarily, where one person deposits money in bank to another's credit, bank is debtor of designated principal, and not of depositor. *Cozart v. Western Nat. Bank of Ft. Worth* (Civ. App.) 194 S. W. 644.

**Trust funds.**—Proceeds of notes deposited in bank for collection were held in trust by the bank for the depositor, and it had no authority to use them except as directed. *First State Bank & Trust Co. of Hereford v. Vardeman* (Civ. App.) 188 S. W. 695.

**Application of deposits to debts due bank.**—A bank which by arrangement with plaintiffs' vendee credited plaintiffs with payments for lumber shipped by such vendee through the bank, held not entitled to charge back such credits upon failure to realize the sale price of the lumber. *People's State Bank v. Dabis* (Civ. App.) 178 S. W. 671.

When customer makes special deposit in bank of funds to discharge liabilities which may be presented for payment, it cannot be used for any other purpose, and cannot be used to pay note due bank unless so intended at the time of deposit. *Cotulla State Bank v. Herron* (Civ. App.) 191 S. W. 154.

A bank cannot set off a depositor's unmatured note to it against his deposit merely because he is a nonresident; there being no proof of his insolvency. *Stockyards Nat. Bank v. Presnell* (Sup.) 194 S. W. 384.

**Payment of check or draft.**—A bank, which knew that the authority of an agent was limited to the drawing of checks in the name of his principal for spot cotton, was liable for paying checks drawn by the agent for cotton futures with knowledge of the facts or with knowledge of such facts as would put it on notice. *W. R. Miller & Co. v. Hobby* (Civ. App.) 159 S. W. 96.

Where a bank, knowing that an agent had authority only to draw checks in the name of his principal for spot cotton, honored checks drawn by the agent payable to the man-

bank held a mortgage, other than his so doing, the bank must have authorized or approved his act. *Lester v. Hawkins* (Civ. App.) 181 S. W. 481.

Where a clerk temporarily alone in the bank accepted by telephone a check on a specific fund and promised to pay the check when presented, the bank held liable to the payee. *Cotulla State Bank v. Herron* (Civ. App.) 191 S. W. 154.

A delivery of a deed of trust to the vice president of a bank held a delivery to the bank, notwithstanding the vice president's agreement that he would retain the instrument in his custody, and that it should only be used to satisfy the directors who had demanded security. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

— **Individual interest.**—Where officers of defendant bank knew the purpose of plaintiffs' draft for \$5,000 to be the purchase of the bank's stock and indorsed it, collected it, and let it remain on deposit in the name of its president as trustee, the knowledge of such officer was the knowledge of the bank; and the fact that the president afterwards misappropriated it did not relieve it from liability to plaintiff. *First State Bank of Seminole v. Shannon* (Civ. App.) 159 S. W. 398.

Where a bank having wrongfully sold certain pledged collaterals to its president later claimed that his holding thereof inured to the benefit of the bank, it was chargeable with his assertions of ownership inconsistent with the rights of the pledgor. *King v. Boerne State Bank* (Civ. App.) 159 S. W. 433.

The fact that one partner was president of the bank in which the firm deposits were kept does not impart to the bank knowledge of an agreement between the partners as to the manner in which the funds were to be deposited and checked out, where the agreement was not communicated to any other officer of the bank. The bank was not liable to the partnership for deposits made by the president in his own name, contrary to the agreement between the partners, where it does not appear that the firm thereby suffered any loss. Nor was the bank liable to the firm, or the other partner for money drawn by the president from the firm's account, or for funds belonging to the partnership which the president received for deposit, but failed to deposit. *Amarillo Nat. Bank v. Harrell* (Civ. App.) 159 S. W. 858.

Where a buyer of a note from the president and cashier of a bank, acting for it drew a check payable to the order of the bank for the price, and the check was cashed and collected, through a clearing house, the bank was liable for fraud of the officers inducing the sale, though one of the officers stole the proceeds of the check. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

Knowledge of the president of a bank that a note given by defendant was a mere accommodation note for the president's own debt due the bank is not imputable to the bank so as to operate as a defense. *Hawkins v. First Nat. Bank of Canyon, Texas* (Civ. App.) 175 S. W. 163.

Agreement by president of bank holding mortgage on sheep of a partnership of which he was a member with his partner that in return for such partner's application of the proceeds of a sale of part of the sheep to payment of a firm note due the seller, holding a prior mortgage, the partner could withdraw the same number of sheep and hold them for himself, the bank releasing its mortgage, was not within the authority of such president. *Lester v. Hawkins* (Civ. App.) 181 S. W. 481.

— **Estoppel.**—Rule that a corporation, by accepting the benefit of the acts of its agent, also adopts the means by which he procures such benefit, held not to apply to make a bank liable for false representations by its president in selling certain stock. *Cowboy State Bank & Trust Co. v. Guinn* (Civ. App.) 160 S. W. 1103.

**TITLE 15**

BEEES

**Articles 578a-578r.**

Act March 22, 1915, c. 82, p. 133, makes an appropriation of \$3,000 to be used for the suppression and eradication of foul brood in bees.



## TITLE 16

## BILLS, NOTES AND OTHER WRITTEN INSTRUMENTS

Art.	Art.
579. Liability of drawer, etc., how fixed by suit in district or county court.	588. Assignments, execution of, put in issue, how.
580. How fixed by suit in justice's court.	589. Consideration, want or failure of, a defense, when.
581. Drawer of bill liable on non-acceptance.	590. Liability of drawer and indorser of bills and notes, may be fixed by protest.
582. Assignee of negotiable instrument may sue in his own name.	593. Days of grace allowed on bills and notes.
583. Non-negotiable instrument may be assigned.	593a. Notes and liens for patent rights.
584. Assignee of non-negotiable instrument may sue in his own name.	593b. Same; notice to subsequent purchasers.
586. Assignor liable to assignee.	
587. Assignor, indorser, etc., may be sued, alone, when.	

### Article 579. [304] [262] Liability of drawer, etc., how fixed by suit in district or county court.

Cited, *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

**Necessity to fix liability.**—An indorser's liability is conditioned upon default of the maker, and upon the holder fixing such liability by suit against the maker before the first term of court, under this article, or by protest according to article 590, so that a petition in an action against an indorser was insufficient for not showing that his liability had been so fixed. *Dunn v. Townsend* (Civ. App.) 163 S. W. 312.

An indorser's liability may be fixed by protest or by bringing suit at the first term of court to which the suit can be brought after it becomes due, or by suit at the second term of court after it becomes due, and showing why suit was not instituted at the first term; and, if not so fixed, he is released. *Barger v. Brubaker* (Civ. App.) 187 S. W. 1025.

An indorser is ordinarily only secondarily liable, and only in a case where the indorsement was made at execution and delivery of the instrument is he primarily liable so as to dispense with the necessity of fixing his liability by compliance with the statute regulating the bringing of such suits at a given term. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

The holder of a check may, without protest for nonpayment, sue the drawer and indorser; action being begun before the next term of court. *Morris v. First State Bank of Dallas* (Civ. App.) 192 S. W. 1074.

**Insolvency or nonresidence of maker.**—The statutory requirement as to suit at next term of court after accrual of cause of action to fix liability of indorser is a substitute for protest under the law merchant, and does not apply where protest is not required, as where the maker is insolvent or a nonresident. *Toole v. First Nat. Bank of Hemphill* (Civ. App.) 168 S. W. 423.

**To what instruments and persons applicable.**—A petition in an action on a county warrant against the county and indorsers held to state a cause of action against the indorsers, who are liable as original obligors, and are not within arts. 579, 583, 584. *Toole v. First Nat. Bank of Hemphill* (Civ. App.) 168 S. W. 423.

Failure to sue a blank indorser of notes in controversy at the first or second term of court relieved him from liability, in the absence of any allegation of a justification therefor. *Jines v. Astle* (Civ. App.) 170 S. W. 1081.

Instruments indorsed and transferred after maturity must be presented within reasonable time to charge an indorser; the holder not being strictly bound by this article. *Barger v. Brubaker* (Civ. App.) 187 S. W. 1025.

**Time of bringing suit.**—Under this article there was no cause of action against the indorser of a note where suit thereon was not filed before the first term to which suit could be brought after right of action accrued, or before the second term of such court. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

— **Excuse for delay.**—To bind an indorser where suit has not been brought within the time required by law, matters of excuse must be alleged and proven. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

**Waiver of requirement.**—Under this article suit need not be brought at either the first or second term of court in order to fix the liability of indorsers on a note which in terms waives presentment for payment and protest. *Newton County Bank v. Montgomery* (Civ. App.) 175 S. W. 803.

A stipulation in a note held a waiver of the statutes, declaring that a failure of the payee to sue the principal pursuant to the indorser's request will discharge the indorser. *Naylor v. Anderson* (Civ. App.) 178 S. W. 620.

Where the indorser by unequivocal words or acts misleads the holder, and induces him to dispense with notice, suit, etc., required by law to fix liability of an indorser, he may be regarded as having waived his right under the law to have the note protested, suit brought, etc. *Barger v. Brubaker* (Civ. App.) 187 S. W. 1025.

An indorser, requesting an indorsee to give the maker of notes further time, waived the bringing of any suit to fix his liability as indorser until after he notified indorsee that he denied liability as indorser. *Id.*

**Art. 580. [305] [263] How fixed by suit in justice's court.**

Cited, *Thompson v. Pennington* (Civ. App.) 174 S. W. 944.

**Art. 581. [306] [264] Drawer of bill liable on non-acceptance.**

**Suit as substitute for protest.**—The holder of a check may, without protest for non-payment, sue the drawer and indorser; action being begun before the next term of court. *Morris v. First State Bank of Dallas* (Civ. App.) 192 S. W. 1074.

**Nature of obligation of drawer of draft.**—The drawer of a draft undertakes in legal effect to pay the sum mentioned therein to the owner of the draft, upon notice of dishonor or duly given, if not accepted and paid by the drawee. *Harper v. Winfield State Bank* (Civ. App.) 173 S. W. 627.

**Art. 582. [307] [265] Assignee may sue in his own name.**

**5. Right of action by assignee.**—Where the maker of a note directed the bank holding it for collection to apply his deposit to the payment thereof, the holder as assignee could sue therefor in his own name. *Slaughter v. Bank of Texline* (Civ. App.) 164 S. W. 27.

Under this article verbal assignment of a note entitled assignee to sue thereon. *Ford v. Johnston* (Civ. App.) 184 S. W. 303.

The legal and equitable owner and holder of a note by indorsement and assignment from the assignee of the original payee, for valuable consideration, could sue the makers, though he purchased for spite. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

**11. Negotiability—Time of payment.**—A note payable to the order of B. and A., "15 after date," could not be revoked by the maker on the ground that it was a testamentary gift, if delivered and transferred within a reasonable time to a bona fide holder before demand. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

A note was not rendered nonnegotiable by the fact that the amount thereof was payable in installments. *Harrison v. Hunter* (Civ. App.) 168 S. W. 1036.

A note payable in installments was not rendered nonnegotiable by a provision maturing all of the installments at the holder's option upon default for 30 days in the payment of any installment. *Id.*

**15. — Special provisions.**—A note payable in installments was not rendered nonnegotiable by a provision for a discount of 6 per cent., if the full amount thereof should be paid at maturity of the first installment. *Harrison v. Hunter* (Civ. App.) 168 S. W. 1036.

That a note recited it was payment on a named contract did not destroy its negotiability. *Metropolitan Nat. Bank v. Vanderpool* (Civ. App.) 192 S. W. 589.

**16. — Effect of negotiability.**—One acquiring a note in good faith and paying a valuable consideration acquires a title which cannot be attacked. *Forster v. Enid, O. & W. R. Co.* (Civ. App.) 176 S. W. 788.

Purchaser of vendor's lien note, in possession of facts which would have led him to knowledge that the holder had agreed with the makers for an extension of time for payment of an installment of interest, stood in the holder's shoes as to his right to precipitate maturity of the whole debt for failure to pay the installment when due. *Cofer v. Beverly* (Civ. App.) 184 S. W. 608.

**17. Bona fide purchasers in general.**—Where S., having contracted to sell land to defendants, sold the land to plaintiff, who reconveyed the same to S. to enable him to fulfill his contract on his transfer of the purchase-money notes to plaintiff, plaintiff was not a bona fide purchaser of the notes. *Ruth v. Cobe* (Civ. App.) 165 S. W. 530.

Neither an equitable assignee of notes, nor those claiming under him, could claim as innocent purchasers, where the assignee never had possession of the notes. *Green v. Eddins* (Civ. App.) 167 S. W. 196.

A note given for commissions on a sale of corporate stock is not void ab initio, and hence is within the doctrine of bona fide purchaser. *Scheffel v. Smith* (Civ. App.) 169 S. W. 1131.

A "holder in due course" is one who has taken an instrument complete and regular on its face, and has become the owner of it before it was overdue. *McCament v. McCament* (Civ. App.) 187 S. W. 1096.

An innocent or bona fide holder for value of negotiable paper is one who has taken it in good faith for a valuable consideration in the ordinary course of business, and when it was not overdue. *Id.*

**19. — Taking as collateral security in general.**—A person who took as collateral security for a loan a note tainted with fraud in its inception, without notice of the fraud, was entitled to protection as a bona fide purchaser to the extent of the loan, with interest. *Pope v. Beauchamp* (Civ. App.) 159 S. W. 867.

A party receiving as collateral security a vendor's lien note from the maker, the vendee, bearing the indorsement of the vendor, the payee, was not a purchaser in due course of trade. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

An innocent holder of a note as collateral, to which there is a valid defense against the payee, is protected only to the amount of the debt for which it is held as collateral. *Iowa City State Bank v. Friar* (Civ. App.) 167 S. W. 261.

Bank to which notes are indorsed as collateral security for valuable consideration without notice is holder for value. *Yantis v. Jones* (Civ. App.) 184 S. W. 572.

**20. — Taking as security for or in payment of pre-existing debt.**—Credit of notes of a third person assigned to plaintiff on a pre-existing debt of the payee to the extent of their full face value held a sufficient consideration for the transfer of the notes to make plaintiff a bona fide purchaser for value. *Malone v. National Bank of Commerce of Kansas City, Mo.* (Civ. App.) 162 S. W. 369.

Though plaintiff received a note in payment of a debt which he had lost all hope of collecting, the debt was a valuable consideration for the note, so that he took it free from defenses, such as want of consideration, which could have been asserted against the payee. *Daniel v. Spaeth* (Civ. App.) 168 S. W. 509.

Valid antecedent debt is valuable consideration for transfer of note as collateral security. *Yantis v. Jones* (Civ. App.) 184 S. W. 572.

21. — **Taking after maturity.**—Where notes upon their face are parts of the same transaction, and the first was overdue when transferred, the transferee is charged with notice of defenses as to all the notes. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 177 S. W. 528; *Iowa City State Bank v. Friar* (Civ. App.) 167 S. W. 261.

Where the holders of notes agreed with the makers to accept land in lieu of payment, there was a complete novation, and a purchaser of the notes after maturity, with knowledge of the novation, is bound thereby, and cannot enforce payment according to the tenor of the instruments. *Cooney v. Dandridge* (Civ. App.) 158 S. W. 178.

A purchaser of a check after maturity, which shows on its face that payment had been refused, takes it subject to the equities between the parties, and, if the debt evidenced by the check has been partially discharged, he acquires nothing more than the balance due. *Rahe v. Yett* (Civ. App.) 164 S. W. 30.

Notes, identical except as to their serial numbers and maturity dates, but containing no recital that they arose out of the same transaction disclosed on their face facts to charge a purchaser with notice that they had a common consideration, and where at the time of the purchase one of them was due, he was not a bona fide holder. *Iowa City State Bank v. Friar* (Civ. App.) 167 S. W. 261.

Where defendants executed a note reciting that it was secured by a vendor's lien, which was in fact not the case, such false recital did not give rise to an equitable estoppel precluding the makers from asserting against the assignee of such note after maturity the defense of failure of consideration. *Hill v. Jones Lumber Co.* (Civ. App.) 178 S. W. 28.

The owner of a note, who allowed it to be taken in the name of a third person and permitted such third person to exercise dominion, is estopped from setting up his rights as against one who in good faith without notice took the note after maturity. *Western Nat. Bank of Hereford v. Laughlin* (Civ. App.) 184 S. W. 1101.

Purchaser of past-due note takes it with notice of any defense which the maker may have, but not with notice of secret equities of third persons. *Gee v. Parks* (Civ. App.) 193 S. W. 767.

22. — **Purchaser from bona fide holder.**—A holder of a note in whose hands they are unenforceable does not acquire it free of defenses by transferring it to an innocent holder, and then repurchasing it from him; and this though he repurchased it with money furnished by another therefor, on their agreement that the other should share in the profits because of the loan. *Bute v. Williams* (Civ. App.) 162 S. W. 989.

A purchaser of notes, with notice of their infirmity from a bona fide holder of them as collateral for a loan acquires such and only such rights therein as his seller had, that is, an interest to the extent of the loan. *Id.*

Where one of the obligees of a bond who did not know of a condition imposed by an obligor assigned his interest to the other obligee, who knew of the condition and was bound thereby, such obligee may recover as assignee, though he could not recover as obligee. *Francis v. Cornelius* (Civ. App.) 173 S. W. 947.

23. **Payment of less than face value.**—Where a purchaser of a negotiable note before maturity is not personally chargeable with fraud, he can recover its full amount from the maker, rather than a less amount paid by him, whatever the original infirmities in the note. *Douglass v. Lockhart* (Civ. App.) 168 S. W. 332; *Lock v. Citizens' Nat. Bank* (Civ. App.) 165 S. W. 536.

While the amount paid for the note of a solvent maker may be so disproportionate to its face value as to show constructive notice of facts in connection with its execution, it is not necessary that the full face value should be paid. *Lock v. Citizens' Nat. Bank* (Civ. App.) 165 S. W. 536.

Discounting of note about 10 per cent. held not to deprive bank of standing of bona fide purchaser, where the makers did not then know of the fraud and the bank by inquiry could therefore not have learned thereof. *Id.*

24. **Notice—Actual.**—A bank purchasing a note before maturity with mere knowledge that the consideration therefor was stock to be issued by a railroad corporation and completion by it of a railroad is a purchaser in good faith. *Forster v. Enid, O. & W. R. Co.* (Civ. App.) 176 S. W. 788.

That a person purchasing purchase money notes secured by a vendor's lien knows of the existence of a grant of the land to a third person prior to that under which the vendor claimed does not alone prevent him from being an innocent purchaser of the notes. *Tuke v. Feagin* (Civ. App.) 181 S. W. 805.

Corporation accepting notes under subscription contract for its stock to be issued, with notice of the conditions contained in the contract and notes, held not a bona fide holder of such notes. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

Notice of defects in notes acquired after purchase in good faith without notice does not affect the holder's standing as a bona fide purchaser. *Landon v. Wm. E. Huston Drug Co.* (Civ. App.) 190 S. W. 534.

25. — **Constructive notice and facts putting on inquiry.**—A transferee of a note is not a bona fide holder no matter how honestly he may have believed that the law would sustain the transfer, but notice is not sufficient to affect his title, unless so cogent and obvious that to remain passive would amount to bad faith. *Pope v. Beauchamp* (Civ. App.) 159 S. W. 867.

Where the buyer of a negotiable instrument has acted in good faith and paid a valuable consideration, his title cannot be impugned; the acquisition of the note under circumstances tending to put a reasonable man on inquiry merely being evidence tending to show bad faith. *First Nat. Bank v. Chapman* (Civ. App.) 164 S. W. 900.

An indorsee of a note who has no actual notice of defenses available by the maker against the payee is not charged with constructive notice of such defenses unless the circumstances are such that bad faith must be presumed in the absence of inquiry. *Daniel v. Spaeth* (Civ. App.) 168 S. W. 509.

Where R. sold corporate stock to defendant, receiving a note for part of the price, representing commissions, which he transferred to plaintiff, R.'s statement to plain-

tiff that he had sold stock to defendant did not charge plaintiff with notice that the stock had not been paid for in some of the ways required by law. *Scheffel v. Smith* (Civ. App.) 169 S. W. 1131.

That at the time the holder of notes acquired them interest thereon was past due and unpaid did not entitle the maker of the notes who claimed a good defense to enjoin the holder from suing, where the notes were acquired by the holder in good faith and for value before maturity. *Tuke v. Feagin* (Civ. App.) 181 S. W. 805.

Where the president of a corporation executes notes without consideration to another corporation, and these notes are shortly pledged to a bank with other collateral to secure a debt partly owed by the said president, the circumstances were such as to put the bank on notice of a fraudulent conspiracy to defraud the corporation. *El Fresnal Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

The indorsee of a note executed by the president of a corporation and purporting to be secured by a lien on corporate land, and pledged to secure a debt partly owed by him, was charged with notice that the president was not authorized to give liens, and it was not an innocent purchaser. *Id.*

The indorser of notes purporting on their face to be secured by a lien in a recorded deed was charged with notice that no lien was reserved in the deed, and he was not an innocent purchaser. *Id.*

The purchaser of vendor's lien notes without actual notice of a conveyance by the purchaser was not charged with any fact upon which, on the doctrine of inquiry, notice of such deed could be imputed to him. *Biswell v. Gladney* (Civ. App.) 182 S. W. 1168.

Where recitals of purchase-money notes merely advised purchaser they were secured by vendor's liens, containing no facts to arouse suspicion of prudent person that a defect existed, such notes were insufficient to put their purchaser upon inquiry. *Branlin v. Richardson* (Sup.) 185 S. W. 562.

That the edge of notes showed perforations, indicating, that they might have been attached to other paper, is not sufficient to show notice of defects or defenses against them. *Landon v. Wm. E. Huston Drug Co.* (Civ. App.) 190 S. W. 534.

That mechanic's lien claimant was in possession of property when mortgage bonds were purchased does not charge purchaser with notice of lien claims, unless he actually knew of such possession. *De Bruin v. Santo Domingo Land & Irrigation Co.* (Civ. App.) 194 S. W. 654.

That bank agreed to take before they were executed the notes of persons on a list of men desirable for insurance given by bank to insurance agent was no evidence of fraud and did not put bank upon notice of fraudulent representations made by insurance agent to makers of the notes. *Amthon v. First State Bank of Uvalde* (Civ. App.) 194 S. W. 1019.

26. — **Notice to corporate officer or stockholder.**—Where a deposit in a bank had been equitably assigned for payment of the depositor's note held by the bank for collection, the president of the bank holding the depositor's subsequently matured note could not claim to be a subsequent purchaser or lienholder without notice. *Slaughter v. Bank of Texline* (Civ. App.) 164 S. W. 27.

Bank, taking note, was not taxed with notice of facts, relative to fraud in inception of note, known to its cashier, whose knowledge was acquired when acting solely in his individual capacity, for himself and another concern, in which bank had no interest. *Guaranty State Bank v. Bland* (Civ. App.) 189 S. W. 546.

27. **Evidence.**—In an action to enforce a vendor's lien note against land, the conveyance of which to the vendor had, subsequent to the execution of the note, been set aside for fraud, evidence held sufficient to show that plaintiff, who took the note as collateral security for a loan, did so in good faith without notice. *Pope v. Beauchamp* (Civ. App.) 159 S. W. 867.

In an action by an indorsee of a note, evidence held insufficient to show that he was charged with notice of the failure of consideration for the note. *Daniel v. Spaeth* (Civ. App.) 168 S. W. 509.

Not only defendant, sued on a note by its indorsee, but his son, having testified to its having been fraudulently put in circulation by the payee, the court may not give judgment for plaintiff, when it has not shown it was a bona fide purchaser. *Word v. Bank of Menard* (Civ. App.) 170 S. W. 845.

In a suit on a bond, evidence held not to show that plaintiff's assignor knew of a condition precedent to the obligor's liability. *Francis v. Cornelius* (Civ. App.) 173 S. W. 947.

In a suit by the assignee of a vendor's lien note against the purchaser and a purchaser from him, evidence held not to establish the defense of payment as against the assignee's position of bona fide purchaser. *Biswell v. Gladney* (Civ. App.) 182 S. W. 1168.

Evidence in a suit on a note held to sustain a finding that plaintiff was not an innocent purchaser before maturity for value without notice of any defense thereto. *Landon v. Halcomb* (Civ. App.) 184 S. W. 1098.

In a suit on a note, the issue of the plaintiff's bad faith in the purchase of the note, like the issue of his assignor's fraud in obtaining the note, could be established by circumstantial evidence. *Id.*

In action by the transferee of drafts given for goods bought, evidence held not to support a finding that plaintiff was not bona fide purchaser of the drafts. *Calfee v. Bryant* (Civ. App.) 185 S. W. 323.

In action by indorsee of note, evidence held to show that it was given in payment for capital stock purchased of agent of trust company, though payable to investment company, which was promoting sale of trust company's stock. *Sweeney v. Davis* (Civ. App.) 188 S. W. 438.

In action on note delivered to broker for purpose of negotiation, fraud in inception of instrument held not proved. *Davis v. Converse* (Civ. App.) 188 S. W. 697.

In bank's suit on note, evidence held insufficient to sustain finding that bank obtained such note with knowledge of fraud practiced on maker. *Guaranty State Bank v. Bland* (Civ. App.) 189 S. W. 546.

In bank's suit on note, evidence held to show that bank purchased note in suit, paying full value before maturity, without knowledge of any fraud by its transferor upon the maker, and without any notice putting it upon inquiry. *Id.*

Evidence, in action on note executed by two of defendants, payable to a third, held to show that note was obtained by fraudulent representations and fraudulently transferred to plaintiff after its maturity, so as to sustain judgment in favor of maker. *Charbonnett v. Arbetter* (Civ. App.) 139 S. W. 1037.

Evidence in action on note executed by two defendants, payable to a third, held to show that it was obtained by fraudulent representations. *Id.*

**28. Defenses as against bona fide purchaser.**—The rule of *lis pendens* does not apply to negotiable instruments purchased in good faith for value before maturity. *Pope v. Beauchamp* (Civ. App.) 159 S. W. 867.

That notes showed on their face that they were given in part payment for land held not to preclude an innocent purchaser thereof from enforcing same free from the defense of breach of warranty of title to the land. *Tuke v. Feagin* (Civ. App.) 181 S. W. 805.

Under this article payment is no defense against a holder in due course of a negotiable instrument. *Brannin v. Richardson* (Sup.) 185 S. W. 562.

Where a note payable to an investment company for stock of a trust company was valid, the amount paid therefor by an indorsee was immaterial, where the defense of fraud was not sustained. *Crawford v. Davis* (Civ. App.) 188 S. W. 436.

A purchaser of notes before maturity for valuable consideration without notice of any defense can recover thereon, though there is a good defense as against the original payee. *Landon v. Wm. E. Huston Drug Co.* (Civ. App.) 190 S. W. 534.

An innocent purchaser, without notice of the purpose for which notes given by authority of a corporation were issued, may recover, though the notes were *ultra vires*. *Galveston-Houston Interurban Land Co. v. Dow* (Civ. App.) 193 S. W. 353.

In indorsee's action on note for premium, testimony that payee insurance agents agreed not to negotiate the note until the policy was delivered is admissible, where defendant maker seeks recovery over against payees. *Texas Life Ins. Co. v. Huntsman* (Civ. App.) 193 S. W. 455.

Where wife paid seven-eighths purchase price of land taken in name of husband, and husband bought goods, giving note and mortgage to seller, which borrowed money from bank depositing accounts and the note as collateral, and was thereafter declared bankrupt, and the trustee recovered the collateral from the bank, an innocent party who purchased the note and mortgage acquired title as against the wife. *Gee v. Parks* (Civ. App.) 193 S. W. 767.

**29. — Want of title.**—Where note was transferred by holder by written assignment to chattel mortgagees to secure note to them, mortgagees were vested with title to note as well as to mortgage intended to secure it, a right which could not be defeated by holder's subsequent acquisition of note and delivery of it to maker without mortgagees' consent. *T. W. Marse & Co. v. Flockinger* (Civ. App.) 189 S. W. 1017.

Innocent purchaser of notes, secured by deed of trust on land, who acquired instruments in due course before maturity, paying value to party who had no notice when he purchased of existence of deed to land from maker of notes to his son, or notice of any defense, was entitled to protection as innocent purchaser for value, and to have his lien foreclosed in son's suit to recover title, possession, and rental value. *Johnson v. Masterson* (Civ. App.) 193 S. W. 201.

**30. — Want or failure of consideration.**—The assignee of a note negotiated to him prior to maturity may enforce the same against prior parties, irrespective of a failure of consideration thereto. *Hill v. Jones Lumber Co.* (Civ. App.) 178 S. W. 28.

Under this article purchaser of land, who assumed payment of vendor's lien notes executed by his sellers to their vendor, when sued by an innocent purchaser of the notes before maturity from the original vendor could not set up failure of consideration in defense. *Brannin v. Richardson* (Sup.) 185 S. W. 562.

A bona fide holder of notes as collateral cannot enforce them where there was a failure of consideration, etc., without showing that such collection is necessary to protect himself. *Continental & Commercial Nat. Bank of Chicago v. Meister* (Civ. App.) 186 S. W. 377.

Party who gave check for note of party desiring loan, transaction being conducted by intermediary who failed to transmit the check to the maker of the note, for whom he acted as agent, held a holder in due course. *Davis v. Converse* (Civ. App.) 188 S. W. 697.

**32. — Fraud, mistake, and undue influence.**—Where the payee fraudulently refused to give the full consideration for a note, the maker cannot set up that fraud against a bona fide purchaser for value without notice. *First Nat. Bank of Iowa City, Iowa, v. Humphreys* (Civ. App.) 166 S. W. 53.

A note obtained by false representations is valid in the hands of an innocent purchaser for value without notice. *Denison v. Brown* (Civ. App.) 172 S. W. 725.

A stockholder giving a note and mortgage to a corporation and depositing stock as collateral held not entitled on the transfer of the note and mortgage, for a valuable consideration to a cancellation of the same on the ground of fraud. *Continental Trust Co. v. Cowart* (Civ. App.) 173 S. W. 588.

Where plaintiff secured a note before maturity for value without notice, he was entitled, under this article, to recover against the maker, who, while admitting his signature, claimed fraud in procuring the note and in detaching it from a contract of which it formed a part. *Landon v. Foster Drug Co.* (Civ. App.) 186 S. W. 434.

As against a bona fide purchaser for value without notice and before maturity, the defense that the note was procured through misrepresentations, and that the payee practically appropriated it, is not available. *Henderson v. McDaniel* (Civ. App.) 186 S. W. 865.

**33. — Forgery and alteration.**—Fraudulent alteration of the time of payment and the amount of principal of a note and extracting a material condition therefrom held to

avoid the note, even in the hands of a bona fide purchaser for value without notice. *First Nat. Bank of Iowa City, Iowa, v. Dorsey* (Civ. App.) 166 S. W. 54.

Where the apparent maker of a note accompanied by the payee thereof represented to a bank that the note was good, and the bank on the payee's indorsement discounted the note, such maker was estopped from defeating a recovery by the bank on the note on the ground that it was a forgery. *Tardio v. First Nat. Bank of Bryan* (Civ. App.) 166 S. W. 1180.

Under this article held that the insertion of the words "or bearer" following the name of the payee was not a material alteration. *Douglass v. Lockhart* (Civ. App.) 163 S. W. 382.

Change in personality, number, or relation of parties to instrument, without consent of the opposite party, held to avoid it, even in the hands of an innocent purchaser. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

Where a note was attached without line or perforation to a conditional contract of sale, its subsequent detachment and negotiation was an alteration avoiding the note in the hands of an innocent purchaser for value. *Spencer v. Triplett* (Civ. App.) 184 S. W. 712.

A material alteration of a note precludes any claim on the part of the holder to protection as an innocent purchaser for value without notice. *Landon v. Halcomb* (Civ. App.) 184 S. W. 1098.

The rule that the maker of a note, secured by fraud, should suffer rather than an innocent purchaser, protects the latter, where the payee or junior assignee filled in the date, which had been left blank, even if it resulted in materially changing the maker's liability. *Landon v. Foster Drug Co.* (Civ. App.) 186 S. W. 434.

Any alteration which is material and made without the consent of the party sought to be charged upon a note at any time after its execution renders it void as to them, even in the hands of an innocent holder. *Metropolitan Nat. Bank v. Vanderpool* (Civ. App.) 192 S. W. 589.

**34. — Illegality.**—A note violative of a statute is void, even in the hands of one otherwise a bona fide holder. *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825; *Jones v. Abernathy* (Civ. App.) 174 S. W. 682.

Where consideration of note of buyer of capital stock of a corporation was illegal under the constitutional and statutory provisions as to the sale of capital stock on credit, the note was void, and its payment could not be enforced by innocent purchaser for value. *Republic Trust Co. v. Taylor* (Civ. App.) 184 S. W. 772; *Sturdevant v. Falvey* (Civ. App.) 176 S. W. 908; *Ater v. Rotan Grocery Co.* (Civ. App.) 189 S. W. 1106.

A transaction held not an issue of stock, for the purchaser's note, in contravention of art. 1146, but nothing more than a subscription for stock, so that the note was good in the hands of a purchaser without notice of a secret agreement making the contract to take the stock optional. *Farmers' & Merchants' State Bank v. Falvey* (Civ. App.) 175 S. W. 833.

That a negotiable note given in consideration of stock of a corporation illegally issued thereof was transferred by the corporation to a third person in satisfaction of an obligation of the corporation, did not estop the maker in suit by such third person's indorsee from questioning the note's validity. *Sturdevant v. Falvey* (Civ. App.) 176 S. W. 908.

A note given for capital stock of a trust company through the medium of an investment company was void in the hands of a purchaser, even if he paid value and had no notice of the status of the negotiation. *Crawford v. Davis* (Civ. App.) 188 S. W. 436.

Under constitutional provisions that no corporation shall issue stock except for money, labor or property, and Rev. St. 1911, arts. 1146, 1147, held that, while consideration for a note issued for corporate stock is void or illegal, note is not void in the hands of a bona fide purchaser for value. *Lockney State Bank v. Martin* (Civ. App.) 191 S. W. 796.

**35. — Insanity.**—A purchaser for value before maturity, without notice of a note and mortgage given by an insane person to the payee for services to be performed, may not recover, where the payee did not perform any service. *Ferguson v. Fitze* (Civ. App.) 173 S. W. 500.

## **Art. 583. [308] [266] Non-negotiable instruments may be assigned.**

**½. Construction and operation in general.**—This article and arts. 579 and 584, amount to a substitute for protest under the law merchant, and do not apply where protest is not required, as where the maker is insolvent or a nonresident. *Toole v. First Nat. Bank of Hemphill* (Civ. App.) 168 S. W. 423.

A petition in an action on a county warrant against the county and indorsers held to state a cause of action against the indorsers, who are liable as original obligors, and are not within arts. 579, 583, 584. *Id.*

**4. Future earnings or profits—Under contracts.**—A building contractor may assign a debt which is to accrue in his favor under his contract. *King v. Hardin Lumber Co.* (Civ. App.) 187 S. W. 401.

Earnings under contracts not yet made having no potential existence, any attempt to assign or mortgage them was void. *First Nat. Bank v. Campbell* (Civ. App.) 193 S. W. 197.

**7. Executory contracts.**—A contract to sell on credit is not assignable by the buyer without consent of the seller. *Magnolia Petroleum Co. v. Havoline Auto Supply Co.* (Civ. App.) 172 S. W. 759.

**9. Written instruments.**—Where goods are placed in a warehouse and nonnegotiable receipts are issued therefor, the bailor may make a valid transfer of the receipts (*Vernon's Sayles' Ann. Civ. St. 1914, art. 583*). *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

**10. Rights of action.**—An assignment of an undivided half interest in a cause of action involved in a suit by the assignor against a third person does not pass anything to the assignee, where the assignor has no cause of action, and the third person making a settlement with the assignor pending the action does not thereby become liable to the assignee. *Texas & P. Ry. Co. v. Sanches* (Civ. App.) 168 S. W. 870.

11. — **On contracts.**—If a provision of a deed does not make the estate granted one on condition subsequent, which may be defeated by reentry, but is a mere agreement to reconvey on certain contingencies, the right to enforce specific performance of it is assignable. *Citizens' Water Co. v. McGinley* (Civ. App.) 175 S. W. 457.

12. — **For torts.**—Causes of action, including those for personal injuries, have been commercialized, and can be bartered, sold, and contracted for like personal property. *McCloskey v. San Antonio Traction Co.* (Civ. App.) 192 S. W. 1116.

19. **Equitable assignments.**—An agreement between plaintiff, an attorney, and the owners of notes by which plaintiff was authorized to bring suit on the notes in consideration of the 10 per cent. attorney's fees stipulated for therein operated as an equitable assignment of such attorney's fees to plaintiff. *Caldwell v. Stalcup* (Civ. App.) 166 S. W. 110.

20. — **Check or order.**—The mere giving of a check on a bank even for a valuable consideration does not, prior to acceptance by the bank, operate as an assignment, though circumstances may make it an assignment before acceptance. The parties must have intended that the check should so operate. *First Nat. Bank of Rising Star v. Texas Moline Plow Co.* (Civ. App.) 168 S. W. 420.

That the drawer of an antedated check, on delivering it to the payee, exhibited to him a deposit slip covering the amount of the check was insufficient to require a finding that the parties intended the check to operate as an equitable assignment pro tanto of the drawer's funds in the bank. *Peters v. H. H. Hardin & Co.* (Civ. App.) 168 S. W. 1035.

Where a contractor paid money due a subcontractor into court and sought to have claimants interplead, the court properly rendered judgment of distribution, giving preference to those who had received orders from subcontractor on contractor, though not accepted, as they constituted an assignment. *Ogburn Gravel Co. v. Watson Co.* (Civ. App.) 190 S. W. 205.

21. — **Order or draft on particular fund.**—Where the holder of a note sent it to a bank for collection and the maker ordered the bank to apply his deposit to the payment of the note, there was an equitable assignment of the deposit for payment of the note. *Slaughter v. Bank of Texline* (Civ. App.) 164 S. W. 27.

An order by a building contractor to the owners to pay a materialman a certain sum operates without acceptance as an equitable assignment of the fund to accrue in favor of the contractor. *King v. Hardin Lumber Co.* (Civ. App.) 187 S. W. 401.

22. — **Agreement to appropriate or pay.**—An agreement to pay a debt out of a certain fund, being a mere promise, does not operate as an equitable assignment of the fund or any part of it. *Provine v. First Nat. Bank of Honey Grove* (Civ. App.) 180 S. W. 1107.

To create an equitable assignment of a fund, there must be delivery, actual or symbolic, or some act to place the fund beyond the control of the assignor, and a mere promise or agreement to pay a debt out of such fund is not an equitable assignment. *Colleps v. George W. Smith Lumber Co.* (Civ. App.) 185 S. W. 1043.

A contractor agreed to pay for material and labor out of the money to be paid him when the work was completed. Held, not an equitable assignment of the fund, since it remained under the contractor's control. *Id.*

Agreement to pay attorney a fixed sum, based on recovery on a life insurance policy, held not to pass the legal title out of the beneficiary so as to make the attorney a necessary party to an action on the policy. *American Nat. Ins. Co. v. Hawkins* (Civ. App.) 189 S. W. 330.

27. **Existence and validity of assignment.**—False representations of defendant as to the solvency of the maker of notes given in payment for timber purchased of plaintiff, relied upon by the plaintiff, held material, and to operate as a legal fraud upon plaintiff. *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438.

Where one states of his knowledge material facts by which another is defrauded, it is no defense to reply that, although the statements were false, the person making them believed them to be true, and, where worthless notes of a third person indorsed to plaintiff "without recourse," and falsely represented to be good, were given in payment under a contract, the defendant, when sued for damages for the deceit, could not shield himself behind such indorsement. *Id.*

In an action to recover amount paid for note purporting to be secured by a vendor's lien, evidence as to peaceable possession by parties other than the pretended vendor, in connection with other testimony, held to show conclusively that the pretended vendor had no interest in the land. *Young v. Barcroft* (Civ. App.) 168 S. W. 392.

Where the agent, through whom plaintiff negotiated a purchase of a note, which falsely purported to be secured by a vendor's lien, was jointly interested with the seller of the note in the proceeds of the sale, he was jointly liable with him to the plaintiff for the fraud. *Id.*

Transferrer of note, falsely purporting to be secured by a vendor's lien, held liable to the transferee for the amount paid, whether guilty of an intentional fraud or not. *Id.*

In trespass to try title where defendant asserted title under an assignment to him of notes reserving a vendor's lien, evidence held insufficient to show that the notes had ever been transferred to defendant. *Hergist v. Stautberg* (Civ. App.) 178 S. W. 723.

Where the buyer after execution of a sales contract, but before delivery of the calves covered thereby, sold the calves to a third party upon understanding that he was to take the calves just as the buyer received them, there was a sale rather than an assignment of the contract. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

29. **Priorities between assignments.**—In determining the rights of two assignees to the fund, the fact that one assignment is in parol and the other in writing does not give the latter any superior dignity. *First Nat. Bank of Paris v. O'Neil Engineering Co.* (Civ. App.) 176 S. W. 74.

A written assignment by a contractor to his surety for sums due him under the contract, is subject to a prior parol assignment by him of the same funds. *Id.*

As between creditors holding assignments of amounts due the debtor, the first in point of time prevails. *West Texas Lumber Co. v. Tom Green County* (Civ. App.) 188 S. W. 283.

Instrument assigning to lender bank all money due borrower, except that necessary to pay labor or material bills, cannot be construed as assignment also to holders of claims

for labor and materials, and such claimants cannot establish priority through such instrument over other assignments postdating it, but antedating their own. *Id.*

**31. Rights and liabilities of parties in general.**—An assignment by a contractor to his surety of money arising from retained percentages under the contract gives the surety no claim to money payable at once. *First Nat. Bank of Paris v. O'Neil Engineering Co.* (Civ. App.) 176 S. W. 74.

A parol assignment by a company constructing a public road of funds to become due vests in the assignee an equitable title to the fund and the right to the possession of warrants drawn thereon as soon as they are issued, unless a superior right intervenes. *Id.*

Where an instrument relating to oil and gas rights is a mere lease, assignees are burdened with its obligations and covenants running with the land. *Pierce Fordyce Oil Ass'n v. Woodrum* (Civ. App.) 188 S. W. 245.

Instrument whereby lessor granted and leased all oil and gas under certain land held governed by law relating to leases, so that assignees are bound to pay sum stipulated on failure to commence operations within agreed time. *Id.*

Each of several assignees to whom an interest in a patent right is assigned has a right to manufacture and sell the patented article, no matter how small his interest may be. *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

Contract for sale of gin and mill outfit by defendants to partnership, which contained covenant that, while partnership operated gin and mill in community, sellers would not engage in such business, was chose in action which, when assigned by partnership to corporation which succeeded it, carried with it all rights existing under it by reason of its covenants and agreements. *Malakoff Gin Co. v. Riddesperger* (Sup.) 192 S. W. 530.

**32. Rights of assignee as against debtor.**—Though a judgment is not within this article, equity will set off one judgment against another, where the interests of justice require it, but it will not allow a set-off against an assignee of an interest in a judgment, where the assignor was not insolvent, and the assignee had no notice of any judgment against the assignor, and paid a fair consideration. *Davidson v. Lee* (Civ. App.) 162 S. W. 414.

Defendant is liable to plaintiff for half the sum it paid H. in settlement; it settling and paying the amount of settlement after notice of assignment to plaintiff of a half interest in the claim for damages and in any compromise, settlement, or recovery. *Gulf, C. & S. F. Ry. Co. v. James B. & Charles J. Stubbs* (Civ. App.) 166 S. W. 699.

That a deed recited that the purchase-money note was "nonnegotiable and nonassignable" held not to preclude a transferee, in view of this article, from suing on the note as owner thereof. *Sands v. Curfman* (Civ. App.) 177 S. W. 161.

**33. Rights of assignee as against third persons.**—Plaintiff, suing as transferee of a vendor's lien note, held entitled to require intervenor, setting up a similar note held as collateral security, to show the indebtedness due under the obligation for which he held it as collateral. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

A contractor's surety who was compelled to complete the work cannot claim the funds by subrogation against a prior assignee unless the payments could have been lawfully withheld by the board from the contractor or the assignee. *First Nat. Bank of Paris v. O'Neil Engineering Co.* (Civ. App.) 176 S. W. 74.

Under proper circumstances, an oral assignment of money due one of the parties might be binding between them but not as to any one else without notice. *First State Bank of Aransas Pass v. Fuson* (Civ. App.) 185 S. W. 1042.

#### **Art. 584. [309] [267] Assignee of non-negotiable instrument may sue in his own name.**

**Construction and operation in general.**—A petition in an action on a county warrant against the county and indorsers held to state a cause of action against the indorsers, who are liable as original obligors, and are not within arts. 579, 583, 584. *Toole v. First Nat. Bank of Hemphill* (Civ. App.) 168 S. W. 423.

Arts. 579, 583, and 584, constitute a substitute for protest under the law merchant, and do not apply where protest is not required, as where the maker is insolvent or a non-resident. *Id.*

**Equities and defenses between original parties.**—Though a judgment is not within this article and art. 583, equity will set off one judgment against another, where the interests of justice require it, but it will not allow a set-off against an assignee of an interest in a judgment, where the assignor was not insolvent, and the assignee had no notice of any judgment against the assignor, and paid a fair consideration. *Davidson v. Lee* (Civ. App.) 162 S. W. 414.

The assignee of a land contract is not responsible for the promises of the vendor to the purchaser, unless it contracted to become so. *South Texas Mortgage Co. v. Coe* (Civ. App.) 166 S. W. 419; *Same v. Erwin* (Civ. App.) *Id.* 422.

An assignee of a claim for the price of machinery sold by the assignor under a warranty is not liable personally for damage by breach of the warranty, though his claim may be abated or defeated thereby. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 167 S. W. 256.

In a transferee's action on a nonnegotiable note, it is no defense that defendant, after notice of the transfer, has paid the amount of the note, or any part thereof, to the payee. *Sands v. Curfman* (Civ. App.) 177 S. W. 161.

An order to pay from funds collected by the drawee is subject to the prior debt of the drawer to the drawee and to the drawee's equities against the drawer. *H. J. Murrell & Co. v. Edwards* (Civ. App.) 179 S. W. 532.

A purchaser from an undisclosed agent can rely on any defense to recovery by the principal which existed against the agent when the purchaser became chargeable with notice of the agency. *Hudgins Produce Co. v. J. R. Beggs & Co.* (Civ. App.) 185 S. W. 339.

Where, in acceptance of an order drawn upon it, defendant school district agreed to pay plaintiff what was due contractor on completion of work to satisfaction of building committee, plaintiff could not recover where contractor had not completed building according to agreement. *Lyon-Gray Lumber Co. v. Wichita Falls Brick & Tile Co.* (Civ. App.) 194 S. W. 1167.



**Right of action by assignee.**—Where, in an action for breach of contract for the sale of rice, plaintiff claimed as assignee of the contract under which defendant sold the rice, and the evidence showed that the alleged assignment was in fact a mere contract of sale, which did not require that the rice delivered to plaintiff be that procured from defendant, a verdict should have been directed for defendant. *Standard Milling Co. v. Imperial Rice Co.* (Civ. App.) 160 S. W. 637.

**Action by assignee in his own name.**—A suit on a guaranty of certain assets of an old bank transferred to a partnership operating a new one held properly brought in the name of the new bank. *Young v. Bank of Miami* (Civ. App.) 161 S. W. 436.

The assignee of a shipper's claim for wrongful delivery may sue the carrier; the assignment protecting it from any future action by the assignor. *Wells Fargo & Co. Express v. Pugh* (Civ. App.) 185 S. W. 61.

**Action in name of assignor.**—Agreement of husband who employed attorney to take case against railroad company for injuries to his wife, to pay half amount recovered, after expenses were paid, held mere agreement to pay contingent fee, not rendering attorney necessary formal party. *Galveston, H. & S. A. Ry. Co. v. Brassell* (Civ. App.) 186 S. W. 428.

Refusal of defendants' charge that plaintiff had no cause of action because it had been assigned, held not erroneous. *Wick v. McLennan* (Civ. App.) 186 S. W. 847.

The petition in a suit by the beneficiary in policy of fraternal insurance brought for use of his assignee, but not alleging that assignee was under legal disability, or had authorized suit, was demurrable, as the judgment would be a bar to subsequent suit by assignee only on proof that assignee had authorized suit, or was estopped. *American Ins. Union v. Allen* (Civ. App.) 192 S. W. 1087.

Though plaintiff has assigned to his attorneys an interest in his cause of action for personal injury, they need not be made formal parties plaintiff; they filing a pleading that they are representing plaintiff on the trial, and agree to be bound by any judgment, as though formal parties. *Missouri, K. & T. Ry. Co. v. Hicks* (Civ. App.) 194 S. W. 1145.

**Art. 586. [311] [269] Assignor liable to assignee.**

**Misrepresentation by assignor.**—Where a holder of a note which in its body stated that it was for \$75, while the figures in the margin were \$7,500, represented that the note was for \$7,500, and the buyer thereof relied on the representations and paid \$7,500 therefor, the buyer could recover the difference between \$7,500 and \$75. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

**Art. 587. [312] [270] Assignor, indorser, etc., may be sued alone, when.**

**Suit against absolute guarantor.**—This article and arts. 1842, 1843, 6336, and 6337, providing the manner of suing obligors other than the principals on notes, bills, etc., apply only to suits against obligors not primarily liable, so that it is not necessary before suing the absolute guarantor of a note to sue the principal, nor to make him a party. *Slaughter v. Morton* (Civ. App.) 185 S. W. 905.

**Art. 588. [313] [271] Assignment, how put in issue.**

Cited, *Webb v. Reynolds* (Civ. App.) 160 S. W. 152.

**Necessity of pleading invalidity in general.**—As the validity of an indorsement of a note cannot be attacked unless it is specially questioned in the pleadings, there is a presumption that an indorsement in blank was made before maturity, and the holder is presumed to be the owner. *First Nat. Bank of Garner, Iowa, v. Smith* (Civ. App.) 183 S. W. 862.

In actions by assignee to enforce payment of the fund assigned, the alleged invalidity of the assignment due to restriction in assignor's contract against assignment is defensive matter which defendant must plead and prove. *King v. Hardin Lumber Co.* (Civ. App.) 187 S. W. 401.

**Necessity of denial under oath.**—In a suit by the holder of a vendor's lien note, in which the holder of a similar note intervened, held, not error to permit evidence of ownership, assignment, or transfer of intervener's note, without denial of the assignment made by the vendor under a sworn plea. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

Under this article maker of note payable to a corporation, and indorsed in its name by its vice president and assistant treasurer, cannot impeach assignment without sworn plea and affidavit. *Forster v. Enid, O. & W. R. Co.* (Civ. App.) 176 S. W. 788.

A sworn plea is not necessary to raise the issue of good faith of the holder of a note, holding under an indorsement. *Id.*

In an action against drawee of drafts, in absence of a sworn plea raising issue as to genuineness of indorsements, it was not necessary to offer proof to support allegations that drafts had been indorsed and delivered. *Bloch v. Rio Grande Valley Bank & Trust Co.* (Civ. App.) 190 S. W. 541.

**Non est factum.**—In a suit on a note, an unsworn plea of non est factum did not have effect of demanding proof of execution of note until sworn to. *Braxton v. Voyles* (Civ. App.) 189 S. W. 965.

**Art. 589. [314] [272] Consideration, failure of, when it constitutes a defense.**

Cited, *Landon v. Wm. E. Huston Drug Co.* (Civ. App.) 190 S. W. 534.

1. **Construction and application.**—In a suit on a note payable unconditionally at a time certain, a contemporaneous agreement to postpone the time of payment cannot be proved by parol, notwithstanding this article. *Hendrick v. Chase Furniture Co.* (Civ. App.) 186 S. W. 277.

2. **Necessity of consideration.**—A statement by defendant that he was responsible and would see that plaintiff bank did not lose anything on a draft which it cashed for

a shipper of produce held a mere naked promise which would not sustain an action. *Citizens' Nat. Bank of Waco v. Abeel* (Civ. App.) 160 S. W. 609.

Where, after the execution of a contract for the sale of land, the purchaser complained of his bargain being a hard one, and asked that he be allowed to have the rents of the property until the closing of the transaction, to which the seller assented, the agreement was without consideration and not enforceable. *Bonzer v. Garrett* (Civ. App.) 162 S. W. 934.

An agreement by the payee to notify a third party, who had assumed the notes, in a county other than that in which the maker lived, and in which the notes were payable, being without consideration, was no defense to an action on the notes after they became due. *Ward v. San Antonio Life Ins. Co.* (Civ. App.) 164 S. W. 1043.

In an interstate shipment, a carrier is liable for the difference between the value of the goods in the condition in which they should have been delivered and the condition when delivered, though the bill of lading issued under the Carmack Amendment restricted its liability to the invoice price, where there was no consideration for the limitation of liability. *International & G. N. Ry. Co. v. Rathblath* (Civ. App.) 167 S. W. 751.

Parol modification of a contract for the sale of cattle as to the manner in which the seller should receive payment held invalid if not supported by a new consideration. *Terrell, Atkins & Harvin v. Proctor* (Civ. App.) 172 S. W. 996.

A modification of a contract, without a new consideration, is not enforceable. *Barlow v. Cotulla* (Sup.) 173 S. W. 874, affirming judgment (Civ. App.) 141 S. W. 292.

Deed from agent to his principal conveying superior title reserved by retaining vendor's lien, held not to require consideration to support it. *Zeigel v. Magee* (Civ. App.) 176 S. W. 631.

A stipulation in a bill of lading signed without consideration after the carrier's failure to deliver cars in time held not binding. *Pecos & N. T. Ry. Co. v. Stinson* (Civ. App.) 181 S. W. 526.

Stipulation in contract for carriage of live stock that suit for damages must be brought within 91 days is not binding if there was no consideration therefor, and where a binding oral contract had been previously made, the subsequent written contract would be without consideration. *Kansas City, M. & O. Ry. Co. v. Hansard* (Civ. App.) 184 S. W. 329.

**3. Adequacy.**—Mere inadequacy of consideration for which a release is given and ignorance of the releasor's rights is insufficient to avoid the release in absence of fraud or other improper influence. *Turner v. Ontiveros* (Civ. App.) 193 S. W. 1089.

**4. Written contract importing consideration.**—Where plaintiff permitted the defendant to use a building temporarily for the purpose of drying cotton, the defendant agreeing to indemnify him for loss by fire, the fact that the liability greatly exceeded the value of the use of the building, did not vitiate the contract, as not based on an adequate consideration, since the liability was remote and contingent and the use present and certain. *Seligmann v. Sonka* (Civ. App.) 183 S. W. 73.

**5. Sufficiency in general.**—The society and affections of a child and the services which it may render are a sufficient consideration to support a contract by persons attempting to adopt such child, but, failing to accomplish such purpose, to leave a portion of their property to such child. *Thompson v. Waits* (Civ. App.) 159 S. W. 82.

Where a partner in a law firm, who had acquired an interest in land, recovered for his clients upon a contingent fee, conveyed it to a company holding the legal title for such clients in order to perfect its title, and to aid in the defense of a suit, a contract by the company to reconvey was supported by a sufficient consideration. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

Agreement by party to take the child of another, raise it as his own, and leave it all of his property at his death held not unenforceable for want of consideration, where it had been fully performed by the child and its father. *Bridgewater v. Hooks* (Civ. App.) 159 S. W. 1004.

Recitals, in a contract for the shipment of live stock, showing that a lower rate had been given upon fixing a certain value upon the property showed a sufficient consideration for the contract of shipment at the rate fixed. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943.

A power of attorney from plaintiff to defendants to sell and convey his land, or any part of it, authorizing them to subdivide it and lay out roads through it, they to be paid a commission on sales, is binding on plaintiff, and cannot be canceled for want of consideration, on defendants subdividing, laying out, and constructing roads, and proceeding to make sales. *Byers v. Chatfield* (Civ. App.) 164 S. W. 415.

Where a note is taken as collateral security for a debt then created, the debt is sufficient consideration to support the note. *First Nat. Bank of Iowa City, Iowa, v. Humphreys* (Civ. App.) 166 S. W. 53.

Under an agreement whereby plaintiff's intestate was to have certain land upon the happening of certain conditions, held, that his entry and making of improvements, recognized by defendant, imposed an obligation upon him to pay the purchase price and furnished a consideration which made an executed binding contract. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

Agreement after expiration of the time for performance of an agreement for an interest in land, whereby the parties recognized the obligation of the first contract to pay for and to convey the land, held supported by a consideration. *Id.*

Custody and control of convict given on execution and delivery of a convict bond held a sufficient consideration for the bond as a common-law obligation, though it was invalid as a convict bond. *Harris v. Taylor County* (Civ. App.) 173 S. W. 921.

A valid "consideration" is some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. *Keitt v. Gresham* (Civ. App.) 174 S. W. 884.

Establishment of switch held sufficient consideration for an agreement that the railroad company should not be liable to the shipper for fires caused by locomotives on either the switch or the main track. *Talley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 176 S. W. 65.

In action for breach of an agreement by an irrigation company to supply water, parol

agreement ancillary to original engagement held supported by consideration arising from benefit to the promisee, though not mutual, to render such agreement binding and proper to be shown in evidence. *Lone Star Canal Co. v. Broussard* (Civ. App.) 176 S. W. 649.

Defendant's contention that the note sued on was given by him to plaintiff to use to secure money to pay defendant an attorney fee, held not objectionable as presenting matter not available as a legal defense or set-off to the note. *O'Neil v. Gibson* (Civ. App.) 177 S. W. 183.

A valuable consideration for a promise may consist of a detriment to the promisee; "detriment" meaning that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise. *Harp v. Hamilton* (Civ. App.) 177 S. W. 565.

A valuable consideration for a promise may consist of a benefit to the promisor; "benefit" meaning that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled. *Id.*

Bill of lading for an interstate shipment, limiting the liability of the carrier to a stated value, the shipper paying the lower of two rates, held binding on the shipper. *Texas & N. O. R. Co. v. Hancock* (Civ. App.) 178 S. W. 654.

Release of building contractors' surety by school district held supported by valuable consideration and to defeat a recovery for the amount of a judgment against the district. *Rice Common School Dist. No. 2 v. Oil City Iron Works* (Civ. App.) 180 S. W. 1121.

Where the grantee of realty paid the grantor \$10 provided an annuity of \$600 for her, and agreed to render her personal services in caring for her as a daughter would her mother, which she did until the grantor's death, there was consideration for the conveyance. *Feebles v. Slaughter* (Civ. App.) 182 S. W. 10.

That defendants signed note without consideration at plaintiff payee's request upon his statement that he was hard pressed for money and their signature would enable him to sell the note, which was given by principal maker in payment of account due, held not to state defense. *Magill v. McCamley* (Civ. App.) 182 S. W. 22.

Under written contracts signed by the shipper, the transportation of the live stock and of the shippers constituted a valuable consideration by the carrier rendering the contract binding upon shipper. *Turner v. Henderson* (Civ. App.) 183 S. W. 51.

A payment of earnest money to mortgagor of cattle under a contract of sale, without the knowledge of the mortgagee and not for its benefit, held not consideration for an agreement to release the mortgage. *Lee v. Clay, Robinson & Co.* (Civ. App.) 185 S. W. 1061.

By a written instrument defendant agreed in consideration of \$1 to convey, within a fixed period, certain land to any one designated by plaintiff upon the payment of a stated sum to defendant. Held, there was no lack of consideration, since that instrument fixed the price to be paid. *Houghtling v. Eubank* (Civ. App.) 186 S. W. 364.

Under an instrument reciting a \$1 consideration, whereby the defendant offers to sell land at a certain price, but plaintiff does not agree to purchase, defendant can withdraw such offer at any time prior to plaintiff's acceptance thereof, although plaintiff tendered defendant a \$1 check upon the instrument's execution. *Id.*

A contract for sale of land which was an ordinary land sale contract providing for earnest money, examination of title, and making title good or return of earnest money held not lacking consideration. *Bender v. Bender* (Civ. App.) 187 S. W. 735.

Injured railroad employe, who gave road a release of liability in consideration "of an order on the treasurer of said company for the sum of one dollar," and failed to present such order for payment, could not attack the release for lack of consideration. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

Under rule that purchaser for value without notice from agent intrusted with possession of property with authority to sell acquires good title as against principal, a purchaser's release of mortgage on piano executed by agent was a valuable consideration. *Posey v. Adam Schaaf Co.* (Civ. App.) 189 S. W. 977.

There is no consideration for a wife's signature to a deed to property which was not the homestead and which the husband could convey without her signature. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

The furnishing of a home and the otherwise maintaining of the owner of land during his life is a sufficient consideration to support a conveyance of such land. *City of Houston v. Ritchie* (Civ. App.) 191 S. W. 362.

Where the organizer of a bank induced defendant to subscribe to its stock and execute his note, agreeing to purchase defendant's stock, promising to pay defendant's note on request and to indemnify defendant against all loss, the organizer's promises were supported by sufficient consideration. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

**6. Mutual promises.**—Under an agreement whereby, in consideration that plaintiff would obtain land at a low price, defendant was to convey an interest to plaintiff and another when a certain amount was paid or sales of land and timber equaled that amount, it was not essential to the validity of the contract or to plaintiff's right to specific performance that there should be reciprocal obligation or mutuality of remedy, where plaintiff had performed his part by procuring the land at the price set. *Johnson v. Mansfield* (Civ. App.) 166 S. W. 927.

A contract by defendants to grow onions and deliver them to plaintiff, who should have the right to determine when and where they should be sold, for a commission, it merely guaranteeing a certain price for fancy onions, but having the right to determine whether any onions came up to the prescribed standard, is lacking in mutuality, and so without consideration. *Texas Produce Exchange v. Sorrell* (Civ. App.) 168 S. W. 74.

A contract between an owner of oil lands and an oil company giving the company the right to bore for oil, or to pay a quarterly rental, or to surrender the grant at any time upon the payment of \$5 to the owner, held a unilateral contract void for want of mutuality; the \$5 being merely a nominal consideration. *Owens v. Corsicana Petroleum Co.* (Civ. App.) 169 S. W. 192.

An agreement to repurchase held a sufficient consideration to support a new contract, though the buyer's debt was barred by limitations. *Mahaney v. Lee* (Civ. App.) 171 S. W. 1093.

Modification of a seller's agreement as to acceptance of payment for cattle held supported by a consideration in the buyer's agreement to stand the loss of all cattle that might die during the night. *Terrell, Atkins & Harvin v. Proctor* (Civ. App.) 172 S. W. 996.

Traffic contract relating to railroads' deliveries of cars on a siding at defendant's lumber yard held supported by the reciprocal promises of the parties. *J. B. Farthing Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 178 S. W. 725.

Warranty executed by seller without knowledge and consent of buyers held to have no binding effect. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

An agreement by a surety to pay a note in case the principal refuses to do so made as an inducement to third persons to sign it is supported by a consideration. *Clevenger v. Commercial Guaranty State Bank* (Civ. App.) 183 S. W. 65.

A contract by which plaintiff put a truck in defendant's possession to use and pay over half its income till paid for held enforceable by defendant so long as he complied with it, though not binding him to continue to do so. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

The contract is unilateral, and so terminable at will, where defendant agrees to furnish, but plaintiffs do not agree to take, for a specified time. *Mutual Film Corp. v. Morris & Daniel* (Civ. App.) 184 S. W. 1060.

Where defendant contracted to buy all the veneer cut by plaintiff and plaintiff agreed to turn over orders to defendant, a modification, requiring defendant to take only the material it needed, held to rest upon mutual consideration. *Tyler Box & Lumber Mfg. Co. v. City Nat. Bank of Paris* (Civ. App.) 185 S. W. 352.

Conditional sale of billiard and pool tables for certain amount represented by notes secured by chattel mortgage, to become the buyer's property if he quit drinking and lived with his wife, under which buyer paid part of notes and was performing the contract, held not unenforceable for want of mutuality. *Fire Ass'n of Philadelphia v. Perry* (Civ. App.) 185 S. W. 374.

Where defendant, in suit to foreclose a vendor's lien, undertook to sell the land for benefit of himself and a codefendant, and procured at least one prospective purchaser, his services in so doing relieved of its want of mutuality, if any, contract of codefendant to buy the land at execution sale and sell to purchaser procured by defendant. *Roberts v. Anthony* (Civ. App.) 185 S. W. 423.

Contract between defendant and codefendant in suit to foreclose vendor's lien whereby defendant was not to contest codefendant's right to recover against him, etc., held not void for want of mutuality. *Id.*

Where there is no other consideration for a contract, the mutual promises must be binding on both parties, but, where there is any other consideration, mutuality of obligation is not essential to the validity of the contract. *Id.*

An instrument, reciting a \$1 consideration, whereby the defendant offers to sell land at a certain price, but plaintiff does not agree to purchase, lacks mutuality, although plaintiff tendered defendant a \$1 check upon the instrument's execution. *Houghtling v. Eubank* (Civ. App.) 186 S. W. 364.

Contract for sale of land which was an ordinary land sale contract providing for earnest money, examination of title, and making title good held not lacking in mutuality. *Bender v. Bender* (Civ. App.) 187 S. W. 735.

If a contract for the sale of onion sets to be grown could be defeated by failure of crops or destruction while being held, was unilateral, part performance by the buyer in growing a crop and holding it for shipment, being that upon which mutuality depends, relates back and makes contract good from the beginning. *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (Civ. App.) 187 S. W. 747.

Contract, whereby defendant agreed to furnish gravel to plaintiff's order, not to exceed 15 cars a day, made when defendant knew plaintiff's customers, and that they would probably require 15 cars per day, held not void for want of mutuality. *Grand Prairie Gravel Co. v. Joe B. Wills Co.* (Civ. App.) 188 S. W. 680.

Contract obligating seller of land to erect pumping plant capable of supplying sufficient water to irrigate, held not unilateral because it did not bind buyer to use any water or to water any land. *Roberts v. Abney* (Civ. App.) 189 S. W. 1101.

Contract for an exchange of land, not signed by the plaintiff, held a unilateral contract lacking in mutuality, so that plaintiff could not enforce specific performance thereof. *Clegg v. Brannan* (Civ. App.) 190 S. W. 812.

Contract between organizer of bank and defendant, whom he induced to subscribe for its stock, agreeing to purchase defendant's stock and to pay defendant's note, held not unenforceable for want of mutuality. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

**7. Property and rights therein.**—A lease of land from a railroad company held not to show conclusively that the lessee made no claim to the property in good faith, so that her giving up of the property was no consideration for the railroad's promise to convey other property to her. *Missouri, K. & T. Ry. Co. of Texas v. Edwards* (Civ. App.) 176 S. W. 60.

A consideration for defendant's promise to organize a corporation and convey his patent rights to it cannot be the consideration for a subsequent promise to convey to plaintiffs an interest in the patent equivalent to the interest they would have in the corporation. *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

**9. Rights under contracts—Release or abandonment of rights.**—Defendant bank's release of its claim against a third person who had presented a forged check signed by plaintiff, upon receipt of plaintiff's check in satisfaction of the claim, held a good consideration for the check. *Schofield v. Texas Bank & Trust Co.* (Civ. App.) 175 S. W. 506.

Contract of suretyship on notes held to be supported by sufficient consideration, shown by surety's release from a former suretyship on a bond of the principal. *Gulf Live Stock Ins. Co. v. Love* (Civ. App.) 181 S. W. 766.

A broker held not entitled to commissions until the contract of sale had been reduced to writing, and so his agreement, made before the contract of sale was executed to de-

mand commissions only in event of a consummated sale was supported by a consideration. *Crawford v. Woods* (Civ. App.) 185 S. W. 667.

The rights of plaintiffs under a former contract cannot be the consideration for a subsequent contract where there was no agreement to surrender those rights. *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

Where plaintiff and defendant entered into a contract to subdivide and sell lots at a certain price and for a certain commission, the fact that the lands were not being sold as rapidly as desired was a sufficient consideration for an oral modification of the written contract in order to facilitate the sales. *Ross v. Moore* (Civ. App.) 191 S. W. 853.

The surrender of a claim against a third person is a valuable consideration for a deed. *Knox v. Gruhkey* (Civ. App.) 192 S. W. 334.

A contract may be rescinded by mutual agreement, consideration being relief from obligation of contract. *Taylor v. Wentworth & Curtis* (Civ. App.) 193 S. W. 158.

**10. Pre-existing liability.**—The past consideration of the advancement of money to a corporation of which defendant was a shareholder will not support a note of the shareholder to the amount of the advancement. *Witt v. Wilson* (Civ. App.) 160 S. W. 309.

A surety or indorser who becomes such after the delivery of a note, in absence of prior agreement or new consideration, is not liable, but if he becomes surety at the time of renewal of the debt in consideration thereof he is liable. *People's State Bank v. Fleming-Morton Co.* (Civ. App.) 160 S. W. 648.

A previous debt, though barred by limitation, was a sufficient consideration for the execution of a new note to the extent that it was given for such indebtedness. *Helmke v. Uecker* (Civ. App.) 161 S. W. 17.

Where sureties executed a note to a bank to indemnify it for possible loss of moneys advanced to H. during the year 1908, and there was no loss, held, that there was no consideration for a renewal note executed by them covering a past indebtedness of H. to the bank. *First Nat. Bank v. Hix* (Civ. App.) 164 S. W. 1035.

Indebtedness is a sufficient consideration for the transfer of a note. *Daniel v. Spaeth* (Civ. App.) 168 S. W. 509.

Where a promoter of defendant lumber company purchased intervener's stock in another company agreeing to protect him against liability on such company's obligations in return for his release of an option on land so that the owner might convey to defendant company, a subsequent contract by defendant embracing the terms of the promoter's contract was supported by a consideration. *Weathersby v. Texas & Ohio Lumber Co.* (Sup.) 180 S. W. 735.

**11. Compromise and settlement.**—A compromise of a claim made in good faith, and with reasonable grounds, is a good consideration for a promise, though the claim in fact could not be enforced in court. *Missouri, K. & T. Ry. Co. of Texas v. Edwards* (Civ. App.) 176 S. W. 60.

Agreement by claimant of property levied on under execution to pay the judgments by delivery of the property levied on, at an agreed price, held not without consideration. *Grisham v. Ward* (Civ. App.) 179 S. W. 893.

Dock company and cotton company, before concluding agreement for diversion of cotton shipment from Port Aransas to Galveston, had right to provide that dock company should pay cotton company freight differential on account of the dock company's breach of original contract for shipment from Port Aransas by diverting to Galveston. *Aransas Pass Channel & Dock Co. v. Southern Products Co.* (Civ. App.) 185 S. W. 916.

The compromise of an amount due a road contractor is sufficient consideration to support an accord and satisfaction. *Clopton v. Caldwell County* (Civ. App.) 187 S. W. 400.

**13. Forbearance—Extension of time of payment.**—Where defendant K., having indorsed a note as surety after its delivery without a new consideration, consented to an extension of time of payment, such extension constituted a sufficient consideration for his indorsement and rendered him liable thereon. *People's State Bank v. Fleming-Morton Co.* (Civ. App.) 160 S. W. 648.

Where a usurious loan had already been discharged, the payments more than equaling the principal, an agreement to release all rights of action for usury, made in consideration of an extension, was without consideration and was no defense. *Cotton v. Beatty* (Civ. App.) 162 S. W. 1007.

Where maker did not agree to forego his right to pay off a note, and did not execute an extension agreement prepared by the payee, there was no consideration for the extension agreement. *Lipscomb v. Walker* (Civ. App.) 175 S. W. 449.

A creditor's extension of the payment of a past-due indebtedness from a corporation upon receiving its 60 and 90 day notes would support a contract of suretyship evidenced by the indorsement of its president. *Bonner Oil Co. v. Gaines* (Civ. App.) 179 S. W. 686.

Where a corporation owed a debt upon open account, due and unpaid, an extension of time for payment thereof upon execution of notes by the corporation and its president individually was sufficient consideration to support the suretyship of the president. *Bonner Oil Co. v. Gaines* (Sup.) 191 S. W. 552.

**14. — Forbearance to sue or defend.**—A promise by a purchaser of merchandise from a dealer indebted to the seller of the merchandise to pay the debt if the dealer did not do so, made in consideration of the seller forbearing to attach the merchandise, was supported by a sufficient consideration. *Williams v. City Nat. Bank* (Civ. App.) 166 S. W. 130.

A creditor's agreement to withhold suit against his debtor, followed by actual forbearance, held a good consideration to support a third party's promise to pay the debt, although no definite time of extension was expressly agreed on. *Enterprise Trading Co. v. Bank of Crowell* (Civ. App.) 167 S. W. 296.

Note to payee bank, covering overdue interest on vendor's lien notes, for which the bank promised to forbear to sue on the vendor's lien notes, held supported by consideration. *Ramsey v. Farmers' & Citizens' Savings Bank* (Civ. App.) 177 S. W. 209.

**16. — Existence or validity of right or remedy.**—Agreement of defendant, in suit to foreclose vendor's lien, to waive service, not to contest codefendant's right to judgment against him, and not to bid on property when sold, was insufficient consideration,

where defendant had no defense, for codefendant's agreement to bid in property for sale to discharge parties' liabilities. *Roberts v. Anthony* (Civ. App.) 185 S. W. 423.

**17. Benefit to third person.**—A note given by shareholders who were not responsible for a corporation's debts to reimburse another for moneys advanced the corporation is void for want of consideration. *Witt v. Wilson* (Civ. App.) 160 S. W. 309.

**18. Performance of legal obligation.**—It is sufficient consideration for a stranger's indorsement of a note, without which the purchaser would not take it, that, from the proceeds of the sale, he was to be and was paid what the payee of the note owed him. *Farmers' & Merchants' State Bank v. Falvey* (Civ. App.) 175 S. W. 833.

That a carrier of live stock furnished free transportation to the shipper as a caretaker is not consideration rendering binding a contract contained in a subsequently signed bill of lading waiving damages for failure to furnish cars as orally agreed. *Pecos & N. T. Ry. Co. v. Stinson* (Civ. App.) 181 S. W. 526.

Agreement by lessor to accept sum less than face of rent notes in consideration of lessee's surrendering possession at fixed time is unenforceable, where by terms of lease, lessee was bound to surrender possession at that time. *Boerger v. Vandegrift* (Civ. App.) 188 S. W. 948.

**18½. Evidence.**—In an action on chattel mortgage notes, evidence held to sustain a finding that the notes were supported by a consideration. *Trabue v. Guaranty State Bank* (Civ. App.) 173 S. W. 612.

Testimony that plaintiff hired a hack from defendant held sufficient to show payment of consideration and render defendant liable for the loss of baggage in transit. *Carter-Mullaly Transfer Co. v. Angell* (Civ. App.) 181 S. W. 237.

**20. Unenforceable or illegal consideration—Violation of statute or ordinance.**—Where a corporation sold all its stock to S. & Co., who employed R. to resell, and R. sold stock to defendant, receiving a note to S. & Co. for a part of the price, and another note for the balance, representing commissions, the latter note was not invalid as violating a statute prohibiting the corporation to sell stock except for money paid, labor done, or property actually received. *Scheffel v. Smith* (Civ. App.) 169 S. W. 1131.

A lease of space for a fruit stand outside a store, providing that if the occupation of the space be contrary to ordinance, then the lessee shall have space inside, is not illegal, though an ordinance is passed forbidding the erection of such stand on the sidewalk. *Wicks v. Comves* (Civ. App.) 171 S. W. 774.

When an act is prohibited by fundamental law or by statute as a means for protecting the public from fraud in contracts or to promote public policy, all contracts in violation thereof are void. *Republic Trust Co. v. Taylor* (Civ. App.) 184 S. W. 772.

Plaintiff entering into an insurance contract whereby he was to receive the benefits of a rebate offered in violation of *Vernon's Sayles' Ann. Civ. St. 1914, arts. 4897, 4954*, while the contract was executory, might recover the premiums paid thereunder. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

There is no merit in contention that consideration for special conditions of shipping contract was invalid, as making lesser rates contrary to schedules approved by the Interstate Commerce Commission, in the absence of evidence that the rate was not one of two rates approved by the Commission. *Betka v. Houston & T. C. R. Co.* (Civ. App.) 189 S. W. 532.

Where realty or personalty has been acquired by means of contract forbidden by Constitution or statute, or otherwise unauthorized, vendor may recover specific property, where clearly identifiable, by return of anything he may have received by virtue of contract of sale. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

The head of a faction in a foreign state cannot recover money, intrusted to an agent to buy arms in the United States in violation of law and contrary to the President's proclamation, from a secret service officer, to whom the agent delivered it, as the courts will not enforce agreements made in violation of law, or relieve the parties thereto. *Caranza v. Hicks* (Civ. App.) 190 S. W. 540.

In an action by the head of a faction in a foreign state to recover money intrusted to an agent to buy arms in violation of law and contrary to the President's proclamation, and turned over to a secret service officer, declarations of the agent held not to show plaintiff's right to the money and to be inadmissible. *Id.*

**21. — Public policy in general.**—A contract binding plaintiff to pool his stock in a newspaper corporation with the stock of defendant, under conditions that the parties and a third person will settle all differences, held contrary to public policy under *Vernon's Sayles' Ann. Civ. St. 1914, arts. 1154, 1159*. *Funkhouser v. Capps* (Civ. App.) 174 S. W. 897.

An agreement by a thrasher, after looking over a farmer's wheat ricks, that he would give the farmer 4,350 bushels of wheat therefor, the thrasher to retain any excess thrashed therefrom and to make good to the farmer any deficiency necessary to make up the 4,350 bushels, was unenforceable as a "wagering contract." *Comer v. Powell* (Civ. App.) 189 S. W. 88.

Contract for sale of cotton, held wagering contract which could be so declared by court, regardless of ambiguity due to terms peculiar to cotton trade. *Wolfe v. Andrews* (Civ. App.) 192 S. W. 266.

All contracts induced by fraud or deceit are not thereby void, unless tending to injure public service. *Varn v. Gonzales* (Civ. App.) 193 S. W. 1132.

"Public policy" is determined by the spirit of the Constitution or law of the state where contract is made or contrary to public morals or illegal from any cause which equity will not enforce. *Id.*

**22. — Immorality.**—Where an agreement contemplated unlawful use of property sold in a bawdyhouse, title being retained in the seller pending payment, the contract was for an illegal object, and payment of installments due and unpaid could not be enforced. *Hayes v. G. A. Stowers Furniture Co.* (Civ. App.) 180 S. W. 149.

Evidence that grantor, owning lots in sections devoted to houses of prostitution, constructed and sold houses to persons likely to use them for immoral purposes, held sufficient to show sale for immoral purposes. *Hall v. Edwards* (Civ. App.) 194 S. W. 674.

**23. — Inducing fraud.**—A contract binding a carrier of cattle transported for sale at destination to transport them with such speed as to require but one feeding and watering en route, so as to make the cattle in such condition at destination that they will inflate themselves with water and increase their weight when offered for sale, is void as in fraud of the rights of buyers, and cannot be made the basis for damages because breached. *St. Louis, I. M. & S. Ry. Co. v. West Bros.* (Civ. App.) 159 S. W. 142.

A contract having for its object the practice of fraud upon a third party to take advantage of confidential relations is void. *Varn v. Gonzales* (Civ. App.) 193 S. W. 1132.

**25. — Prevention of competition.**—An agreement that one of the parties should purchase property at a judicial sale and sell it to the other, which was not intended to stifle competition or prevent the property bringing a fair price, does not invalidate the sale. *Evans v. Carter* (Civ. App.) 176 S. W. 749.

**27. — Affecting appointment to or emoluments of office.**—A contract agreeing to pay money or other valuable thing to a testamentary trustee in consideration of his renunciation is void, being *contra bonos mores*. *Lednum v. Dallas Trust & Savings Bank* (Civ. App.) 192 S. W. 1127.

Evidence of an agreement of renunciation by testamentary trustees examined, and held not *contra bonos mores*, the trustees receiving no personal advantage, but surrendering in order that estate might be administered according to will. *Id.*

**28. — Ousting jurisdiction of courts and obstruction of justice.**—A stipulation in a contract of sale fixing a venue of any suit growing out of it is valid. *Texas Moline Plow Co. v. Biggerstaff* (Civ. App.) 185 S. W. 341.

A by-law of a fraternal beneficiary society declaring that a member's disappearance should be no evidence of his death, and that the by-law should be construed as a waiver of any statute, etc., thereon, held invalid, as a stipulation as to the admission of evidence ousting the court of its jurisdiction. *Sovereign Camp of Woodmen of the World v. Robinson* (Civ. App.) 187 S. W. 215.

**29. — Compounding offenses.**—An agreement by a creditor who had charged the debtor with crime to receive the amount of the debt and stop prosecution would be illegal and void. *Western Union Telegraph Co. v. Smith* (Civ. App.) 179 S. W. 548.

**32. — Effect of partial illegality.**—The whole consideration of the contract is void if any part thereof is illegal, and it is immaterial whether the illegality consists in a violation of statute or of the common law. *Lloyd v. Robinson* (Civ. App.) 160 S. W. 128.

A contract, illegal in part, may be specifically enforced if the illegal part is severable, but not if the contract is entire. *Wicks v. Comves* (Civ. App.) 171 S. W. 774.

Invalidity of a contract for the control of a corporation held to render invalid a provision for the sale and purchase of stock. *Funkhouser v. Capps* (Civ. App.) 174 S. W. 897. The rule that where the lawful part of a contract can be separated from the balance the unlawful part will be rejected does not apply where the consideration entering into the valid part is tainted with the illegality. *Id.*

If any part of consideration in a contract is illegal and not severable, the whole consideration is void, whether the illegality arises from statute or common law. *Prudential Life Ins. Co. of Texas v. Pearson* (Civ. App.) 188 S. W. 513.

An agreement for resumption of marital rights as part of the consideration for a deed, made by a husband to a wife, was void and rendered whole contract, including an agreement for ratification of a prior deed, illegal. *McKay v. McKay* (Civ. App.) 189 S. W. 520.

**33. — Relief to parties.**—The mere knowledge that money was to be used by the borrower for an illegal purpose will not, without some act in furtherance thereof, defeat the lender's right to recover. *Futch v. Sanger* (Civ. App.) 163 S. W. 597.

The court will not enforce an illegal contract, whether the illegality is *malum in se* or merely *malum prohibitum*. *Bishop v. Japhet* (Civ. App.) 171 S. W. 499.

Where plaintiff gave her check to defendant bank in consideration of its release of its claim against a third person, the law would not aid plaintiff to recover back the amount if the check was given to carry out an agreement to compound felony. *Schofield v. Texas Bank & Trust Co.* (Civ. App.) 175 S. W. 506.

A note, the consideration of which is illegal, cannot be enforced as between the parties. *Sturdevant v. Falvey* (Civ. App.) 176 S. W. 908.

If a contract is void for any reason, it is immaterial as to the ground rendering it void, as it cannot be enforced in any event. *Varn v. Gonzales* (Civ. App.) 193 S. W. 1132.

Where an illegal contract has been fully executed by the parties, the courts will recognize the rights and titles resulting therefrom, where the suit is not to enforce the contract itself. *Hall v. Edwards* (Civ. App.) 194 S. W. 674.

The courts will not assist in the furtherance of an illegal contract, and it is immaterial that the illegality does not appear upon the face of the contract. *Id.*

**34. — Relief to parties not in pari delicto.**—Where a conveyance is executed under circumstances showing both parties in *delicto*, but one less guilty than the other, as where he has a mere knowledge of the fact that the property is to be put to an illegal use, without furthering such use, equity will relieve him even to the setting aside of the conveyance. *Futch v. Sanger* (Civ. App.) 163 S. W. 597.

Plaintiff who on defendant's false representations that a proposed contract had been held legal by the courts, entered into it, and who received no benefit therefrom and abandoned it when he found it was illegal, was not in *pari delicto* and could rescind and cancel the note given to defendant. *Coons v. Lain* (Civ. App.) 168 S. W. 981.

Where plaintiff, under an illegal contract, procured the ostensible sale of a liquor business to defendant, intending to own it himself and on his repudiation of the contract sued defendant, who by a cross-action claimed title, the court properly refused to render judgment for plaintiff, but erred in refusing to render judgment for defendant sustaining his title and on a sequestration bond. *Bishop v. Japhet* (Civ. App.) 171 S. W. 499.

**35. — Further or subsequent agreement.**—Where defendant purchased property for immoral purposes, sale on foreclosure of trust deed was not an independent transaction, so as to make the sale valid. *Hall v. Edwards* (Civ. App.) 194 S. W. 674.

**36. Failure of consideration.**—Shortage in acreage of land and misrepresentation by the vendor or his broker as to the quantity of land sold held not a partial failure of con-

sideration for notes given by the vendee direct to a loan company, which advanced the amount specified therein, which was paid to the vendor as a part of the price. *Roberts v. Prather* (Civ. App.) 158 S. W. 789.

Where an agent of an insurance company who accepted a premium note failed to pay the amount of the premium to the company, as he agreed, on account of which the policy was canceled, the consideration for the note had failed, and the maker can recover judgment against the agent in an action against him and the payee by an indorsee of the note. *Newman v. Tarwater* (Civ. App.) 159 S. W. 495.

If stock was sold transferable to the purchaser only upon payment of his note, the refusal to deliver the stock would not constitute a failure of consideration of the note unless the seller had received payment of the note. *Cowboy State Bank & Trust Co. v. Guinn* (Civ. App.) 160 S. W. 1103.

Where an agent negotiated for his principal the sale of a worthless note for land, the grantor could recover the land for failure of consideration. *Rutherford v. White* (Civ. App.) 174 S. W. 930.

Where an assignment of moneys due one party was made under the other party's agreement to extend the time on a mortgage, but no extension was made, the assignment was without consideration. *First State Bank of Aransas Pass v. Fuson* (Civ. App.) 185 S. W. 1042.

### **Art. 590. [315] [273] Liability of drawer, etc., fixed by protest.**

**In general.**—An indorser's liability is conditioned upon default of the maker, and upon the holder fixing such liability by suit against the maker before the first term of court, under art. 579, or by protest according to this article, so that a petition in an action against an indorser was insufficient for not showing that his liability had been so fixed. *Dunn v. Townsend* (Civ. App.) 163 S. W. 312.

**Waiver of protest.**—A provision of a note that each surety and indorser waived notice, protest, and presentation for payment fixed the liability of an indorser upon nonpayment, without protest, as effectually as a protest would have done. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

### **Art. 593. [318] [276] Days of grace allowed on all bills and notes.**

**Days of grace.**—A bill payable on demand is suable at once, without grace, while a bill payable at sight is entitled to grace. *Waggoner Banking Co. v. Gray County State Bank* (Civ. App.) 165 S. W. 922.

**Art. 593a. Notes and liens for patent rights.**—That all notes and liens given for a patent right consideration or patent right territory shall state on their face that the same were given for a patent right. [Act March 22, 1915, ch. 76, § 1.]

**Explanatory.**—Act took effect 90 days after March 20, 1915, the date of the adjournment of the legislature.

**Art. 593b. Same; notice to subsequent purchasers.**—The aforesaid statement on the face of said notes or liens shall be notice to all subsequent purchasers of said notes or liens of all equities existing between the parties to the original transaction, and the same shall be subject to all defenses against subsequent owners and holders, that they would, if the same had remained in the hands of the original owner. [Id., § 2.]

**Explanatory.**—Sec. 3 makes it a misdemeanor to take a note for a patent or patent right territory without complying with the act, and is set forth in Vernon's Pen. Code 1916 as art. 999zzzz.

## **DECISIONS RELATING TO SUBJECT IN GENERAL**

**3. Execution and delivery.**—A contract signed by "M. & B. agents of the estate of B. O'Connor, authorized by E. O. Tenison," which recited that there was received of C. a certain sum in payment of a lot, would not bind John F. O'Connor in the absence of proof that the contract was authorized to be signed for him. *O'Connor v. Camp* (Civ. App.) 158 S. W. 203.

Where an escrow agreement provided for the delivery of vendors' lien notes on the final determination of litigation concerning the land in question, such final determination meant a final settling of the rights of the parties beyond appeal, and was not satisfied by dismissal of the action by consent of the parties. *Hanby v. First Nat. Bank* (Civ. App.) 163 S. W. 415.

A written contract is not completed until signed or accepted and acted upon by the party not signing. *Benson v. Ashford* (Civ. App.) 189 S. W. 1093.

**5. Designation of parties.**—No one is chargeable on a note unless his name appears as a party to it in some relation. *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993.

The holder of notes executed alone by a partner for land, the deed to which ran to him alone, though the circumstances were such as to constitute him a trustee for his unnamed partner, could not recover thereon against such unnamed partner. *Manley v. Noblitt* (Civ. App.) 180 S. W. 1154.

**6. Designation of amount.**—The marginal figures in the corner of a note are not a part thereof, and where a difference exists between them and the sum stated in the body of the note, the latter controls. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

**9. Acceptance.**—A bill payable on demand is due and suable at once while a bill payable at sight must be presented for acceptance before it can be enforced against par-



ties collaterally liable. *Waggoner Banking Co. v. Gray County State Bank* (Civ. App.) 165 S. W. 922.

The drawee of an order held not to have accepted the order by the words, "the order shall have our attention" at an uncertain time. *H. J. Murrell & Co. v. Edwards* (Civ. App.) 179 S. W. 532.

10. — **Effect.**—Where drafts were presented to and accepted by defendant, there was a primary contract between him and owner of drafts, and he became absolutely liable, regardless of question whether or not payee in drafts was alive or dead when they were drawn. *Bloch v. Rio Grande Valley Bank & Trust Co.* (Civ. App.) 190 S. W. 541.

12. **Validity.**—In a suit on a bond evidence held to sustain a verdict that the obligor notified the obligee he would not be bound unless the signatures of others were procured. *Francis v. Cornelius* (Civ. App.) 173 S. W. 947.

The court will cancel notes secured by mortgage given for stock subsequently issued by a corporation in violation of law. *General Bonding & Casualty Ins. Co. v. Mosely* (Civ. App.) 174 S. W. 1031.

If the promise of defendant's agents to loan plaintiff money was part of the agreement when plaintiff signed a stock subscription contract, he should have sought reformation, and cannot maintain suit to cancel the contract. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936.

In an action on a note against administrator of maker, where defense was that note was given as consideration for a fraudulent sale of plaintiff's stock of goods, without intent it should be paid, evidence held to support a verdict for defendant. *Powell v. Erwin* (Civ. App.) 189 S. W. 563.

Notes held valid, though effort to create lien on homestead for entire debt was ineffectual because part of debt was for something for which homestead could not be incumbered. *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

13. — **Fraud, duress and mistake.**—In an action upon a check given by defendant to pay for repairs to his automobile, where plaintiffs by unlawfully withholding possession of the machine compelled the giving of a check for a larger amount than that which was really due, their good faith in enforcing a claim, in fact improper, will not affect defendant's right to set up duress as a defense. *Caldwell v. Auto Sales & Supply Co.* (Civ. App.) 158 S. W. 1030.

Statement of payee's agent that notes were payable at P. with no effort to conceal the fact that they provided for payment at H. if not paid at maturity held not to constitute fraud in obtaining the execution of the notes. *Newman v. Buffalo Pitts Co.* (Civ. App.) 160 S. W. 657.

That notes were procured by payee's agent by misrepresentations concerning a matter in which the payee was not interested held a defense to the notes in the hands of the payee. *Bankers' Trust Co. v. Franks* (Civ. App.) 178 S. W. 602.

Testimony of woman seeking cancellation of note to bank for fraud held open to a construction rendering her agreement with the cashier of the bank not fraudulent as to the bank so as to defeat relief. *Lockney State Bank v. Damron* (Civ. App.) 179 S. W. 552.

Cashier's misrepresentation to maker of note to bank as to its amount that he was also a party and would stand between her and all danger held sufficient ground for a cancellation. *Id.*

Purchaser sued on note for purchase price held entitled to rely upon misrepresentations as a defense, not on the theory of fraud and deceit, but because they were warranties. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

Instrument will not be set aside for mistake of one of the parties unless superinduced by fraud of other. *Yantis v. Jones* (Civ. App.) 184 S. W. 572.

Evidence in a suit on a note detached from a written contract or order executed by defendant and plaintiff's assignor, held to sustain finding that contract or order had been obtained from defendant for fraudulent purpose of realizing on it by transfer to third party. *Landon v. Halcomb* (Civ. App.) 184 S. W. 1098.

In bank's suit on note for \$150, wherein defendants claimed they had been defrauded, when one of them borrowed \$125, into signing the note, evidence held sufficient to support judgment for defendants. *Farmers' & Citizens' Sav. Bank v. Smith* (Civ. App.) 188 S. W. 1026.

In bank's suit on note, evidence held insufficient to sustain finding that a defendant obtained possession of note sued on from another defendant by means of fraudulent representations of such character as to amount to a fraudulent taking of the note without consideration. *Guaranty State Bank v. Bland* (Civ. App.) 189 S. W. 546.

14. **Alteration.**—Erasure of the name of a surety from a supersedeas bond by a stranger held not to affect the legality of the instrument. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 160 S. W. 337.

If, after signing, a bill of lading was altered by adding the words "charges guaranteed," the alteration was material and would not bind the consignor. *Chicago, R. I. & G. Ry. Co. v. Floyd* (Civ. App.) 161 S. W. 954.

Since a payee who makes a special indorsement of a note, and afterwards becomes its owner, may strike out his own and subsequent indorsements, and sue thereon in his own name, his erasure of his own indorsement is not such an alteration as to release the maker. *Smalley v. Vinton* (Civ. App.) 164 S. W. 918.

Alteration of a note by changing the indorsement, by permission, after suit had begun, held error. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

A change of a purported indorsement on the back of a note, originally indorsed thereon without authority, would not be an alteration of a contract. *Roberds v. Laney* (Civ. App.) 165 S. W. 114.

The insertion of the words "or bearer" following the name of the payee was not a material alteration. *Douglass v. Lockhart* (Civ. App.) 168 S. W. 382.

Detaching of note for price of piano from order for the piano as authorized in the order held not an alteration of the contract. *Harrison v. Hunter* (Civ. App.) 168 S. W. 1036.

An alteration of a stock subscription contract with respect to the number of shares and amount of capital stock subscribed for, releases the subscribers. *Bohn v. Burton-Lingo Co.* (Civ. App.) 175 S. W. 173.

The rule that where the instrument has been altered, recovery may be had on the original instrument applies only where the alteration has been without fraudulent intent. *Id.*

Change in personality, number, or relation of parties to instrument, without consent of the opposite party, held to avoid it, even in the hands of an innocent purchaser. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

Where a note was attached without line or perforation to a conditional contract of sale, its subsequent detachment and negotiation was an alteration avoiding the note in the hands of an innocent purchaser for value. *Spencer v. Triplett* (Civ. App.) 184 S. W. 712.

Where the plaintiff's assignor and defendant, parties to a contract or order with a note attached, intended and understood that the note was not to be detached, its detachment for the purpose of negotiations was a material "alteration" of the note. *Landon v. Halcomb* (Civ. App.) 184 S. W. 1098.

Bank's innocent alteration of due date of note, pursuant to agreement with signatory, held to have destroyed instrument as an obligation, despite stipulation whereby parties secondarily liable waived presentment, etc., and agreed that, if note was extended as to principal, their liability would not be affected. *Caldwell Nat. Bank v. Reep* (Civ. App.) 188 S. W. 507.

While a material, though innocent, alteration of a note, destroys it as an obligation, and as a premise for recovery, under appropriate conditions recovery may be had on the original consideration. *Id.*

Where a note recited it was payment on numbered contract, erasure of number was a material alteration which would defeat action. *Metropolitan Nat. Bank v. Vanderpool* (Civ. App.) 192 S. W. 589.

Change in contract of guaranty effected by a stranger to the instrument did not defeat recovery upon the contract as actually made. *Goodman v. W. S. Peck & Co.* (Civ. App.) 192 S. W. 785.

In suit on contract of guaranty, evidence held to justify trial court's finding that change in contract was in defendant's handwriting. *Id.*

**15. — Erasures before signing.**—Where a printed statement in a contract is written over, varying its terms, the one accepting the contract must be held to have understood the significance of the change, and failure of his agent to communicate it would not provide him with a defense. *American Mfg. Co. v. O. C. Frey Hardware Co.* (Civ. App.) 180 S. W. 956.

Evidence held to show that interlineations in a contract were made by the defendant, who denied it, and were of date concurrent with the contract. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

**16. Indorsement and transfer in general.**—In action on a premium note transferred by an insurance company to its soliciting agent in consideration of his paying the cost of term insurance, after the note had been dishonored, evidence held to warrant a finding that the writing of the words "with recourse" following the entire indorsement in blank was a mistake. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 163 S. W. 396.

In an action on a note, evidence held to support a finding that the payee did not authorize its indorsement in her name by a third person. *Sloan v. Gilmore* (Civ. App.) 167 S. W. 1089.

The mere fact that the payee of a note is such in a fiduciary capacity does not incapacitate him to transfer it. *Baker v. Brown* (Civ. App.) 186 S. W. 813.

It is not essential to validity of transfer of a note by the payee that the maker agree to or direct the transfer. *Id.*

An indorsement of a note by an agent in his own name does not bind the principal. *Borschow v. Wilson* (Civ. App.) 190 S. W. 202.

In a suit on a note payable to maker and indorsed in maker's name, evidence held to support a finding that maker executed indorsement. *Amthorn v. First State Bank of Uvalde* (Civ. App.) 194 S. W. 1019.

**18. Title and rights acquired by purchase or payment.**—A note and a trust deed given to secure it are so blended and merged into each other that an assignment or transfer of the note carries with it the mortgage lien. *Ward v. San Antonio Life Ins. Co.* (Civ. App.) 164 S. W. 1043.

**19. Liability on indorsement.**—The indorsement of a note by a stranger for a consideration, on the sale thereof, carries with it his warranty of its genuineness, making him liable to the purchaser, even if the note is void as to the maker. *Farmers' & Merchants' State Bank v. Falvey* (Civ. App.) 175 S. W. 833.

In an action on a note which defendants indorsed before negotiation, evidence held to warrant a finding that they were primarily liable. *Hill & Meredith v. First State Bank of Hillsboro* (Civ. App.) 181 S. W. 219.

An insurance company, which issued its stock, contravening Constitution and statute, for a note, and indorsed before maturity to a third person as part consideration for property transferred, was liable to the third person on its indorsement. *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825.

An indorser cannot escape liability by showing that he had an understanding that his indorsement was to be without recourse on him, that he was ignorant of the legal effect of signing his name on the back of the note, and that he was told that signing his name was only a formal matter necessary to transfer. *Barger v. Brubaker* (Civ. App.) 187 S. W. 1025.

The indorser of a note, being only secondarily liable, cannot be held until a valid obligation is established against the maker. *Hackney Mfg. Co. v. Celum* (Civ. App.) 189 S. W. 988.

If one not having an assignable interest in promissory notes joined in an indorsement for purpose of assignment alone, his liability would have been that of a surety

or guarantor, and not that of an ordinary indorser. *Borschow v. Wilson* (Civ. App.) 190 S. W. 202.

20. — **Compelling resort to security.**—Where note and mortgage were given and payee indorsed note, by such indorsement he impliedly agreed that he was satisfied with transaction, and indorsee could accept the security as tendered and rely on indorsement, on which he could recover; though the security was lost owing to failure to record mortgage. *Nunn v. Smith* (Civ. App.) 194 S. W. 406.

22. **Indorsement without recourse.**—A holder of notes indorsed without recourse cannot recover against his indorser on the notes, though he was induced by fraud to purchase them, but his remedy is by rescission of the contract and recovery of the price or by action for damages for fraud. *Doolen v. Hulsey* (Civ. App.) 192 S. W. 364.

23. **Discharge of indorser.**—Where a note was obtained by fraudulent representation without consideration and plaintiff was not a bona fide holder without notice, releasing the maker from liability, an indorser was also released. *Wills v. Tyer* (Civ. App.) 186 S. W. 862.

26. **Indorsement in blank.**—A note payable to maker's order, when indorsed in blank, becomes, in legal effect, a note payable to bearer. *Kanaman v. Gahagan* (Civ. App.) 185 S. W. 619.

27. **Liability of guarantor.**—On a guaranty of the collection of certain assets of a bank, time not being of the essence, the guarantors were not relieved from liability because the uncollected paper was not delivered to an attorney for suit within 30 days after maturity as provided for. *Young v. Bank of Miami* (Civ. App.) 161 S. W. 436.

Where a note and contract of guaranty showed that defendant was liable on the note only as guarantor, the substitution as principal payor of the note of an insolvent corporation for the original payor, which was solvent, released the guarantor. *May v. Waniger* (Civ. App.) 164 S. W. 1106.

Where defendant's guaranty of certain drafts drawn on a grain company was subject to presentation of drafts, with bills of lading attached, direct to defendant for payment, the conditions were not waived by a course of transmission direct to the grain company, disregarding defendant, so as to make it liable for a draft so presented and refused by the drawee, without bill of lading attached. *Waggoner Banking Co. v. Gray County State Bank* (Civ. App.) 165 S. W. 922.

A written guaranty of payment for merchandise limited in amount held a continuing one which rendered the guarantors liable, though the principal had paid more than the amount limited. *Woelfel v. Rotan Grocery Co.* (Civ. App.) 184 S. W. 803.

The liability under a guaranty will be construed as continuing when it is evident the object was to give a standing credit to the principal debtor to be used from time to time. *Id.*

28½. **Construction in general.**—A contract will be construed most strictly against the one who wrote it. *St. Louis, B. & M. Ry. Co. v. Hicks* (Civ. App.) 153 S. W. 192; *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

A contract should be construed as a whole. *Sparkman v. Davenport* (Civ. App.) 160 S. W. 410; *Riggins v. Post* (Civ. App.) 172 S. W. 210; *Broocks v. Moss* (Civ. App.) 175 S. W. 791; *Taylor v. First State Bank of Hawley* (Civ. App.) 178 S. W. 35.

In construing written instruments effect must be given to every clause if possible, and in determining whether apparently contradictory provisions can be harmonized, the entire instrument should be looked to in the light of the surrounding circumstances. *Thompson v. Waits* (Civ. App.) 159 S. W. 82.

Where two purposes or intents may be inferred from the language of a written instrument, and the main purpose clearly appears, it will control, but this merely means that where the language is susceptible of two meanings, that will be adopted which does not contradict the main purpose, as evident on the face of the instrument. *Id.*

Where the language of a written instrument admits of but one meaning, and the different clauses are plainly contradictory, they mutually destroy each other and render the instrument void. *Id.*

Courts should hesitate to change by implication the terms of express contracts. *Northern Irr. Co. v. Dodd* (Civ. App.) 162 S. W. 946.

The governing principle in the construction of contracts is the intention of the parties. *Rankin v. Rhea* (Civ. App.) 164 S. W. 1095.

Where an instrument is susceptible of two constructions, the one working no injustice should be adopted. *Id.*

It is the duty of courts to enforce contracts as they have made them, notwithstanding a hardship may be worked. *Id.*

Particular words may not be isolatedly considered, but the whole contract must be interpreted with reference to the nature of the obligation between the parties. *Id.*

The meaning of words in a contract is governed by the intent of the parties, and, though the terms are not ambiguous, the situation of the parties, the subject-matter, and other circumstances may be looked to, and a party will be bound by that meaning which he knew the other party supposed the words to bear. *Dublin Electric & Gas Co. v. Thompson* (Civ. App.) 166 S. W. 113.

In construing a written contract, words used should be accepted in their ordinary sense, unless there is something to show that they were used in a different sense. *Gulf Refining Co. v. Brown-Lloyd Co.* (Civ. App.) 167 S. W. 162.

A telegram by a bank to protect drawees on drafts secured by cotton against overdrafts held an unconditional guaranty. *William D. Cleveland & Sons v. First State Bank of Floydada* (Civ. App.) 176 S. W. 663.

The rule that the contract of a guarantor is to be strictly construed in his favor is applied only after the legal scope of its terms is determined by the same rule of construction applied to other writings. *Taylor v. First State Bank of Hawley* (Civ. App.) 178 S. W. 35.

In construing a contract the court should seek the intention of the parties from the words used, the subject-matter, and the purpose of the agreement, reconciling conflicting clauses, and considering the instrument as a whole in the light of surrounding

circumstances, to give it a fair and customary construction, giving effect to all terms. *Stone v. Robinson* (Civ. App.) 180 S. W. 135.

Where the maturity of a note rests at the election of the holder, until such election is exercised the debt will not be considered due. *Cofer v. Beverly* (Civ. App.) 184 S. W. 608.

Contracts are to be construed in accordance with intention of parties ascertained from writing itself when meaning is clear. *Corbin v. Booker* (Civ. App.) 184 S. W. 696.

When some of the provisions of a contract are printed and some written, and there is a conflict between the printed and written provisions, the printed must yield. *American Nat. Ins. Co. v. Van Dusen* (Civ. App.) 185 S. W. 634.

The giving of a note for an antecedent note will not extinguish the latter unless the parties so intend. *Jackson v. Home Nat. Bank of Baird* (Civ. App.) 185 S. W. 893.

Where a note is of doubtful meaning, or the language is ambiguous, the construction given by the parties themselves, as shown by their conduct or admissions, will be deemed the true one. *T. W. Marse & Co. v. White* (Civ. App.) 189 S. W. 1027.

Where a contract is ambiguous because of apparent inconsistencies between the written or typewritten and printed parts, the written or typewritten words control. *Producers' Oil Co. v. Snyder* (Civ. App.) 190 S. W. 514.

Where the printed terms of sale of a contract were left blank, the terms written in ink are conclusive. *Ames Portable Silo & Lumber Co. v. Worrall* (Civ. App.) 194 S. W. 480.

**29. Construction as to parties—Joint or several.**—Where a note recites that "we" promise to pay, and is executed by the president of a corporation for the company, and indorsed by him as surety, it must be treated as a joint obligation. *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897.

**30. — Principals, sureties, or guarantors.**—In an action on a note, evidence held to sustain finding that a maker gave the comaker authority to execute the note for the former, and not merely bind him as surety. *Connor v. Uvalde Nat. Bank* (Civ. App.) 172 S. W. 175.

One who, as part of the original transaction, indorses a draft is liable to pay it if the drawer fails to do so. *Harper v. Winfield State Bank* (Civ. App.) 173 S. W. 627.

One not the payee of a note, who signs his name on the back thereof before delivery without words to express the nature of his undertaking, is an original promisor or surety. *Brooks v. Stevens* (Civ. App.) 178 S. W. 30.

Letter of defendant, assistant cashier of bank, in response to inquiry as to financial standing of corporation, held not a personal guaranty of draft thereafter drawn on corporation. *Taylor v. First State Bank of Hawley* (Civ. App.) 178 S. W. 35.

Under agreement whereby indorsers renewed a note without the maker's signature, and whereby one indorsed such note without agreement fixing his liability and afterwards renewed the note, they would not be sureties, but principals. *Wilson v. Thompson* (Civ. App.) 186 S. W. 773.

Joint obligors on a note are, as between themselves, each sureties for the payment of the shares of the others. *Red River Nat. Bank v. Ferguson* (Civ. App.) 192 S. W. 1088.

Relation between indorser and maker of note, even after liability of indorser is fixed by protest or waiver, is very similar to that of principal and surety, and most acts which will discharge one will discharge other. *Nunn v. Smith* (Civ. App.) 194 S. W. 406.

**31. Accommodation parties.**—An accommodation maker of a note might at any time before payee bank advanced money thereon, withdraw from his engagement evidenced thereby. *First State Bank of Teague v. Hare* (Civ. App.) 190 S. W. 1113.

Where one of two accommodation makers of a note before payee bank had advanced money thereon notified bank of his withdrawal from note, his release did not release other accommodation maker. *Id.*

**32. — Relation to other makers.**—President of corporation who writes his name on back of its note, at inception, before delivery, for accommodation of corporation, is surety and not indorser. *Houston Transp. Co. v. Paine* (Civ. App.) 193 S. W. 188.

**35. Collateral agreements.**—A purchaser under a contract stipulating that he would sell and transfer to the vendor two notes executed by a third person, one of which was received as shown by the recitals in the deed as cash, was only required to indorse such note without recourse. *Clopton v. Abee* (Civ. App.) 158 S. W. 180.

An agreement between the makers of a note that it should not be used unless signed by other parties will not defeat the payee's right to recover on it, unless he had notice thereof when he accepted it. *Solomon v. Merchants' & Planters' Nat. Bank* (Civ. App.) 168 S. W. 1029.

In an action on a note given in payment for corporate stock, held, that the balance of the stock subscribed for by the payee of the note which was not legally issued under Const. art. 11, § 6, had never been placed as required by a collateral agreement before defendant's obligation became binding. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Cause of action against person fraudulently failing to sign renewal note as agreed held for breach of such promise and not on the note. *Kelley v. Audra Lodge No. 438, Fraternal Union of America* (Civ. App.) 176 S. W. 784.

Two signers of a note as principals had the right to sign and deposit it with the payee on condition that it should not become valid until other principals had signed it. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

**37. — Security.**—Drawer of draft payable to plaintiff bank held not released from liability by its cashier's agreement as to sale of cotton subject to lien, nor entitled to complain of irregularity therein, where it was sold at market value and the proceeds were credited to him. *Harper v. Winfield State Bank* (Civ. App.) 173 S. W. 627.

Mere knowledge on the part of a bank, holder of notes, that a third party was an indemnitor and had agreed to pay the same, did not impose on the bank any obligation to pursue the third party and to exhaust securities owned by him and in the bank's hands before suing the maker. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

In action by bank on note, an answer demanding accounting under alleged agreement

of payee to deposit with plaintiff bank moneys realized upon sale of lands in which maker was interested, which moneys were to be applied on note, held to state good defense as against general demurrer. *Seabrook v. First Nat. Bank of Port Lavaca* (Civ. App.) 192 S. W. 314.

**38. Extension and agreements to extend.**—An agreement to extend the time of payment of vendor's lien notes, in consideration of the debtor's agreement to pay interest, is not binding, where the debtor did not obligate himself to pay interest for a definite time and there was no agreement to extend the notes for any stated period. *Workman v. Ray* (Civ. App.) 180 S. W. 291.

**39. — Sufficiency.**—Request for and promise of extension of time of payment of note held not to show extension. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

**40. — Effect.**—Giving time to one joint maker of a negotiable note does not discharge the other joint makers. *Hardy v. Carter* (Civ. App.) 163 S. W. 1003.

The provision of a contract guarantying the payment of an indebtedness that an extension of time for payment should not discharge the guarantor was effectual, and discharge would not follow on extension, though unconsented to by the guarantor. *Neblett v. Cooper Grocery Co.* (Civ. App.) 180 S. W. 1162.

Where the holder of a vendor's lien note exercised his option to declare the whole debt due for failure to pay an interest installment, an agreement by such holder after declaring the note due to extend the time for payment of interest bound his assignee. *Cofer v. Beverly* (Civ. App.) 184 S. W. 608.

Agreement by holder of note for extension of time for payment of installment of interest held to estop him and his assignee from declaring the entire note due, under its provisions, for failure to pay the installment when due. *Id.*

One who signed a written guaranty expressly authorizing the extension of time for payment is not released by the taking of additional security as a consideration for such extension. *Woelfel v. Rotan Grocery Co.* (Civ. App.) 184 S. W. 803.

**42. Defenses against payee.**—The fact that the note sued on was given by defendant to guarantee the payment by a contract purchaser of land of the consideration of the purchase, and not as a forfeit upon the purchaser's failure to perform, would not be a defense to an action on the note by vendor on the purchaser's failure to perform. *Sears v. Ainsworth* (Civ. App.) 166 S. W. 60.

Committee of citizen subscribers defaulting in its contract undertaking to furnish railroad with title to right of way, so that injunction had restrained completion of grade work within the contract time, held not entitled to possession and cancellation of its promissory notes. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

Seller of piano held entitled to recover on notes given for its price; the facts not showing rescission of the contract. *Perry v. Smith* (Civ. App.) 180 S. W. 160.

The execution of notes and mortgages in payment of an irrigation plant held no defense to an action by the purchaser for damages for the failure of the machinery to irrigate the crops. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

That a purchaser of irrigating machinery gave notes to secure the purchase price and the seller forebore to enforce collection will not preclude the purchaser from recovering damages for loss of crops due to the failure of the machinery to properly irrigate the land. *Id.*

Cancellation of subscription note held properly denied, where, though maker's brother was to sign it, a note by the brother had been turned over to plaintiff, and he had not offered to return it. *Collett v. Quanah, A. & P. Ry. Co.* (Civ. App.) 183 S. W. 857.

**43. Payment, tender or release.**—A note for \$200, executed by plaintiff to defendant, was satisfied and discharged if plaintiff afterwards presented to defendant a bill for \$200 for services in satisfaction of the note, and requested that the note be returned, and defendant impliedly acquiesced in such means of payment. *Autrey v. Collins* (Civ. App.) 161 S. W. 413.

Where renewal notes were not executed according to the agreement, the creditor's extension of time and acceptance of the renewal notes held not to discharge the original note which was retained. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

Where a note was the joint and several obligation of the makers, the release of one of them did not operate as a release of the others. *Tinkham v. Wright* (Civ. App.) 163 S. W. 615.

Where either of two renewal notes constituted a novation, the note for which the renewals were given was no longer a binding obligation. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

Where the holder of a note providing for attorney's fees, instituted suit thereon, a tender of the principal and interest due, but without the attorney's fees, or accrued costs, is insufficient. *Dawson v. Falfurrias State Bank* (Civ. App.) 181 S. W. 533.

**44. — Application of payments.**—If there was no appropriation of a payment made upon a promissory note, it would be applied to the interest. *Wilson v. Ware* (Civ. App.) 166 S. W. 705.

**45. — Recovery of payments made.**—A purchaser, making a partial payment and giving a note for a partial payment, held entitled to recover the money paid and the note, on the vendor being unable to give good title without awaiting the outcome of a suit to perfect the title. *Raywood Canal & Milling Co. v. Sharp* (Civ. App.) 175 S. W. 499.

Vendor receiving partial payment and note for another payment held liable to purchaser therefor, on his inability to convey good title within the specified time, though purchaser stated that he was unable to perform. *Id.*

A vendor held to waive the purchaser's nonpayment of a note, so that the purchaser could recover a partial payment made and the note. *Id.*

A receiver of a company which had received defendant's note, without consideration and upon a credit and had transferred it to a bank and had paid it when indebted to

defendant for a greater amount and charged defendant the amount, but failed to return it to defendant, could not recover thereon. *Orange Iron Works v. Stafford* (Civ. App.) 178 S. W. 683.

Where payees, contrary to their agreement, transferred note to an innocent purchaser who secured a judgment, including attorney's fees against the maker, the maker could recover the entire amount, and not merely face of note, from the payees. *Texas Life Ins. Co. v. Huntsman* (Civ. App.) 193 S. W. 455.

46. — **Agreement to pay note.**—In an action on a note of a corporation, evidence held to warrant a finding that defendant had assumed payment of the note, and had not merely agreed to indemnify the indorser. *Bank of Garvin v. Freeman* (Sup.) 181 S. W. 187.

47. — **Evidence.**—In a suit on a note, evidence held to show that it was not intended that the notes which were given to secure a guaranty should be discharged when the guaranty was discharged. *Gaines v. Brown* (Civ. App.) 177 S. W. 220.

In suit to recover balance due on a partnership note, facts held not to show a composition agreement between debtor and creditors, whereby the creditors were to take 60 cents on the dollar. *Abernathy Rigby Co. v. McDougle, Cameron & Webster Co.* (Civ. App.) 187 S. W. 503.

50. **Attorney's fees—Right in general.**—A stipulation in a note for 10 per cent. attorney's fee is valid. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

A provision in a note that, if it be placed with an attorney for collection, the maker will pay 10 per cent. as attorney's fees should be enforced unless unreasonable. *Childs v. Juenger* (Civ. App.) 162 S. W. 474.

A vendor cannot recover an attorney's fee provided for in vendor's lien notes on default in making payments, where no part of the debt was due at the time suit was brought. *Humphreys v. Douglass* (Civ. App.) 177 S. W. 569.

51. — **Nature of claim.**—Where purchaser in possession sued for title to land, claiming the notes he would have executed therefor, if they had been presented, would have been barred, and defendant recovered, defendant was not entitled to the stipulated attorney's fees on the notes, since his recovery was not on the notes, but in equity on his superior title to the land and after long delay in prosecuting his claim. *Corbett v. Allman* (Civ. App.) 189 S. W. 91.

52. — **Against whom recoverable.**—Purchaser of land from grantee of original purchasers, who had given vendor's lien notes therefor carrying attorney's fees, who had assumed payment of the debt of the sum called for, held liable for such fees in suit on the notes by the original vendors. *Allen v. Traylor* (Civ. App.) 174 S. W. 923.

53. — **Placing with attorney for collection.**—A payee of notes who may, at his option, declare all the notes due for nonpayment of the note first maturing, need not give the maker notice of his election to declare all the notes due before placing them in the hands of an attorney for collection, and making a contract for attorney's fees to recover the same as provided in the notes. *Coleman v. Garvin* (Civ. App.) 158 S. W. 185.

A payee of a note stipulating for attorney's fees, who placed the note in the hands of an attorney only for foreclosure, may not recover attorney's fees. *Gunter v. Merchant* (Civ. App.) 172 S. W. 191, rehearing denied 173 S. W. 260.

54. — **Bringing suit.**—A holder of a note, stipulating for attorney's fees in the event of an action thereon, may not recover attorney's fees where he does not bring suit, but compels another to do so, and contests the right to maintain the action. *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

Where a note provided for 10 per cent. attorney's fees if not paid at maturity, and suit was instituted on the third day of grace, attorney's fees were properly allowable where trial was not had until nearly two months thereafter; the error in prematurely filing the action having been cured. *Robertson v. Balkam* (Civ. App.) 192 S. W. 583.

55. — **Payment to, or agreement with, attorney.**—Where defendant took notes which were then being sued on by plaintiff under an agreement with former owners that he should receive the 10 per cent. attorney's fees stipulated therein, with knowledge of such agreement, and that the suit was pending, held, that defendant was bound, as upon a constructive contract, to pay the attorney's fees to plaintiff upon the judgment being taken in defendant's name. *Caldwell v. Stalcup* (Civ. App.) 166 S. W. 110.

57. — **Amount.**—A stipulation in a note for 10 per cent. attorney's fee will be enforced when the note is collected by suit without a showing of the amount paid by the holder to his attorney. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

In an action on a note stipulating for attorney's fees, where there was no proof that the stipulated fees were unreasonable or unconscionable, the court was authorized to act on the stipulation and enter judgment for the stipulated amount. *Lock v. Citizens' Nat. Bank* (Civ. App.) 165 S. W. 536.

The full amount of attorneys' fees stipulated in notes sued on may in the absence of plea and proof of its unreasonableness, and therefore on default, be included in the judgment. *McCaulley v. Farmers' & Merchants' State Bank & Trust Co.* (Civ. App.) 175 S. W. 728.

58. — **Reasonableness.**—Holder in due course of notes providing for 10 per cent. attorney's fees could recover attorney's fees without proving the reasonable value of the services rendered, in the absence of proof that the amount was unreasonable. *Brannin v. Richardson* (Sup.) 185 S. W. 562.

59. **Right of action on note.**—When a note is payable to bearer, possession passes property and is sufficient authority for maintaining suit. *Kanaman v. Gahagan* (Civ. App.) 185 S. W. 619.

60. **Accrual of cause of action.**—Bringing of suit on notes containing stipulations that failure to pay one when due should mature the other at holder's election, one being past due when suit was instituted, held sufficient to show holder's election to declare second note due. *Stewart v. Thomas* (Civ. App.) 179 S. W. 836.

Where the failure to pay an installment of a debt ipso facto matures the whole debt, it is not the rule that by accepting payment of overdue installments or extending time upon an installment the creditor waives the default. *Cofer v. Beverly* (Civ. App.) 184 S. W. 608.

Where a mortgagor makes an honest, but unsuccessful, effort to find the mortgagee and to tender him his interest and is prevented from ascertaining the owner of the note, the courts have the power to release the mortgagor from the effect of nonpayment, which would otherwise mature the whole debt. *Id.*

Sale of note, given to secure advancement of price of land, by the assignee of the original payee, with the understanding that the suit instituted by the assignee should be dismissed, and its dismissal, did not annul the assignee's election to declare the note due for nonpayment of interest, or estop the buyer from such election. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

The holder of a check may, on the drawee refusing payment, sue the indorser without returning the check to him, having credited his account with the amount thereof and paid his drafts, reducing his balance below such amount. *Morris v. First State Bank of Dallas* (Civ. App.) 192 S. W. 1074.

**63. Lost instruments—Indemnity.**—In a suit against a corporation to establish rights under lost stock, the court may order an indemnity bond to be given to defendant as a condition precedent to plaintiffs' recovery. *Yeaman v. Galveston City Co.* (Civ. App.) 173 S. W. 489, certified questions answered by Supreme Court 167 S. W. 710, 106 Tex. 389.

**64. Conversion of note.**—Measure of damage for conversion, while maker was solvent, of notes given to cover purchase price of stock sold by plaintiff, in which notes he held a 15 per cent. interest as commission, held 15 per cent. of the face of such notes. *Mutual Loan & Investment Co. v. Matthews* (Civ. App.) 176 S. W. 924.

In an action for conversion of notes given for the price of stock sold by plaintiff, in which notes he had a 15 per cent. interest as commission, converted by defendant, his principal, by transferring them to liquidate its own debt, judgment for plaintiff for 15 per cent. of face of notes, less credit arising through individual dealings between him and purchaser of stock, held proper. *Id.*

Return of notes converted to defendant, who transferred them, held not to bar plaintiff's right of action for the initial conversion. *Id.*

Transfer by defendant of notes, together with stock, purchased therewith and pledged by buyer as security, to liquidate an individual indebtedness of defendant, held a conversion of the 15 per cent. interest in such notes of plaintiff, who had negotiated the sale. *Id.*

If one joint owner of a secured note assumed authority to deal with interest of co-owner, and loss ensued, measure of damages would be value of co-owner's interest. *Beall v. Clack* (Civ. App.) 190 S. W. 774.

One joint owner in possession of a secured note payable to order of co-owner has no authority to dispose of co-owner's interest in note or convert it to its own use. *Id.*

## TITLE 17

## BLACKLISTING

**Article 594. Discrimination.**

**Constitutionality.**—The provision compelling a corporation to give a discharged employé a statement of the cause of discharge is unconstitutional. Galveston, H. & S. A. Ry. Co. v. King (Civ. App.) 174 S. W. 335; Galveston, H. & S. A. Ry. Co. v. State (Civ. App.) 175 S. W. 1096.

The impairment of a corporation's right to discharge employes by the Blacklisting Law cannot be sustained as an exercise of the police power. The law is invalid as a denial of the equal protection of the laws secured by Const. U. S. Amend. 14, as violative of the constitutional right of liberty of contract, and violative of the liberty to speak and write secured by Const. art. 1, § 8. Where a contract of employment is for an indefinite time, either party may end it at will without cause or notice. St. Louis Southwestern Ry. Co. of Texas v. Griffin, 171 S. W. 703, 106 Tex. 477, reversing judgment (Civ. App.) 154 S. W. 583.



## TITLE 18

## BONDS—COUNTY, MUNICIPAL, ETC.

Chap.		Chap.
1. General provisions and regulations as to the issue of bonds.		3. Funding, refunding, and compromise of indebtedness.
2. Particular provisions and regulations as to issue of bonds.		

## CHAPTER ONE

GENERAL PROVISIONS AND REGULATIONS AS TO THE  
ISSUE OF BONDS

Art.		Art.
605. Election on bonds required.		616. Annual tax to meet interest and sinking fund.
606. Proposition submitted, how.		617. Rate of interest; terms of sale.
610. Courthouse, jail and bridge bonds, authorized.		618. No bond to run longer than forty years.
612. Interest on such bonds.		626. Law not applicable in certain cases.

**Article 605. Election on bonds required.**

**Submission to taxpayers.**—A city can issue, in installments as they are needed for the work, bonds, though the question submitted to the voters was the issue of the total amount. *Cohen v. City of Houston* (Civ. App.) 176 S. W. 809.

A city intending, and taking necessary steps, to issue warrants, instruments issued pursuant thereto, though containing elements of a bond are warrants, and not bonds requiring for their issuance vote of the taxpaying voters. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

**Misappropriation of sinking fund for previous bond issue.**—That a city had misappropriated money in a sinking fund created to pay previous bond issues, does not authorize an injunction against a subsequent bond issue until that money has been restored. *Cohen v. City of Houston* (Civ. App.) 176 S. W. 809.

**Diversion of proceeds.**—The proceeds of bonds issued for the erection of a bridge "at or near" a designated crossing, under arts. 605 and 606, cannot be diverted by the county commissioners' court to the construction of a bridge at another crossing five or six miles away; the latter crossing not being "near" the designated one. *Moore v. Coffman* (Civ. App.) 189 S. W. 94.

**Art. 606. Proposition submitted, how.**

**Form of submission.**—Under arts. 606, 616, and 884, the notice for an election on a municipal bond question need not specify the rate of the tax to be levied, but that is left to the city council or town board. *Hunter v. Rice* (Civ. App.) 190 S. W. 840.

**Diversion of proceeds.**—See *Moore v. Coffman* (Civ. App.) 189 S. W. 94.

**Art. 610. [877] Courthouse, jail, bridge, road, and poorhouse and farm bonds, authorized.**

Cited, *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312; *Moore v. Coffman* (Civ. App.) 189 S. W. 94.

**Art. 612. [879] Interest on such bonds.**

**Variance between bonds and proposition submitted.**—Under arts. 627-641, and article 612, held, that bonds of a road district bearing interest at 5 per cent. semiannually were valid, although order of court under which election was held stated that it was to vote on issuance of 5 per cent. bonds. *Moore v. Commissioners' Court of Bell County* (Civ. App.) 175 S. W. 849.

**Art. 616. [918a] Annual tax to meet interest and sinking fund.**

**Form of submission.**—The notice for an election on a municipal bond question need not specify the rate of the tax to be levied, but that is left to the city council or town board. *Hunter v. Rice* (Civ. App.) 190 S. W. 840.

**Tax lien.**—Where a municipal corporation was liable on bonds, a tax lien to secure them on all the property within the corporate limits existed. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Art. 617. [918b] Rate of interest; terms of sale.**

**Expenses of bond issue.**—Under Sp. Acts 1907, c. 70, amending the charter of San Antonio, no commissions, attorney's fees, or other expenses connected with a bond issue can be taken from the proceeds, unless the bonds are sold at a premium sufficient to pay such expenses, but the city was not precluded from contracting to pay expenses incident to the issuance of bonds, including commissions and attorney's fees, out of the general fund. *Davis v. City of San Antonio* (Civ. App.) 160 S. W. 1161.

**Provisions of ordinance.**—Under the statute requiring municipal bonds to be sold for not less than par and accrued interest, an ordinance, providing for their sale at par,

though not in the language, met the requirement, as the taxpayers would receive the principal and accrued interest and hence did not invalidate the bonds. *McCarthy v. McElvaney* (Civ. App.) 182 S. W. 1181.

**Art. 618. [918c] No bond to run longer than forty years.**

**Antedating bonds.**—Under Denison City Charter, art. 4, § 4, ordinance passed after election in favor of issuing bonds, dating such bonds prior to the time they were authorized to be issued, held not to invalidate them. *McCarthy v. McElvaney* (Civ. App.) 182 S. W. 1181.

**Art. 626. [918g] Law not applicable in certain cases.**

Cited, *Banks v. State* (Cr. App.) 186 S. W. 840.

## CHAPTER TWO

### PARTICULAR PROVISIONS AND REGULATIONS AS TO THE ISSUE OF BONDS

#### 1. FOR PUBLIC ROADS—CONSTRUCTION AND MAINTENANCE OF

Art.

627. Power to issue road, etc., bonds and levy tax for interest and sinking fund.
628. Election for; propositions, restrictions and requirements; provisions as to interest.
632. Bonds, term, interest, examination, registry, custody; sale; disposition of proceeds; disbursement, regulation of.
- 637a. County may issue bonds to take over roads constructed by district; election; tax; term of bonds.
- 637b. Exchange of county bonds for bonds of road district; levy of tax.
- 637c. County bonds in excess of district bonds may be expended in constructing, etc., roads.

Art.

- 637d. Political division shall not be created out of territory of district having outstanding road bonds.
- 637e. Investment of sinking fund; interest how disposed of.
- 637f. Provisions cumulative; partial invalidity.
639. County commissioner to be ex officio road superintendent; powers.
640. Bids to be taken on contract work; contract to be let to lowest and best bidder; right to reject.

#### 2. FOR CAUSEWAYS, VIADUCTS, BRIDGES, ETC., CONSTRUCTION AND MAINTENANCE AND USE OF

642. Elections in certain counties to authorize bonds for causeways, viaducts, bridges, etc.
653. Power of condemnation, etc.

#### 1. PUBLIC ROADS—CONSTRUCTION AND MAINTENANCE OF

##### Article 627. Power to issue road, etc., bonds and levy tax for interest and sinking fund.

Cited, *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305; *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312.

**Disposition of proceeds.**—A claim for breach of a contract for the construction of a road cannot be paid out of proceeds of bonds issued by the district. *Matagorda County v. Horn* (Civ. App.) 182 S. W. 76.

**"Roads" as including bridges.**—Const. art. 3, § 52, as amended in 1903, authorizing counties, etc., to issue bonds for road construction, empowers counties, etc., to build necessary bridges as part of roads; the use of the term "roads" in Const. art. 3, § 56, art. 8, § 9, art. 11, § 2, and art. 16, § 24, not being controlling. *Aransas County v. Coleman-Fulton Pasture Co.* (Sup.) 191 S. W. 553.

**"Paved roads" as including shell roads.**—Const. art. 3, § 52, as amended in 1903, authorizing counties, etc., to issue bonds to construct "paved" roads, empowers counties, etc., to construct shell roads. *Aransas County v. Coleman-Fulton Pasture Co.* (Sup.) 191 S. W. 556.

**Districts which may issue bonds.**—Const. art. 3, § 52, as amended in 1904, and Rev. St. art. 627, relating to road districts and their bonds, held not limited to political subdivisions then existing or subsequently created by Legislature, but to extend to districts created by commissioners' court ordering election in particular territory. *Moore v. Commissioners' Court of Bell County* (Civ. App.) 175 S. W. 849.

**District including city.**—Under Const. art. 3, § 52, as amended in 1904, fact that city located in road district had already issued bonds to its constitutional limit held not to render district's issuance of bonds void. *Moore v. Commissioners' Court of Bell County* (Civ. App.) 175 S. W. 849.

**Art. 628. Election for; propositions, restrictions and requirements; provision as to interest.**—Upon the petition of fifty, or a majority of resident property tax paying voters of any county, or political subdivision or defined district of any county in this state, to the county commis-

sioners court of such county, such court shall have the power, and it is hereby made its duty, at any regular or special session thereof, to order an election to be held in such county, political subdivision or defined district thereof, to determine whether or not the bonds of such county, or political subdivision or defined district thereof, shall be issued in any amount not to exceed one-fourth of the assessed valuation of the real property of such county, or political subdivision, or defined district, for the purpose of constructing, maintaining or operating macadamized, graveled or paved roads and turnpikes, or in aid thereof; and, at such election, there shall also be submitted to such resident property taxpaying voters the question as to whether or not a tax shall be levied upon the property of said county, or political subdivision or defined district thereof, subject to taxation, for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof. The amount of bonds proposed to be issued, with rate of interest thereon and date of maturity, shall be stated in the order ordering said election, and in the notice therefor; or such order and notice may provide that the bonds may bear interest at a rate to be fixed by the commissioners court, not to exceed five and one-half per cent, and that the bonds may mature at such times as may be fixed by the commissioners court, serially or otherwise, not to exceed thirty years from their date, except as otherwise provided in Articles 637a and 637b hereof; provided that where such election is ordered for a political subdivision or defined district of a county, other than the whole county, such order and notice of election shall describe the boundaries thereof as described and defined in the order of the county establishing such political subdivisions or defined district of the county. [Acts 1907, p. 250; Acts 1909, S. S. p. 271; Act April 5, 1917, ch. 203, § 1.]

**Explanatory.**—The act amends arts. 628 and 632, ch. 2, tit. 18, Rev. Civ. St. 1911, and adds to such chapter arts. 637a to 637f, inclusive. Filed with Secretary of State without approval April 5, 1917.

Cited, *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312; *League v. Brazoria County Road Dist. No. 13* (Civ. App.) 187 S. W. 1012.

**Form of submission.**—Bonds of a road district bearing interest at 5 per cent. semi-annually were valid, although order of court under which election was held stated that it was to vote on issuance of 5 per cent. bonds. *Moore v. Commissioners' Court of Bell County* (Civ. App.) 175 S. W. 849.

**Art. 632. Bonds, term, interest, examination, registry, custody; sale; disposition of proceeds; disbursement, regulation of.**—Such bonds shall mature not later than thirty years from their date, except as otherwise provided in Articles 637a and 637b hereof, with such options of redemption as may be fixed by the commissioners court, or such bonds may be issued to mature serially in approximately equal portions every year for not exceeding thirty years; and such bonds shall bear not more than five and one-half per cent interest per annum, and which bonds shall be examined by the Attorney General of Texas, and registered by the Comptroller of Public Accounts of Texas, and such bonds, when so issued, shall continue in the custody of and under the control of the commissioners court of the county in which they were issued, and shall be by said court sold to the highest and best bidder, for cash, either in whole or in parcels, at not less than their par value, and the purchase money therefor shall be placed in the county treasury of such county to the credit of the available road fund of such county, or of such political subdivision or defined district of such county, as the case may be; provided that the expense incurred in surveying the boundaries of a political subdivision or defined district of the county and other expenses incident to the issuance of bonds of such political subdivisions or defined districts shall be paid from the proceeds of the sale of the bonds of the district. Such funds shall be paid out by the county treasurer upon warrants drawn on such funds issued by the county clerk of the county, countersigned by the county judge, upon certified accounts approved by the commissioners court of the county, when such funds belong to the entire county;

and, when such funds belong to a political subdivision or defined district of the county, they shall be paid out by the county treasurer upon warrants issued by the county clerk, upon certified accounts of the road superintendent of such road district, and approved by the commissioners court of the county. [Acts 1909, S. S. p. 271; Act April 5, 1917, ch. 203, § 1.]

See note under art. 628.

**Form of submission.**—Under arts. 627-641, and article 612, held, that bonds of a road district bearing interest at 5 per cent. semiannually were valid, although order of court under which election was held stated that it was to vote on issuance of 5 per cent. bonds. *Moore v. Commissioners' Court of Bell County* (Civ. App.) 175 S. W. 849.

**Sale of bonds at discount.**—That the court of county commissioners sold the bonds of a road district at a discount by means of a sham contract will not invalidate the contract of a third person with the county commissioners for the sale of road materials, even though arts. 627-655 are evaded by the sale of such bonds at a discount. *Douglass v. Myrick* (Civ. App.) 159 S. W. 422.

A county is not prohibited from selling road construction bonds to road contractors, provided there is no evasion of the statute forbidding sale of bonds for less than par value and accrued interest. A contract for road construction work and a sale of road district bonds to the contractor held not an evasion of the statute forbidding sale of bonds for less than par and accrued interest. *Ogg v. Dies* (Civ. App.) 176 S. W. 638.

**Custody and control of bonds.**—Under the requirement that bonds shall remain in the custody of the commissioners' court until sold for cash at not less than par, an order of the commissioners' court transferring the custody of bonds to the county attorney and giving him unrestricted authority to sell is void, and a contract, by which the commissioners' court gave to the county attorney the custody of bonds with the authority to sell them at the best price obtainable, delegated authority to him to bind the sale, and is therefore void. *Jones v. Veltmann* (Civ. App.) 171 S. W. 287.

**Time of maturity.**—Under Rev. St. art. 632, bonds of road district maturing in 40 years, with option to redeem some of them before expiration of 20 years, held valid. *Moore v. Commissioners' Court of Bell County* (Civ. App.) 175 S. W. 849.

**Diversion of fund.**—Where the people of a county voted bonds to construct macadamized, graveled, or paved roads, the diversion, by county authorities, of over half the funds realized to the construction of necessary bridges will be restrained, but the county authorities could constitutionally use the funds to erect shell roads. *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 316.

**Art. 637a. County may issue bonds to take over roads constructed by district; election; tax; term of bonds.**—In any county of this State wherein any road district or districts have heretofore been, or may hereafter be formed, and bonds have been issued in said district or districts for the purpose of constructing public roads under the provisions of the general, or of any special county road law, and it should be desired that the said district roads be merged into and become a part of a general county system of public roads, it shall be the duty of the commissioners court, upon the presentation of a petition signed by 250 resident property tax paying voters of the county, whether residing in such road district or districts or not, to order an election under the provisions of Chapter 1, Title 18 or Chapter 2, Title 18, Revised Civil Statutes of this State, 1911 compilation, to determine whether or not the bonds of such county shall be issued for the purpose of purchasing or taking over the improved roads already constructed in said road district or districts and of further constructing, maintaining and operating macadamized graveled or paved roads and turnpikes throughout such county, such bonds to be issued in such an amount as may be stated in the petition and order of the commissioners court within the limitations of the constitutional and statutory provisions; and, at such election, there shall also be submitted to such resident property tax paying voters the question as to whether or not a tax shall be levied upon the property of said county, or political subdivision or defined district thereof, subject to taxation, for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof. At said election those favoring the issuance of bonds and the levy of taxes as herein provided for shall have written or printed on their ballot "For the issuance of bonds for the purchase of district roads and the further construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, and for the levy and collection of a tax to provide for interest and sinking fund for said bonds"; and those opposing the issuance of bonds and the levy of taxes as herein provided shall have written or printed on their ballots "Against

the issuance of bonds for the purchase of district roads and the further construction, maintenance, and operation of macadamized, graveled or paved roads and turnpikes, and against the levy and collection of a tax to provide for interest and sinking fund for said bonds." The bonds issued under this Article may mature serially or otherwise at the discretion of the commissioners court and may run for a term not to exceed forty years. The issuance and sale of said bonds and the levy and collection of taxes therefor shall be conducted as now required by law except as herein otherwise provided. [Act April 5, 1917, ch. 203, § 2.]

**Explanatory.**—See note under art. 628. The title of the act, in enumerating the articles to be added, designates this article as 636a instead of 637a.

**Art. 637b. Exchange of county bonds for bonds of road district; levy of tax.**—In the event the proposition to issue such county bonds shall receive the necessary favorable vote, as is now provided by law, and said bonds shall have been approved and issued, the taxes theretofore levied and collected in any road district or districts shall from that date be dispensed with as hereinafter provided. It shall be the duty of the commissioners court to act apart from such county issue bonds in an amount equal to all of the outstanding bonds of any such district or districts. The bonds so set apart by the commissioners court shall be used exclusively for purchasing or taking over the improved roads in any road district or districts within such county. Said bonds shall be issued in similar denominations, bearing the same rate of interest, having the same date of maturity, and with similar options of payment, as the outstanding bonds of any such road district or districts, it being the intent hereof that said county bonds shall in every respect be similar to said district bonds except that they shall be county obligations instead of district obligations. Such county bonds so set apart shall be disposed of in the purchase of said improved district roads in one of the following methods, to-wit:

1. An exchange of said bonds may be made with the holder or holders of any outstanding district road bonds. The agreement for such exchange shall be evidenced by order of the Commissioners court authorizing the same, and by the written consent of the holder or holders of such district bonds properly signed and acknowledged as provided for the acknowledgment of written instruments by the laws of this state, which said order of court, written agreement properly executed by the holder or holders of such district bonds, together with the county bonds to be given in exchange, shall be presented to and approved by the Attorney General of the State and shall bear his certificate of approval before the exchange is finally consummated. In arranging an exchange of county bonds for district bonds, interest coupons may be detached and such credits arbitrarily entered on any bond or bonds as may be necessary so that the principal and interest represented by county bonds may be the same in amount as represented by the district bonds surrendered in exchange, any difference in market value of said bonds being taken into account. When such exchange of county bonds for district bonds shall have been consummated it shall be the duty of the Commissioners Court to cancel and destroy said district bonds. A complete itemized list of all such district bonds so retired shall be put on record with appropriate order of the court evidencing such retirement, and thereafter no tax shall ever be levied or collected therefor under the original election in such district or districts, and the sinking fund then on hand to the credit of any such district or districts shall be passed to the sinking fund account of the county.

2. In the event that an exchange of county bonds for district bonds cannot be made as hereinbefore provided, for, it shall then be the duty of the Commissioners Court, not later than ninety days after the approval and issuance of said county bonds, to effect the purchase of the improved roads in such district or districts by depositing with the county

treasurer for the credit of the interest and sinking fund account of said district or districts an amount of county bonds equal in face value to the amount of outstanding district bonds. Said county bonds so deposited shall be similar in all respects to the outstanding district bonds as hereinbefore provided, and interest coupons may be detached and credits arbitrarily entered on any bond or bonds in order to make the amount so deposited to the credit of any district equal to the face value of outstanding bonds of said district. Before such deposit of county bonds shall be made and credit passed to said district or districts, there shall be submitted to the Attorney General of the State a certified list of all bonds of such district or districts then outstanding, which list shall show the date, amount, rate of interest and date of maturity of said outstanding bonds, together with the county bonds to be so deposited, and an order of the Commissioners Court authorizing such action, and shall bear his certificate of approval before said transaction shall be finally consummated. After such county bonds shall have been deposited for the credit of the interest and sinking fund account of said district or districts, the sinking fund theretofore collected and on hand for the credit of such district or districts, shall be passed to the sinking fund account of the county. The Commissioners Court shall no longer levy and collect the taxes provided for under the original election for said bonds in such district or districts, but in lieu thereof they shall annually, from the taxes levied for the county bonds hereinbefore provided for, pay the interest on said county bonds deposited for the credit of such district or districts, detaching the coupons therefor, and said payment of interest shall be passed to the credit of the interest account of said district or districts as the owner of said county bonds and the funds so realized by said district or districts shall be used by the Commissioners Court to pay the interest on all outstanding district bonds. From said county taxes levied for that purpose, the Commissioners Court shall also set aside annually the necessary sinking fund for the retirement of said county bonds, and upon maturity of said county bonds, the Commissioners Court shall pay said bonds in full, and said payment shall be passed to the credit of the sinking fund of such district or districts, and the funds so realized by said district or districts shall be used by the Commissioners Court to pay in full all outstanding district bonds. [Id.]

See note under art. 628.

**Art. 637c. County bonds in excess of district bonds may be expended in constructing, etc., roads.**—All county bonds, voted upon and authorized at the election hereinbefore provided for, in excess of the amount required to exchange for, or offset and retire outstanding district bonds shall be issued and sold in the manner now provided by law. The proceeds thereof shall be credited to the available road fund of the county and shall be expended by the Commissioners Court in constructing, repairing, maintaining, and operating macadamized, graveled or paved roads and turnpikes or in aid thereof. [Id.]

See note under art. 628.

**Art. 637d. Political division shall not be created out of territory of district having outstanding road bonds.**—Where a political subdivision or defined road district of a county has heretofore been established and issued bonds, or is hereafter established and issues bonds, no political subdivision or defined district shall thereafter be created or established overlapping the same territory or embracing any part thereof while any of the bonds of such political subdivision or defined district are outstanding and unpaid, except as hereinbefore provided for the county as a whole. [Id.]

See note under art. 628.

**Art. 637e. Investment of sinking fund; interest, how disposed of.**—The Commissioners Court of any county in this state is authorized and

empowered, when it considers it advisable, to invest sinking funds now on hand or which may hereafter be on hand, accumulated for the redemption and payment of any bonds issued by such county or political subdivision or defined district thereof, in bonds of the United States, of the State of Texas or any county in the State, or of any incorporated city or town or road district or school district in this state; or in bonds of the Federal Farm Loan Bank System; provided that no such bonds shall be so purchased which, according to their terms, mature at a date subsequent to the time of maturity of the bonds for the payment of which such sinking fund was created; and, provided, that all interest on such investments shall be credited to the sinking fund to which it belongs; and such sinking funds, together with the interest thereon, shall be and is hereby set apart as a special fund for the uses designated herein, and their use for any other purpose shall be considered a diversion thereof and punishable as provided by the Penal Code of this State, Article 104, Acts 1911. [Id.]

See note under art. 628.

**Art. 637f. Provisions cumulative; partial invalidity.**—The provisions of this Act shall be held cumulative of other laws now in effect and shall not operate to amend or repeal any law except as herein specifically provided, and in case it shall be declared by the courts that any part of this Act is unconstitutional such decision shall not impair other parts and provisions of this Act. [Id.]

See note under art. 628.

**Art. 639. County commissioner to be ex officio road superintendent; powers.**

**Liability on general bond.**—Under Sp. Laws 1903, c. 25, § 1, making county commissioners of San Augustine county ex officio road commissioners, county commissioner and sureties on bond as such are not liable for sums coming into his hands for road purposes. *Polk v. Roebuck* (Civ. App.) 184 S. W. 513.

**Art. 640. Bids to be taken on contract work; contract to be let to lowest and best bidder; rights to reject.**

**Submission to competition.**—In purchasing shell for road purposes, the county commissioners' court need not advertise for bids under this article. *Douglass v. Myrick* (Civ. App.) 159 S. W. 422.

**Indemnity clause in contract.**—A contract for construction of a road providing that contractor assume liability for all accidents accruing by reason of negligence of himself or employes, during prosecution of work, did not cover an injury received after work was completed, because of a defect in road as completed by one not a party to the contract. *Cummins v. Owen Bros. Const. Co.* (Civ. App.) 192 S. W. 792.

**Irregularity on bond proceedings as affecting contract.**—That the court of county commissioners sold the bonds of a road district at a discount by means of a sham contract will not invalidate the contract of a third person with the county commissioners for the sale of road materials, even though arts. 627-655 are evaded by the sale of such bonds at a discount. *Douglass v. Myrick* (Civ. App.) 159 S. W. 422.

**Disqualification of contractor.**—A contract by the county commissioners for the purchase of shell to be used by a road district cannot be held invalid merely because the contractor's agent, who secured the contract, had previously performed services for the commissioners; it appearing that they were ended and that he was not taking advantage of his fiduciary capacity to defraud the county. *Douglass v. Myrick* (Civ. App.) 159 S. W. 422.

## 2. CAUSEWAYS, VIADUCTS, BRIDGES, ETC., CONSTRUCTION AND MAINTENANCE AND USE OF

**Art. 642. Elections in certain counties to authorize bonds for causeways, viaducts, bridges, etc.**

**What constitutes bridge.**—The building by a county of a causeway across a bay, part of which, spanning deep water, was a bridge, held unauthorized by Const. art. 3, § 52, and subject to restraint. *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312.

**Art. 653. Power of condemnation, etc.**

**Special damages.**—In an action for special damages from the construction of a railroad viaduct in front of plaintiff's property, it is no defense that the viaduct is beneficial to the public. *Texas & P. Ry. Co. v. Hardin* (Civ. App.) 168 S. W. 1017.

## CHAPTER THREE

FUNDING, REFUNDING AND COMPROMISE OF  
INDEBTEDNESS3. RAILROAD, ETC., SUBSIDY BONDS, ETC.—COMPROMISE, ADJUST-  
MENT AND REFUNDING OF

**Article 678. [909] Railroad, etc., subsidy bonds, how adjusted and paid.**

**“Donation.”**—“Donation,” within the statute authorizing county aid in the construction of a railroad, is not a gift. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

**Location of offices, etc.**—The construction of a railroad within the statute authorizing county aid may include the location of offices, shops, and roundhouses. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

**Order for election.**—The statute authorizing a county to aid in the construction of a railroad does not require that the order for an election on the question shall state all the terms agreed on. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.



## TITLE 20

## CARRIERS

Chap.		Chap.	
1. Duties and liabilities of carriers.		4. Connecting lines of common carriers.	
2. Bills of lading certified, etc.		5. Pipe lines.	
3. Disposition of unclaimed or perishable property by carriers.			

## CHAPTER ONE

## DUTIES AND LIABILITIES OF CARRIERS

Art.		Art.	
707. Common law shall govern, except, etc.		711. Liability as warehousemen, etc.	
708. Carriers cannot limit their responsibilities.		712. Diligence as to delivery.	
710. Must give bill of lading.		713. Shall forward in good order, etc.	
		714. Shall feed and water live stock, unless, etc.	

**Article 707. [319] [277] Common law shall govern, except, etc.**

Cited, Crosbyton-Southplains R. Co. v. Railroad Commission of Texas (Civ. App.) 169 S. W. 1038; Ft. Worth & D. C. Ry. Co. v. Berry (Civ. App.) 170 S. W. 125; American Express Co. v. Duncan (Civ. App.) 193 S. W. 411.

4. **Carriage of passengers—What law governs.**—Performance of agreement of release by news agent to his employer, made in Texas where agent and defendant road were residents, held, in part at least, to involve interstate commerce. *Nevill v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 187 S. W. 388.

Whether news agent entitled to transportation on defendant's roads, under contract with his employer involving interstate commerce, was a passenger when injured through negligence of defendant's servants was to be determined by the federal law. *Id.*

5. — **Who are passengers in general.**—Plaintiff, getting on steps of moving street car at a point where it never stopped and knocked off by a post before conductor could open door, held not a passenger. *Horwitz v. Jefferson County Traction Co.* (Civ. App.) 188 S. W. 26.

7. — **Employés of others carried under contract with carrier.**—Under the state or local law, a news agent employed by a news service, and entitled under a contract between his employer and the road to free transportation upon passenger trains, was entitled to the rights, privileges, and protection of a passenger. *Nevill v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 187 S. W. 388.

8. — **Invitation or acquiescence of carrier's employé.**—An agent of the owner of a car of fruit who attempts to ride along with the car on a nontransferable pass issued to his principal, believing that the employés will permit him to do so, is not a passenger, but a licensee. *Beard v. International & G. N. Ry. Co.* (Civ. App.) 171 S. W. 553.

9. — **Commencement and termination of relation.**—Deceased, carried past his destination, taking shelter on another train, and killed in dismounting to secure a return train, held a passenger. *Ft. Worth & R. G. Ry. Co. v. Keith* (Civ. App.) 163 S. W. 142.

In an action for injuries to a passenger by being struck by a trainman while he had temporarily left the train at the station with a view of returning, such temporary departure did not terminate the relation of carrier and passenger. *St. Louis, B. & M. Ry. Co. v. Fielder* (Civ. App.) 163 S. W. 606.

By the common law the relation of carrier and passenger does not terminate until after the passenger has alighted and has a reasonable time and opportunity to leave the depot, the question of what is a reasonable time and opportunity being one of fact, dependent on the circumstances of the particular case. *Missouri, K. & T. Ry. Co. of Texas v. Cook* (Civ. App.) 166 S. W. 453.

A passenger at a transfer point boarding a wrong train in the nighttime, in the absence of a watchman and sufficient light, held a passenger on such train. *Ft. Worth & R. G. Ry. Co. v. Dubose* (Civ. App.) 171 S. W. 1090.

Passenger carried by station and told to get off at next station held to cease to be a passenger when she failed to do so, and her subsequent ejection was justifiable if ordinary care was used. *Missouri, K. & T. R. Co. of Texas v. Middleton* (Civ. App.) 172 S. W. 1114.

Under the Carmack Amendment to the Interstate Commerce Act, a stipulation in bill of lading of animals that in case of loss the value of any animal shall be its cash value at time and place of shipment, not to exceed a certain sum is valid. *Galveston, H. & S. A. Ry. Co. v. Carmack* (Civ. App.) 176 S. W. 158.

Where a shipper of live stock exercised his option to pay the higher rate for a shipment at carrier's risk, the refusal of the agent to accept such rate or mark the bill of lading accordingly does not deprive the shipper of his right to the carrier's liability. *Chicago, R. I. & G. Ry. Co. v. Core* (Civ. App.) 176 S. W. 778.

A carrier of live stock cannot, under the Hepburn Act, exempt itself by contract from liability for its negligence or that of its servants, causing damage to an interstate shipment of live stock. *Id.*

Person awaiting train, for which she had purchased ticket, held a passenger, with right to remain in depot, and right to a comfortable room for her and her children accompanying her. *St. Louis Southwestern Ry. Co. of Texas v. Padgett* (Civ. App.) 181 S. W. 718.

A railroad's negro porter, running along beside a train, after it left a station, endeavoring to board, owed the duty to a passenger thereon, who had neglected to leave the train at the stop, to use care not to injure him in getting on the train. *Paris & G. N. R. Co. v. Campbell* (Civ. App.) 185 S. W. 346.

11. **Tickets—Nature and effect of ticket.**—A ticket agent authorized to sell two kinds of return trip tickets, with different date limits for the return trip, must issue a ticket for the time limit demanded by a passenger, and, where he inserts, without the fault of the passenger, an erroneous date limit for return, the passenger may recover the damages sustained. *Chicago, R. I. & G. Ry. Co. v. Howell* (Civ. App.) 166 S. W. 81.

13. — **Conditions in tickets.**—A railroad company in selling a round-trip ticket is entitled to make it a condition of passage that the trip coupons be not detached from the contract portion of the ticket. *Missouri, K. & T. Ry. Co. of Texas v. Luster* (Civ. App.) 162 S. W. 11.

Where a passenger ticket purports to be a contract ticket offered for a reduced rate, the passenger is bound by its lawful stipulations. *Chicago, R. I. & G. Ry. Co. v. Howell* (Civ. App.) 166 S. W. 81.

15. — **Transportation by connecting carrier.**—A carrier held not liable for damages caused plaintiff by failure to connect with a train on another road, where defendant's agent sold a ticket only to the connecting point, though its trainmen, without authority, represented to the plaintiff that she could catch a train and would not have to stay all night at the connecting point. *Texas & P. Ry. Co. v. Conway* (Civ. App.) 180 S. W. 666.

Where passenger over connecting railroads had ticket made up of coupons, act of railway employes in directing her to take a train, which stopped at a station represented by a coupon, but not at plaintiff's destination beyond, held not a wrongful act. *Texas & P. Ry. Co. v. Lathrop* (Civ. App.) 192 S. W. 1080.

Where defendant authorized another carrier to sell tickets over its road, and such other sold ticket at reduced rate in accordance with published tariffs, undisclosed rule of defendant that such ticket was invalid on a certain train did not relieve it of liability on the contract. *Chicago, R. I. & G. Ry. Co. v. Carroll* (Sup.) 193 S. W. 1068.

16. **Duties as to transportation.**—The failure of a railroad company to furnish reasonable and proper facilities for taking a train which left the station at the same time as another train on the track between the station and the first train held to be the proximate cause of the failure of a prospective passenger to take his train. *Trinity & B. V. Ry. Co. v. Voss* (Civ. App.) 160 S. W. 663.

A carrier's contract to transport a passenger from one station to another is unconditional, while the contract for safety only requires a specified degree of care. *Beaumont, S. L. & W. Ry. Co. v. Bishop* (Civ. App.) 160 S. W. 975.

In an action for breach of a contract for the transportation of passengers, held that defendant after breach could not be relieved from the consequences thereof by showing plaintiff's subsequent transfer of his outfit, and inability to personally perform the contract. *Chicago, R. I. & G. Ry. Co. v. Martin* (Civ. App.) 163 S. W. 313.

17. — **Accommodations during transit.**—The failure of a street car company to furnish a passenger with a seat in the car is not actionable negligence, where the fact that all the seats are occupied is apparent to the passenger when he takes his position on the running board, from which he thereafter falls. *Tennegkeit v. Galveston Electric Co.* (Civ. App.) 182 S. W. 72.

18. — **Discharging and setting down passengers.**—Where a carrier contracted to transport a passenger, and required him to alight before destination was reached, there was a breach of contract for which the passenger was entitled to damages. *Beaumont, S. L. & W. Ry. Co. v. Bishop* (Civ. App.) 160 S. W. 975.

The announcement of a station in an audible voice in the coach in which a passenger is riding, so that it can be heard by those paying attention and possessed of the ordinary sense of hearing, is sufficient notice of the arrival at the station. *Missouri, K. & T. R. Co. of Texas v. Middleton* (Civ. App.) 172 S. W. 1114.

Where passenger over connecting railroads with coupon ticket had no special contract with railroad to transport her on a particular train the fact that the train which she took did not stop at her destination did not alone impose liability on the carrier, where she could change at an intermediate point to a local train. *Texas & P. Ry. Co. v. Lathrop* (Civ. App.) 192 S. W. 1080.

In an action against railroad for damages for carrying plaintiff past her destination, where plaintiff was told by conductor who took her ticket on train that she would have to change cars, as the train did not stop at her destination, she could not in good faith rely upon incorrect statement of railroad employes before boarding the train that it would stop at her destination. *Id.*

21. **Action for breach of contract to carry—Damages.**—A prospective passenger who was prevented from taking a train by the failure of the railroad company to furnish reasonable facilities for boarding it may recover from the company damages for the loss of time thereby occasioned. *Trinity & B. V. Ry. Co. v. Voss* (Civ. App.) 160 S. W. 663.

A verdict awarding a passenger \$500 for being compelled to alight a mile short of his destination held excessive, and reduced to \$200. *Beaumont, S. L. & W. Ry. Co. v. Bishop* (Civ. App.) 160 S. W. 975.

Where a railroad company agreed with a father to wire a ticket to his son, but failed to do so, the father held entitled to recover compensation for mental suffering caused by the son's delay in reaching home. *Missouri, K. & T. Ry. Co. of Texas v. Stogner* (Civ. App.) 163 S. W. 319.

Where a passenger demanding a return trip ticket good until October 31st received a ticket good only until September 15th, so that he was obliged to pay a specified sum for the fare home, he was entitled to recover the amount of the fare so paid, minus the

sum which he failed to pay for the return trip ticket demanded. *Chicago, R. I. & G. Ry. Co. v. Howell* (Civ. App.) 166 S. W. 81.

In action for breach of agreement to furnish plaintiff and friends through chair car, if he would induce such friends to travel over defendant road, plaintiff could not recover for humiliation because he and friends were forced to travel in an inferior car. *Freeman v. Clark* (Civ. App.) 177 S. W. 1188.

Plaintiff, who induced friends to travel with him by defendant road to Confederate reunion, relying on road's promise to furnish through chair car, held not entitled to recover for humiliation suffered by him through road's failure to furnish such car. *Freeman v. Clark* (Sup.) 177 S. W. 1189.

An award of \$425 in favor of plaintiff who was carried to a different place from that to which she had secured a ticket held not excessive, where she suffered long delays and was ridiculed. *Texarkana & Ft. S. Ry. Co. v. Schevoight* (Civ. App.) 181 S. W. 802.

22. **Personal injuries—Care required in general.**—An instruction that a carrier is required to exercise the highest degree of care possible for the safety of its passengers held proper. *St. Louis Southwestern Ry. Co. of Texas v. Woodall* (Civ. App.) 159 S. W. 1012.

A carrier's duty to exercise the high degree of diligence which would be exercised by very prudent persons under similar circumstances is not limited to the operation of its cars and trains. *St. Louis Southwestern Ry. Co. of Texas v. Gresham*, 106 Tex. 452, 167 S. W. 724, affirming judgment (Civ. App.) 140 S. W. 483.

"High degree of care" and "ordinary care," which a carrier is required to exercise toward its passengers, defined. *Bryning v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 167 S. W. 826.

The highest degree of care is required of a carrier of passengers. *Galveston, H. & S. A. Ry. Co. v. Bibb* (Civ. App.) 172 S. W. 178.

The care to be exercised by a carrier of passengers is that high degree that a very cautious person would exercise under the circumstances. *Missouri, K. & T. Ry. Co. of Texas v. Kemp* (Civ. App.) 173 S. W. 532.

The degree of care required of common carriers of passengers is the same without reference to the character of the conveyance used. *Paris & G. N. Ry. Co. v. Atkins* (Civ. App.) 185 S. W. 306.

In absence of contract, where negligence is foundation of right, custom cannot be set up to show that negligence does or does not exist. *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

24. — **Freight or mixed trains.**—The test of due care toward a passenger riding in caboose of freight train is what prudent and cautious men would do under the same or similar circumstances, and not what railway employes usually or ordinarily do. *Paris & G. N. Ry. Co. v. Atkins* (Civ. App.) 185 S. W. 306.

25. — **Care as to persons intoxicated or under disability.**—Where a passenger becomes unable to care for herself by reason of sickness, or other cause, it is the carrier's duty to exercise the care of a very cautious person to protect the passenger from the dangers incident to her surroundings. *St. Louis Southwestern Ry. Co. of Texas v. Adams* (Civ. App.) 163 S. W. 1029.

A carrier owes to every passenger the highest degree of care without regard to age, sex, or bodily infirmity, the degree of care to be determined by the circumstances of each case. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 183 S. W. 1185.

Where a passenger is burdened with baggage or other impediments, or is blind, sick, aged, young, crippled, or infirm, which condition is known to the carrier, or if there is a defect in the car or steps, the obligation to render personal assistance in alighting may arise. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

28. — **Acts or omissions of employes.**—A carrier is liable for intentional assault on a passenger by a brakeman not justified or excused by the circumstances. *St. Louis Southwestern Ry. Co. of Texas v. Huddleston* (Civ. App.) 178 S. W. 704.

If it was railroad porter's duty to open doors of car vestibule at station, it was not outside scope of employment as to passenger to open door on particular side, notwithstanding that in opening it he may have violated railroad's instructions and rules. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Civ. App.) 194 S. W. 1128.

29. — **Acts of fellow passengers or third persons.**—The failure of a passenger conductor to prevent a white city marshal from entering a negro coach does not render the carrier liable for the death of a negro in the coach, killed by the marshal, unless the conductor could have reasonably anticipated that as a result of his failure decedent or some passenger in the coach, would likely be killed or suffer injury. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.) 158 S. W. 259.

The mere unauthorized presence of a white person in a negro coach is not a violation of any right of negro passengers, and gives them no cause of action against the carrier. *Id.*

The act of a conductor in dragging a drunken passenger through the car to a point near where a passenger who had made complaint against the drunken passenger was standing, and then leaving the car, following which the drunken passenger made an assault upon the other, who, in protecting himself, shot and wounded an innocent fellow passenger, amounted to negligence. *Galveston, H. & S. A. Ry. Co. v. Bell* (Civ. App.) 165 S. W. 1.

The carrier held not liable for incompetency or negligence of persons in assisting a passenger to alight; they not being its employes or authorized to act for it. *Missouri, K. & T. Ry. Co. of Texas v. Kemp* (Civ. App.) 173 S. W. 532.

The contract of a carrier with a society to run a special train providing for members thereof assisting passengers to alight, it is liable for incompetency or negligence of members in so assisting a passenger. *Id.*

It is the absolute duty of a carrier of passengers to protect them by the exercise of the highest degree of care, from the willful misconduct and violence of their fellow passengers and strangers. *Nevill v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 187 S. W. 388.

While a carrier is not ordinarily liable for unauthorized acts of third parties, nonemployes, it may become liable for negligence in permitting such acts to be done or the

consequences thereof to continue, if knowledge has been brought to its servants. *Wichita Falls Traction Co. v. Berry* (Civ. App.) 187 S. W. 415.

31. — **Condition and use of premises.**—A railroad company which maintains an unlighted and unguarded station platform elevated four or five feet above the ground is guilty of negligence towards its passengers. *Stamp v. Eastern Ry. Co. of New Mexico* (Civ. App.) 161 S. W. 450.

One visiting a railroad depot to inquire as to a train on which he desires to become a passenger is an invitee, and the carrier owes him the duty of exercising reasonable care to keep its premises in such condition that he will not, while in the exercise of ordinary care, suffer injury in seeking an exit. *Houston Belt & T. Ry. Co. v. Winerich* (Civ. App.) 162 S. W. 903.

32. — **Taking up passengers.**—A carrier, affording a reasonably safe way and sufficient time for plaintiff to board its car, held not liable for plaintiff's injury in attempting to board at a different place after it had started. *Missouri, K. & T. Ry. Co. of Texas v. Vaughan* (Civ. App.) 178 S. W. 721.

Where carrier, acting through its conductor in scope of his employment, undertakes to assist passenger to board car, it is bound to employ the highest degree of care. *Southern Traction Co. v. Reagor* (Civ. App.) 186 S. W. 272.

33. — **Sufficiency and safety of means.**—A carrier of passengers must furnish a reasonably safe car and exercise the highest degree of care to ascertain and repair defects in the car, as by furnishing an experienced inspector, etc. *St. Louis Southwestern Ry. Co. v. Moore* (Civ. App.) 161 S. W. 378.

To leave fruit on a wet platform of a passenger car while running a distance of 25 or 30 miles is sufficient to show knowledge of the existence of the fruit. *Galveston, H. & S. A. Ry. Co. v. Bibb* (Civ. App.) 172 S. W. 178.

That plaintiff did not inform the carrier or its servants of the delicate condition of his wife will not preclude recovery for injuries resulting to her from cold contracted through an insufficiently heated car. *St. Louis Southwestern Ry. Co. of Texas v. Rutherford* (Civ. App.) 184 S. W. 700.

It is the duty of a railway to use reasonable care to keep the traps and doors of vestibuled cars closed. *St. Louis Southwestern Ry. Co. of Texas v. Christian* (Civ. App.) 191 S. W. 175.

Carrier of passengers must use high degree of care to discover and remove dangerous obstructions on its track. *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

34. — **Management of conveyances.**—Two railroads maintaining parallel tracks held not guilty of actionable negligence toward a passenger on one of the trains jumping from the train under the erroneous belief that a collision was imminent. *Beaty v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 450.

If a passenger was thrown down by an unusual and negligent jerk of a train, it was immaterial whether or not the train was moving when she arose to leave the car. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

35. — **Setting down passengers.**—Where a negligent jerk of a street car threw a passenger from the car, injuring her, the street railway company was liable, whether she attempted to alight while the car was in motion or not. *San Antonio Traction Co. v. Badgett* (Civ. App.) 158 S. W. 803.

Where a passenger on a train which was not scheduled to stop at his destination paid the conductor for transportation to the next station beyond, and then, when the train stopped at his destination, on the invitation of the conductor attempted to alight, the carrier owed him a duty to provide a safe place to alight. *St. Louis Southwestern Ry. Co. of Texas v. Woodall* (Civ. App.) 159 S. W. 1012.

Where a carrier's servants knew that a passenger had become mentally deranged from illness, but there was nothing to indicate that she contemplated leaving the train while in motion, the carrier was not negligent in failing to provide a guard for her, or to forcibly restrain her to prevent such act. *St. Louis Southwestern Ry. Co. of Texas v. Adams* (Civ. App.) 163 S. W. 1029.

A special contract to run a train to place where there was no station does not, as to passengers not parties thereto, absolve the carrier from its duty as to their safety in alighting. *Missouri, K. & T. Ry. Co. of Texas v. Kemp* (Civ. App.) 173 S. W. 532.

Passenger, forced to leave depot with children and wait outside on muddy ground, where she was annoyed by insects and frightened by Mexicans and negroes from construction train, held entitled to damages. *St. Louis Southwestern Ry. Co. of Texas v. Padgett* (Civ. App.) 181 S. W. 718.

A carrier is chargeable with knowledge of the necessity of assisting a passenger from the train when she was 59 years old, corpulent, carried several bundles, and had in charge a small child. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 183 S. W. 1185.

In an action for injuries while alighting from a street car, defendant was not liable if the car stopped for a reasonable time, and its servants did not know, or have reason to know, that the plaintiff had not alighted. *San Antonio Traction Co. v. Cox* (Civ. App.) 184 S. W. 722.

The carrier may assume that an able-bodied male passenger will exercise care required for his own safety, and will be able to alight safely without assistance from a stationary car, the highest step of which is 18 inches from the ground, the platform, sill and steps being dry. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

The carrier must furnish safe appliances and facilities for alighting from its train, and give passengers a reasonable time to alight at their destination, but need not ordinarily extend personal assistance to a passenger in alighting. *Id.*

Railroad held liable to plaintiff passenger for damages sustained from falling from car when porter who undertook to aid plaintiff to alight with box negligently caused box to fall down steps and against plaintiff. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Civ. App.) 194 S. W. 1128.

36. — **Care as to persons accompanying passengers.**—That trainmen were without notice of plaintiff's intention to assist his daughter aboard held immaterial, in view of a

custom to delay the train for such a purpose. *Ft. Worth & D. C. Ry. Co. v. Abbott* (Civ. App.) 170 S. W. 117.

The conductor of a vestibuled train, with knowledge, that plaintiff had boarded it to assist his mother and her other children, was bound to hold the train a reasonable time to allow plaintiff to disembark, and, the train having started before plaintiff had time to alight, the conductor was bound to stop it to permit plaintiff to do so. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Civ. App.) 171 S. W. 517.

One assisting passengers to board a train in the interest of the company and with its knowledge does so by implied invitation, and the train must be held long enough to allow him to render such services and leave the train. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 179 S. W. 62.

In the absence of knowledge that one enters its train merely to assist passengers and then alight, the carrier may assume such person to be a passenger, and may start its train after giving him reasonable time to get aboard. *Id.*

Where a person, entering a train to assist passengers, answers the brakeman's question as to destination by saying "they" are going to H., the brakeman is not thereby charged with knowledge of his intention. *Id.*

Where one enters a train only to assist passengers on board, and then to get off, there being no custom to hold trains for that purpose and no knowledge by the railroad that he is so upon the train, failure to hold the train a reasonable time for him to alight is not negligence. *Id.*

Where a person assisting a passenger alights from a moving train getting under way from a station, without hesitation or request to stop, the carrier owes no duty to stop the train nor to prevent his alighting until it can be stopped. *Id.*

Where a woman hotel keeper at the request of a guest accompanied her to the station for the purpose of assisting her, the railway company was liable for negligence in failing to properly light the platform, by reason of which the hotel keeper was injured, since she was, under the circumstances, an "invitee." *Missouri, K. & T. Ry. Co. of Texas v. Bailey* (Civ. App.) 186 S. W. 230.

In the absence of regulation to the contrary, a person who goes to a depot of a railway for the purpose of accompanying a departing passenger is deemed as going upon the premises of the company under an implied invitation. *Id.*

37. — **Proximate cause of injury.**—A carrier's wrongful act in permitting a white man to ride in a car for negroes, where he assaulted plaintiff, a negress, held the proximate cause of her injury, unless she provoked the assault by her own misconduct. *Baker v. Texas & P. Ry. Co.* (Civ. App.) 158 S. W. 263.

The negligence of a conductor in failing to remove a drunken passenger from a car held to be the proximate cause of an injury received by a passenger from a stray bullet fired by another passenger in self-defense at the drunken passenger. *Galveston, H. & S. A. Ry. Co. v. Bell* (Civ. App.) 165 S. W. 1.

In an action for personal injuries to plaintiff's wife while alighting from a train, an instruction that the evidence must show that the injury was the natural and probable consequence of the negligence and ought to have been foreseen as likely to occur by a person of ordinary prudence, in the light of attending circumstances, held proper. *Bryning v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 167 S. W. 826.

That a door was left unlocked and no attendant provided to assist passengers alighting from a car did not contribute or cause the fall of a passenger, who stepped on a banana peeling, for such result from leaving the door unlocked could not have been reasonably contemplated and was not, in a legal sense, the proximate cause. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

Negligence of Pullman Company and railway company in not seeing that gate of tourist car was closed held concurrent proximate causes of injury to passenger stepping from tourist car to baggage car as train was cut between them at station. *Galveston, H. & S. A. Ry. Co. v. Packard* (Civ. App.) 193 S. W. 397.

Negligence of Pullman Company and railway company in not seeing that gate of tourist car was closed held concurrent proximate causes of injury to passenger stepping from tourist car to baggage car as train was cut between them at station. *Id.*

39. — **Connecting carriers.**—An initial carrier of live stock held not relieved from liability to the shipper accompanying the shipment, for an accident on the connecting carrier's line, by selling to him a ticket good over the initial and connecting carriers. *Missouri, K. & T. Ry. Co. of Texas v. Ryon* (Civ. App.) 177 S. W. 525.

41. — **Limitation of liability.**—Where, before statehood, a railroad company in the territory of New Mexico gave plaintiff a pass for an intrastate trip, a condition in the pass exempting the company from all liability, whether caused by its own negligence or not, was valid. *Stamp v. Eastern Ry. Co. of New Mexico* (Civ. App.) 161 S. W. 450.

A pass given by a railroad company to the mother of one of its employes is none the less a free pass because the giving of such pass was customary, where the employé could not have recovered in case of the carrier's refusal. *Id.*

A pass given as a gratuity is none the less a free pass because the carrier requires the person using to sign an agreement exempting it from liability for injuries. *Id.*

A news agent riding upon a pass issued by road under arrangement with his employer would not be precluded from recovering under the state law for injury from negligence of road's employes, by an agreement releasing road from such liability. *Nevill v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 187 S. W. 388.

News agent, entitled to transportation on defendant road, who had released his employer and all roads from liability for accidents, negligence, etc., held not a passenger, and not entitled to benefits of inhibition against stipulations limiting carriers' liability for damages from negligence of their employes. *Id.*

42. — **Release of liability.**—A release of a claim for damages for personal injuries, executed while a party was in a semiconscious condition to such an extent that he did not know what he was doing, was not binding upon him. *Texas & P. Ry. Co. v. Hubbard* (Civ. App.) 169 S. W. 1058.

47. — **Sufficiency of evidence.**—See *Houston & T. C. Ry. Co. v. Fox* (Civ. App.) 156 S. W. 922, judgment reversed 106 Tex. 317, 166 S. W. 693; *Texas Traction Co. v. Sherron* (Civ. App.) 166 S. W. 897; *Texas & N. O. R. Co. v. Jones* (Civ. App.) 187 S. W. 717.

Lighting cars and depot. *Houston, E. & W. T. Ry. Co. v. Hooper* (Civ. App.) 184 S. W. 347; *Missouri, K. & T. Ry. Co. of Texas v. Bailey* (Civ. App.) 186 S. W. 230.

Obstructions near track. *Horwitz v. Jefferson County Traction Co.* (Civ. App.) 188 S. W. 26; *Texas Midland R. Co. v. Truss* (Civ. App.) 186 S. W. 249.

Defect in car. *Houston & T. C. R. Co. v. Walker* (Civ. App.) 167 S. W. 199, judgment reversed (Sup.) 173 S. W. 208, motion to retax costs granted (Sup.) 177 S. W. 954; *Texas Midland R. Co. v. Sikes* (Civ. App.) 185 S. W. 412.

Taking up passengers. *Texas Midland R. Co. v. Truss* (Civ. App.) 186 S. W. 249; *Southern Traction Co. v. Reager* (Civ. App.) 186 S. W. 272.

Derailment. *International & G. N. Ry. Co. v. Berthea* (Civ. App.) 179 S. W. 1087; *Atchison, T. & S. F. Ry. Co. v. Fiedler* (Civ. App.) 158 S. W. 265; *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145; *Abilene & S. Ry. Co. v. Burleson* (Civ. App.) 173 S. W. 517; *St. Louis Southwestern Ry. Co. of Texas v. Sterling* (Civ. App.) 178 S. W. 665.

Setting down passengers. *Ft. Worth & D. C. Ry. Co. v. Abbott* (Civ. App.) 170 S. W. 117; *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 161 S. W. 932; *Ft. Worth & R. G. Ry. Co. v. Keith* (Civ. App.) 163 S. W. 142; *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Civ. App.) 171 S. W. 517; *Texas Cent. R. Co. v. Claybrook* (Civ. App.) 178 S. W. 580; *Smith v. Texas Traction Co.* (Civ. App.) 180 S. W. 933; *International & G. N. Ry. Co. v. Williams* (Civ. App.) 183 S. W. 1185; *Wichita Falls Traction Co. v. Berry* (Civ. App.) 187 S. W. 415.

Obstructions on platform. *Gulf, C. & S. F. Ry. Co. v. Battle* (Civ. App.) 169 S. W. 1048.

Slippery platform. *Galveston, H. & S. A. Ry. Co. v. Bibb* (Civ. App.) 172 S. W. 178. Sudden jerk of train after stopping. *Fox v. Houston & T. C. Ry. Co.* (Civ. App.) 186 S. W. 852.

Projections from trains. *Houston Electric Co. v. Pearce* (Civ. App.) 192 S. W. 558. Knocking from steps of car. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Civ. App.) 194 S. W. 1128.

48. — **Damages.**—Where plaintiff's wife, while a passenger on defendant's road, was injured and took such means as an ordinarily prudent person would have taken to avoid the consequences of such injury, he was not to be denied a recovery because the jury might believe that if some other means had been taken the consequences would not have been so serious. *Missouri, K. & T. Ry. Co. of Texas v. McCormick* (Civ. App.) 160 S. W. 429.

Where a person sustaining a personal injury had gone into the saloon business, and only resorted to his carpenter's trade to recoup his broken fortunes to enable him to re-enter the saloon business, his lessened earning capacity must be tested in connection with his occupation as a saloon keeper. *San Antonio Traction Co. v. Crisp* (Civ. App.) 162 S. W. 422.

The value of the time one negligently injured will lose in the future from his injuries should be estimated at what he will be able to earn in his crippled condition, and not what he could earn if uninjured. *Missouri, K. & T. Ry. Co. of Texas v. Beasley* (Civ. App.) 162 S. W. 950.

A railway mail clerk held entitled to damages for diminished earning capacity in other lines of business. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 171 S. W. 1091.

The damages a husband may recover for injuries to the wife stated. *Galveston, H. & S. A. Ry. Co. v. Bibb* (Civ. App.) 172 S. W. 178.

49. — **Excessive damages.**—See *Atchison, T. & S. F. Ry. Co. v. Fiedler* (Civ. App.) 158 S. W. 265; *San Antonio Traction Co. v. Badgett* (Civ. App.) 158 S. W. 803; *Missouri, K. & T. Ry. Co. of Texas v. Pitkin* (Civ. App.) 158 S. W. 1035; *St. Louis Southwestern Ry. Co. v. Duncan* (Civ. App.) 164 S. W. 1087; *St. Louis Southwestern Ry. Co. of Texas v. McNatt* (Civ. App.) 166 S. W. 89; *Missouri, K. & T. Ry. Co. of Texas v. Cook* (Civ. App.) 166 S. W. 453; *Cleburne St. Ry. Co. v. Barnes* (Civ. App.) 168 S. W. 991; *Galveston, H. & S. A. Ry. Co. v. Bibb* (Civ. App.) 172 S. W. 178; *Abilene & S. Ry. Co. v. Burleson* (Civ. App.) 173 S. W. 517; *Galveston, H. & S. A. Ry. Co. v. Craighead* (Civ. App.) 175 S. W. 453, rehearing denied 175 S. W. 1199; *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822; *Texas & P. Ry. Co. v. Tucker* (Civ. App.) 183 S. W. 1183; *Texas & Pac. Ry. Co. v. Hanson* (Civ. App.) 189 S. W. 289; *Houston Electric Co. v. Pearce* (Civ. App.) 192 S. W. 558.

51. **Contributory negligence of and assumption of risk by person injured.**—That a railroad company owes the highest degree of care to a passenger upon its premises will not excuse the contributory negligence of the passenger. *Stamp v. Eastern Ry. Co. of New Mexico* (Civ. App.) 161 S. W. 450.

A passenger, unfamiliar with a railroad station, in walking around in the dark is guilty of contributory negligence barring recovery for a fall from the unlighted and unguarded platform. *Id.*

A charge, in a passenger's action for injuries alleged to have been received when he stepped on a banana peel on the car sill and fell to the platform, that the passenger could rely on the carrier keeping its floor, doorsill, and platform free and clear of banana peeling and other slippery substance is erroneous, as relieving the passenger from any obligation to watch out for his own safety. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

The doctrine of "assumed risk," as distinguished from contributory negligence, does not apply where a passenger is seeking recovery of damages for personal injuries due to carrier's negligence. *St. Louis Southwestern Ry. Co. of Texas v. Christian* (Civ. App.) 191 S. W. 175.

53. — **In transit.**—Though there was fuel and a stove in the car in which plaintiff and his wife were riding, plaintiff's failure to build a fire, the car becoming cold, is not contributory negligence precluding recovery for injuries to his wife from cold. *St. Louis Southwestern Ry. Co. of Texas v. Rutherford* (Civ. App.) 184 S. W. 700.

In action by passenger for injuries from fall through vestibule trap or door, it was not error to refuse instruction barring recovery if plaintiff could have discovered the vestibule door was open when he went upon the platform, and if he was guilty of the slightest degree of want of ordinary care. *St. Louis Southwestern Ry. Co. of Texas v. Christian* (Civ. App.) 191 S. W. 175.

That railroad passenger induced its porter to violate instructions in regard to opening car vestibule doors, did not relieve porter of duty as such to use care to avoid injuring passenger, as by pushing down steps against him box carried by him. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Civ. App.) 194 S. W. 1128.

54. — **Leaving conveyance.**—Railroad passengers must exercise ordinary care to leave the train upon its arrival, as well as to ascertain the means of exit from the coach. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

A passenger was required to use ordinary care in alighting, and, if she could have safely left the coach at the exit provided by due care, she cannot recover if she did not do so, even though the train employes were negligent in not sufficiently designating the exits, etc. *Id.*

That a passenger alights from a train moving slowly does not show contributory negligence per se, at least when done with the knowledge, assent, and encouragement of the carrier's employes. *San Antonio, U. & G. R. Co. v. Vivian* (Civ. App.) 180 S. W. 952.

A passenger held guilty of contributory negligence in alighting from a fast-moving train passing his station. *Id.*

For passenger on street car, after signal to stop, to walk to rear entrance and stand upon steps while car was moving slowly does not constitute contributory negligence as a matter of law, where, through sudden jolt, passenger was thrown from car. *Burkes v. Northern Texas Traction Co.* (Civ. App.) 185 S. W. 428.

Alleged contributory negligence of a passenger cannot be predicated upon his act in leaving the car at a door where there was no attendant, when the door was left unlocked, although there was another door, which was open, at which an attendant was stationed. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

It is not negligence as a matter of law for the passenger to alight from a moving train, where his testimony was that he was caused to alight by its sudden and unanticipated jerk. *Chicago, R. I. & G. Ry. Co. v. Comstock* (Civ. App.) 189 S. W. 109.

55. — **Acts by permission or direction of carrier.**—Statement by brakeman to person alighting from moving train to "jump with the train" held not to be an invitation or command so to do. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 179 S. W. 62.

Where a person was alighting from a moving train, the act of the brakeman in making room for him on the step held not an invitation to alight. *Id.*

56. — **Negligence as to incidental dangers.**—Though servants of a carrier in failing to discover a piece of wood left in the aisle of a railroad car were negligent, a passenger who stepped on it cannot be held negligent in failing to discover the same. *Texas & Pac. Ry. Co. v. Hanson* (Civ. App.) 189 S. W. 289.

57. — **Acts in emergencies.**—Where plaintiff, being unable to alight from the right side of a train after it had started because of the conductor's misconduct, rushed to the opposite side and attempted to alight, but was struck by a depot roof support, he did not assume the risk. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Civ. App.) 171 S. W. 517.

A passenger jumping from a train to avoid an apparent danger of collision between trains held guilty of contributory negligence. *Beaty v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 450.

61. — **Sufficiency of evidence.**—See *Ft. Worth & R. G. Ry. Co. v. Keith* (Civ. App.) 163 S. W. 142; *Texas Traction Co. v. Sherron* (Civ. App.) 166 S. W. 897; *Ft. Worth & D. C. Ry. Co. v. Abbott* (Civ. App.) 170 S. W. 117; *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Civ. App.) 171 S. W. 517; *Darden v. Southern Traction Co.* (Civ. App.) 172 S. W. 200; *Texas Midland R. Co. v. Truss* (Civ. App.) 186 S. W. 249.

63. **Ejection of passengers and intruders.**—See arts. 6560, 6561, 6591, post, and notes. Though plaintiff purchased a ticket, yet if he refused to deliver it to the conductor, and informed him that he had no money to pay his fare, the carrier's servants may eject him, whether he was intoxicated or not. *Texas Cent. Ry. Co. v. Rose* (Civ. App.) 161 S. W. 387.

Refusal to pay fare for a young child over five years old justifies ejection of the passenger with the child. *Fleck v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 191 S. W. 386.

64. — **Defective or invalid ticket or pass.**—Where a conductor inadvertently detached a coupon from the contract portion of a ticket, but returned the contract portion so that the two might be presented together on the return trip, the passenger was not excused from presenting the contract portion with the coupon, and on presenting the coupon alone was properly ejected. *Missouri, K. & T. Ry. Co. of Texas v. Luster* (Civ. App.) 162 S. W. 11.

Where a passenger's ticket called for a station which was not a regular stopping place for the train upon which he was riding, the conductor, using no more force than necessary, had the right to eject him at the last stopping place before reaching the point called for, if he did not offer to pay fare to the next regular stopping place. *Missouri, K. & T. Ry. Co. of Texas v. Dice* (Civ. App.) 168 S. W. 478.

Failure of passenger to produce ticket or to pay fare when called for justifies ejection from the train, although the conductor knows that passenger has purchased ticket. *Fleck v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 191 S. W. 386.

65. — **Tender or payment of fare to avoid ejection.**—When a passenger has failed and refused to produce a ticket or pay fare after having been given a reasonable opportunity to do so, and the train is stopped to put him off, his offer to pay fare after the process of ejection has begun will not render his ejection unlawful. *Fleck v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 191 S. W. 386.

A passenger who has been given opportunity to procure the money to pay his fare before ejection has no right to re-enter the train for the purpose of procuring money to pay his fare. *Id.*

66. — **Intruders and trespassers.**—One who paid a brakeman less than the passenger fare for the privilege of riding on a freight train cannot recover from the company for injuries resulting from being ejected by the brakeman while the train was in motion. *Texas & P. Ry. Co. v. Spann* (Civ. App.) 173 S. W. 600.

68. — **Negligence in ejecting person under disability.**—Where the employés do not know of the intoxicated condition of a passenger, they may act upon the presumption that he will exercise care to avoid injury. *Texas Cent. Ry. Co. v. Rose* (Civ. App.) 161 S. W. 387.

Where a carrier ejected an intoxicated passenger, its liability depends upon whether the place of ejection was such a one as a prudent person would have considered safe under the circumstances. *Id.*

Where an intoxicated passenger, ejected from a train, was incapacitated from protecting himself from danger, the carrier's liability for consequent injury depended upon whether the place of ejection was one that a prudent person would have considered safe under the circumstances. *Texas Cent. R. Co. v. Rose* (Civ. App.) 172 S. W. 756.

A carrier ejecting passenger so intoxicated as to be unable to protect himself from danger, at an unsafe place, was negligent, and where plaintiff as a proximate consequence was later run over by a train was liable for his injury. *Id.*

69. — **Proximate cause of injury.**—Fatigue and cold, suffered by plaintiff from walking to his destination after being ejected short of that place, from a train which did not stop there, as he was told, when he could have reached it by a later train in time for his purposes, held not the proximate result of his ejection, and therefore not the basis of an action for damages. *Cook v. Beaumont, S. L. & W. Ry. Co.* (Civ. App.) 160 S. W. 123.

70. — **Contributory negligence of person ejected.**—The captain of a National Guard company held the agent of one of the members whose ticket he presented on the trip to the encampment, and the member was liable for the captain's negligence in failing to give him the contract portion of the ticket on his return trip. *Missouri, K. & T. Ry. Co. of Texas v. Luster* (Civ. App.) 162 S. W. 11.

Where railroad company agreed with a father to wire a ticket to his minor son, but failed to do so and ejected the son from the train, the son's contributory negligence held not imputable to the father or to defeat the company's liability to the father for breach of the contract. *Missouri, K. & T. Ry. Co. of Texas v. Stogner* (Civ. App.) 163 S. W. 319.

Under Rev. St. 1895, arts. 4503, 4504, held, that a passenger delivering his ticket to an employé on a passenger train without the prescribed badge on his hat or cap voluntarily took the risk that such employé was not authorized to receive it, and was not excused for its nonproduction when demanded by proper authority. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

A passenger receiving a ticket in two parts held chargeable with notice that it was necessary for him to have the part calling for the last part of the passage in order to complete his journey. *Id.*

A passenger entering the train with a good ticket, and giving it to an employé, who was authorized to take it, but was required to return a part thereof, may stand upon his right to remain upon the train until carried to his destination. *Id.*

71. — **Companies liable.**—Carrier, whose ticket was sold by another carrier in accordance with published tariff, held liable for ejection of passenger holding valid ticket, ordered while on its lines, but not consummated until lines of another connecting carrier were reached. *Chicago, R. I. & G. Ry. Co. v. Carroll* (Sup.) 193 S. W. 1068.

75. **Actions for wrongful ejection—Sufficiency of evidence.**—See *Missouri, K. & T. Ry. Co. of Texas v. Dice* (Civ. App.) 168 S. W. 478; *Missouri, K. & T. Ry. Co. of Texas v. Norris* (Civ. App.) 184 S. W. 261.

77. — **Damages.**—Excessive damages, see *Ft. Worth & R. G. Ry. Co. v. Dubose* (Civ. App.) 171 S. W. 1090; *Ft. Worth & R. G. Ry. Co. v. Hales* (Civ. App.) 173 S. W. 991; *St. Louis Southwestern Ry. Co. of Texas v. Reed* (Civ. App.) 185 S. W. 1025.

In passenger's action for excessive force used in ejecting him from train, defendant held entitled to have jury consider as mitigating damages plaintiff's offensive language which provoked excessive force. *Texas & N. O. R. Co. v. McAllister* (Civ. App.) 183 S. W. 82.

78. **Baggage.**—Razors in a trunk checked by a male passenger are baggage for which the carrier is liable. *San Antonio & A. P. Ry. Co. v. Green* (Civ. App.) 170 S. W. 110.

Photographs may be considered baggage, for which the carrier is liable. *Id.*

Winter clothing which a passenger expected to use on the completion of his journey, winter being near, is baggage for the loss of which the carrier is liable. *Id.*

Money can be considered as baggage only if taken in good faith and in a reasonable amount for traveling expenses and personal use on a trip. *Id.*

80. — **Loss or injury.**—A carrier held not liable for loss of a trunk left on a platform adjoining baggage room, without calling it to the attention of any one, and without knowing whether the baggage room was open, where no custom to accept such delivery was shown. *Peterson v. San Antonio & A. P. Ry. Co.* (Civ. App.) 164 S. W. 915.

Railroad companies are not insurers of baggage not checked but carried by and retained in the control of passengers upon the cars; the carrier being liable in such case only when the loss is caused by its negligence. *Missouri, K. & T. Ry. Co. v. Kirkpatrick* (Civ. App.) 165 S. W. 500.

A passenger who, on inquiry, was told by trainmen that the car in which he left his baggage would go on through and not be switched off, was justified in relying upon the correctness of such information and in assuming that it would not be switched off so as to endanger losing his baggage in such car. *Id.*

Trainmen were negligent in informing a passenger that a car attached to the train in which the passenger's baggage was would go on through with the train when as a matter of fact the car was switched onto another line and the baggage was lost. *Id.*

81. — **Connecting carriers.**—Where passage over several lines is had on separate tickets, one carrier is not liable for the other carrier's loss of baggage. *Texas City Terminal Co. v. Thomas* (Civ. App.) 178 S. W. 707.

85. — **Damages.**—Excessive damages. *Houston & T. C. Ry. Co. v. Hirsch* (Civ. App.) 160 S. W. 426.



86. **Palace cars and sleeping cars.**—Sleeping car companies are required to use only reasonable or ordinary care to guard the property of passengers from theft, and are not held to that high degree of care applicable to common carriers generally. *Pullman Co. v. Moise* (Civ. App.) 187 S. W. 249.

92. — **Damages.**—In action against sleeping car company for loss of passenger's clothes stolen from her berth, damages were not recoverable for her mental anxiety or fear of some contingency, when the anxiety was unfounded and the contingency never came to pass. *Pullman Co. v. Moise* (Civ. App.) 187 S. W. 249.

Woman passenger whose clothes were stolen from berth in sleeping car, obliging her to walk lightly clad through train to her trunk in baggage car, might recover, as an element of damages, for her consequent humiliation and embarrassment. *Id.*

93. **Carriage of live stock—Duties and liabilities in respect to transportation in general.**—A railroad carrier must furnish cars suitable to transport cattle, and cannot shield itself by proving that the shipper contracted to inspect the cars furnished and reject them if improper. *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

A carrier, not being an insurer of a shipment of live stock against increased risks necessary to the transportation, is not liable for injuries, unless negligent. *Ft. Worth & D. C. Ry. Co. v. Berry* (Civ. App.) 170 S. W. 125.

Where cattle owned by a resident of Texas were driven across the state line and herded into pens in New Mexico, held, that the shipment constituted "interstate commerce," though the cattle were consigned to a point in Texas. *Pecos & N. T. Ry. Co. v. Stinson* (Civ. App.) 181 S. W. 526.

If failure of railroad to receive shipment of live stock when tendered it by connecting road was negligence, and such negligence prevented shipment of cattle that night to destination, railroad cannot excuse itself from liability on ground that it did not actually receive shipment until next day. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

Court did not err in refusing instruction that carriers are not insurers of the safe delivery of the live stock at any particular time, but were only bound to use ordinary care under the circumstances of the shipment. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

If there was no unreasonable delay, no rough handling out of the ordinary, or if cattle were damaged owing to their nature or condition or other causes over which the carrier had no control, carrier, if it used ordinary care, would not be liable. *Id.*

95. — **Contracts for transportation.**—See notes under art. 3687, rule 21, note 24. Consideration, see notes under art. 589.

Where a shipper of live stock without knowledge of its contents, hurriedly signed a contract for interstate shipment at the request of the carrier's agent, just as the train was starting, he was not bound thereby. *Gulf, C. & S. F. Ry. Co. v. Vashbinder* (Civ. App.) 172 S. W. 763.

Where a shipper of live stock, knowing that he would sign a written contract, orally contracted for cars for shipment, held, that the written contract, later executed, governs the carrier's liability. *Kansas City, M. & O. Ry. Co. of Texas v. Adams* (Civ. App.) 182 S. W. 365.

An interstate shipment of live stock may be made on an oral contract. *Kansas City, M. & O. Ry. Co. v. Hansard* (Civ. App.) 184 S. W. 329.

Where the only railroad at place of shipment refused to ship cattle unless it was written across bill of lading that some were in bad condition, and although statement was untrue, and shipper, under such pressure, signed such bill of lading, the carrier's act constituted legal duress, and shipper was not barred from recovering damages for their negligent transportation. *Missouri, K. & T. Ry. Co. v. Pacheco* (Civ. App.) 185 S. W. 1051.

97. — **Sanitary regulations.**—Under Act Cong. March 3, 1905, §§ 1, 3, 4, and express provision of federal quarantine regulation, held, that cattle exposed to a disease might be shipped as uninspected exposed cattle for immediate slaughter from quarantined territory to slaughtering centers in another state, so that carrier, requiring cattle to be dipped, was liable for consequent shrinkage and injury. *Pecos & N. T. Ry. Co. v. Hall* (Civ. App.) 189 S. W. 535.

98. — **Food and water.**—Under contract for shipment of live stock requiring shipper to feed and water them, etc., where that was not done in an ordinarily prudent way, the carrier was not liable for resulting damages from shrinkage. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 189 S. W. 765.

A carrier must furnish reasonable facilities and opportunities for feeding and watering stock shipped under a contract, requiring the shipper to care for them. *Id.*

99. — **Duties in respect to delivery.**—It is the duty of a carrier of live stock to deliver it with a reasonable degree of care and caution. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

100. — **Delay in transportation or delivery.**—See art. 6554 and notes. Carrier's agreement to deliver cattle at market on particular day held not complied with by delivering them too late to unload them and get them on the market before its close. *Texas Midland R. R. v. Becker & Cole* (Civ. App.) 171 S. W. 1024.

A carrier, delivering live stock on the day agreed on too late for market, held not to comply with its contract, where it is necessary to carry the stock over to the following day's market. *Texas Midland R. R. v. Fogleman* (Civ. App.) 172 S. W. 558.

Carriers of live stock are not responsible for the usual and ordinary delays incident to the ordinary conduct of their business. *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384.

Where cattle shipped to Kansas City with privilege of Wichita were unloaded at Wichita, at shipper's request, and were reshipped to Kansas City, no recovery against the carrier could be had for delay and shrinkage at Wichita. *Panhandle & S. F. Ry. Co. v. Harp* (Civ. App.) 193 S. W. 438.

101. — **Excuses for delay.**—An unreasonable delay in the transportation of live stock is not justified by the maintenance by the carrier of a schedule resulting in such delay. *St. Louis, S. F. & T. Ry. Co. v. Armstrong* (Civ. App.) 166 S. W. 366.

Where a carrier accepted a shipment of cattle, knowing that a flood had carried away a bridge on its line, but did not inform the shipper, it cannot justify delay on account of the flood. *Atchison, T. & S. F. Ry. Co. v. Boyce* (Civ. App.) 171 S. W. 1094.

Carrier held not liable for delay in transportation of cattle, due to burning of bridge without its fault, and instruction that burning, though unavoidable, would be no defense, was erroneous. *Ft. Worth & D. C. Ry. Co. v. Morgan* (Civ. App.) 179 S. W. 901.

102. — **Loss or injury in general.**—When a railroad company accepts live stock for transportation, it must exercise ordinary care in the handling and operation of the cars in which the live stock are riding and in transporting them within a reasonable time to their destination. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

A carrier is an insurer of the safe transportation of animals delivered to it for carriage, unless the loss results from act of God, act of the owner, the proper vice of the animals, or the public enemy, subject to the exception provided by Rev. St. 1895, art. 326 (now Rev. St. 1911, art. 714). *Pecos & N. T. Ry. Co. v. Morrison* (Civ. App.) 169 S. W. 1098.

In an action for injuries to cattle unloaded by the owner at a dipping station and held for 14 days, an instruction to find for plaintiff for injuries from delay during transportation, including the time they were thus unloaded, was erroneous. *Ft. Worth & D. C. Ry. Co. v. Berry* (Civ. App.) 170 S. W. 125.

Supervision by government officer of dipping of cattle held not to relieve defendant railroad from liability for injury to plaintiff's stock through carrier's failure to dip the cattle in an arsenic dip. *Missouri, K. & T. Ry. Co. of Texas v. Cauble* (Civ. App.) 174 S. W. 880.

A railroad was not liable for the death of a mare in transit proximately caused by a kick from another horse in the shipping pens, not brought about by any negligence of the road's servants, and not followed by any negligence of the road in further transporting the mare. *Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co.* (Civ. App.) 180 S. W. 1170.

It being a matter of common knowledge that the natural propensity of a mule is to kick, it is the duty of a carrier transporting such animals to take into consideration and furnish cars constructed with regard to this natural propensity. *Ft. Worth & R. G. Ry. Co. v. Albin* (Civ. App.) 185 S. W. 647.

Where shipment of cattle, suffering from Texas fever, is negligently delayed by road, and cattle are damaged solely on account of their infection with disease, shipper cannot recover. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

Under live stock shipping contract, carrier held not exempt from the results of its own negligence and, if ordinary care required, bound to protect the stock from injury until the shipper could unload it, or to unload the stock itself. *Chicago, R. I. & G. Ry. Co. v. Pavillard* (Civ. App.) 187 S. W. 998.

103. — **Stock awaiting transportation.**—A carrier receiving cattle for transportation held liable for injuries caused by placing them in pens without shelter, too small to accommodate them properly. *Andrews v. McGill* (Civ. App.) 179 S. W. 1087.

Carrier must use ordinary care to prevent injury to cattle while in pens awaiting shipment after acceptance for transportation, if such care is necessitated by delay, notwithstanding contract for shipment requiring shipper to care for cattle while awaiting shipment. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

105. — **Contributory negligence of owner.**—The failure of the consignee of a horse properly to protect it from the weather after delivery by the carrier is not contributory negligence which will bar a recovery for the death of the horse caused by delay in shipping, and by transporting it in a box car without sufficient ventilation. *Texas & N. O. R. Co. v. Francis* (Civ. App.) 165 S. W. 40.

A shipper of cattle held not guilty of contributory negligence in failing to take them from the railroad pens and drive them to a watering place, where the train was late. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

Defendant railroad transporting a mare, which, after her injury in the shipping pens or cars, the shipper's agent refused to remove from the train and have cared for, was not liable for the death of the mare, caused solely by her further transportation, unaccompanied by any negligence of the road's servants. *Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co.* (Civ. App.) 180 S. W. 1170.

Shipper of live stock could not recover from the road for death of a mare, the negligence of his own agent in ordering the mare shipped through after discovering she was injured having proximately contributed to her death, though the road's servants were also negligent in the further transportation. *Id.*

Where shipper of cattle, on part of shipment being delayed by repairs becoming necessary to cars, refused road's offer to forward residue of shipment immediately, he could not recover for additional delay of residue of shipment so offered to be immediately transported. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

Where a shipper of live stock was negligent in failing to unload it on arrival so that it was injured, he could not recover for such injury. *Chicago, R. I. & G. Ry. Co. v. Pavillard* (Civ. App.) 187 S. W. 998.

110. **Actions against carriers of live stock—Weight and sufficiency of evidence.**—In an action against carrier for injuries to a shipment of cattle evidence held sufficient to sustain a verdict for plaintiff. *Chicago, R. I. & G. Ry. Co. v. Swaggerty* (Civ. App.) 163 S. W. 317.

In an action against a carrier for damages to live stock, evidence held insufficient to show any unreasonable delay in transportation, or that any of the cattle died en route as alleged. *Blackwell v. St. Louis, B. & M. Ry. Co.* (Civ. App.) 168 S. W. 52.

In an action for injuries to a shipment of mules, evidence held to support jury's conclusion that the shipper was not negligent in the manner in which he watered the mules when unloaded in a famished condition. *Kansas City, M. & O. Ry. Co. of Texas v. Beckham* (Civ. App.) 168 S. W. 399.

Evidence, in an action against a carrier for delay in transporting live stock, held to

sustain a recovery for shrinkage and depreciation in value. *Gulf, C. & S. F. Ry. Co. v. J. A. Bowers & Son* (Civ. App.) 175 S. W. 861.

In an action for injuries to horses during shipment, evidence held sufficient to warrant the jury in attributing the injuries either to the delay or to the rough handling. *Southern Pac. Co. v. W. T. Meadors & Co.* (Civ. App.) 176 S. W. 882.

Evidence held sufficient to support a judgment against a railroad company for injuries to live stock on account of delay and rough handling. *International & G. N. Ry. Co. v. Frank* (Civ. App.) 177 S. W. 168.

In an action against a carrier of live stock for delay in transit, evidence held insufficient to show any unreasonable delay. *Gulf, C. & S. F. Ry. Co. v. Bogy* (Civ. App.) 178 S. W. 577.

Evidence, in an action for damages for negligent delay in transportation of live stock, held sufficient to sustain a verdict for the plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Dale Bros. Land & Cattle Co.* (Civ. App.) 179 S. W. 935.

Evidence in an action for damages to a shipment of cattle held not to show that any parcel contract of shipment was ever made. *Turner v. Henderson* (Civ. App.) 183 S. W. 51.

In an action against a carrier for injury to a mule in transportation, where the animal caught its foot in a crack four or five feet above the floor of the car, evidence held sufficient to warrant the deduction of an improper construction of the car. *Ft. Worth & R. G. Ry. Co. v. Albin* (Civ. App.) 185 S. W. 647.

A prima facie showing of negligence of the carrier in action for damages to live stock shipped is not met by proof that the cattle when shipped were securely tied by the shipper, and while in the exclusive charge of the carrier became untied. *San Antonio & A. P. Ry. Co. v. Jackson & Allen* (Civ. App.) 187 S. W. 488.

In an action against a carrier to recover damages for injuries to a shipment of cattle, evidence held insufficient to sustain a verdict for plaintiff on an alleged verbal contract. *International & G. N. R. Co. v. Hudson* (Civ. App.) 188 S. W. 277.

In action for damages to shipment of live stock, evidence held to show merely shipper's request for cars as required by Interstate Commerce Act Feb. 4, 1887, § 1, as amended by Act Cong. June 29, 1906, § 1, and not the elements of a contract. *Atchison, T. & S. F. Ry. Co. v. White* (Civ. App.) 188 S. W. 714.

In action for damages for negligent transportation of live stock, evidence held to show defendant's negligence as charged and being the proximate cause of the injury. *Houston & T. C. R. Co. v. Patterson* (Civ. App.) 192 S. W. 1103.

In action against railroad for damage to mare by rough handling, evidence held to sustain a verdict for defendant. *Jones v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 193 S. W. 373.

In action for damages to a shipment of stock owing to delay and a consequent shrinkage, evidence held sufficient to sustain a finding that the carrier was negligent in failing to provide a proper engine. *International & G. N. Ry. Co. v. Mudd* (Civ. App.) 194 S. W. 960.

113. — **Damages.**—Measure of damages for injury to shipment of live stock is the difference between the market value on arrival and what would have been the value, had the shipment been transported with ordinary care and dispatch. *Texas & P. Ry. Co. v. De Long* (Civ. App.) 176 S. W. 874; *Missouri, K. & T. Ry. Co. of Texas v. Mulkey & Allen* (Civ. App.) 159 S. W. 111; *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375; *Rodgers v. Texas & P. Ry. Co.* (Civ. App.) 172 S. W. 1117; *Texas Mexican Ry. Co. v. King* (Civ. App.) 174 S. W. 336; *Gulf, C. & S. F. Ry. Co. v. King* (Civ. App.) 174 S. W. 960; *Texas & P. Ry. Co. v. Martin Bros.* (Civ. App.) 175 S. W. 707; *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708; *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384; *Ft. Worth & R. G. Ry. Co. v. Albin* (Civ. App.) 185 S. W. 647; *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

It is not necessary that live stock be put upon the market for sale in order to entitle the owner to recover its impaired value because of negligent injuries, etc., in shipment. *Texas Mexican Ry. Co. v. Reed* (Civ. App.) 165 S. W. 4.

Where a carrier was unable to ship cattle to destination because of quarantine regulations, and some died, and others were sold at a point short of destination, the carrier's conversion, if any, occurred at that point, and plaintiff's measure of damages was the reasonable market value there. *Texas & P. Ry. Co. v. Crowder* (Civ. App.) 165 S. W. 116.

In an action for negligent delay and rough handling of a shipment of live stock, the jury, in estimating the damages, should consider the fact of their recovery from any injury after they were put upon a pasture. *Ft. Worth & D. C. Ry. Co. v. Shank & Dean* (Civ. App.) 167 S. W. 1093.

In an action for damages to a shipment of live stock, some of which died, the measure of damages is the value of the stock at the time at which it should have been delivered, which value, if there is a market at the place of destination, will be measured by the market value, and, if not, by the intrinsic value. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

Where the market value of an animal injured in shipment at the place of delivery is not shown, the intrinsic value of the animal is the measure of damages. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.) 173 S. W. 273.

That live stock injured by dipping in crude oil recovered from such injury does not preclude the owner from recovery for any depreciation in value caused thereby. *Missouri, K. & T. Ry. Co. of Texas v. Cauble* (Civ. App.) 174 S. W. 880.

A carrier guilty of delay and rough handling in transporting cattle for pasturage may show that the cattle, though injured, soon recovered. *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708.

The measure of damages for injuries to cattle shipped for pasturage is the same as for injuries to those shipped to market for sale. *Pecos & N. T. Ry. Co. v. Holmes* (Civ. App.) 177 S. W. 505.

Where a shipper recovered for shrinkage in cattle, and it appeared that the cattle brought the actual market price, no additional recovery for loss in selling appearance can be had. *International & G. N. Ry. Co. v. Rhoden* (Civ. App.) 177 S. W. 984.

The measure of damages for negligent injury to live stock during transportation is the market value at place of delivery of those killed or rendered worthless, and the measure of damages for those injured, but not killed or rendered worthless, is the difference between the market value as delivered and what it would have been if properly handled. *Hovencamp v. Union Stockyards Co.* (Sup.) 180 S. W. 225.

Where hogs died in transit, the measure of damages is their market value at point of destination, or, in case there was no market value, their intrinsic value at such point. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

Where the plaintiff's cattle had been injured by a wreck and consequent delay, he was not required to accept an unfavorable sale, but was entitled to a reasonable time to prepare them, and an opportunity to sell them in the open market. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

Where some cattle shipped were dead at destination, because of negligent delay of shipment at intermediate point, measure of shipper's damages was market value at destination on arrival had no delay occurred. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

Carrier converting a calf held liable for the value thereof at destination in the condition in which it would have arrived but for its negligence or conversion. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

A carrier of live stock, in the absence of any special contract, is liable for the full amount of their depreciation caused by its negligence. *Id.*

The measure of damages for negligent injury of cattle in transit is the same, whether they are for immediate sale on the market or for pasture. *Panhandle & S. F. Ry. Co. v. Norton* (Civ. App.) 188 S. W. 1011.

Where live stock were negligently killed in transit and the shipper removed their hides and sold them, the carrier should be allowed the market value at the time and place where the hides were removed. *Id.*

Where shipment of live stock is injured by carrier's negligence, shipper must use all reasonable means at his command to lessen damages which would otherwise result from such negligence, and his failure to do so limits recovery to damages which would have resulted from such negligence had such means been used. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 189 S. W. 765.

In action for damages to shipment of live stock, increased expense in caring for it while recuperating could not be recovered in addition to loss from shrinkage, as it would be double damages. *Id.*

Where cattle were not shipped for immediate sale on the market, the measure of damage from injury and delay is the difference between their market price as delivered and what their market price would have been had they been properly cared for and handled during transportation. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

In action against a carrier for injuries to stock shipped and for delay in shipment, shrinkage, depreciation in market value, and decline of market price were all proper elements of damage. *Panhandle & S. F. Ry. Co. v. Harp* (Civ. App.) 193 S. W. 438.

In an action against a railroad for damage to live stock shipments, the exact amount of damages need not be capable of definite computation in order to support a verdict for plaintiff. *Houston & T. C. R. Co. v. Derden* (Civ. App.) 194 S. W. 489.

114. **Control of premises.**—Where a railroad company had given a particular transfer company the exclusive right upon the railroad company's trains and premises to solicit baggage, etc., defendant will be enjoined at the suit of the company from going upon its premises to solicit patronage. *Denton v. Texas & P. Ry. Co.* (Civ. App.) 160 S. W. 113.

## Art. 708. [320] [278] Carriers can not limit their responsibility.

Cited, *Nevill v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 187 S. W. 388.

1. **Nature of right and of restriction.**—A provision of a bill of lading that property destined to a station at which there is no regular agent shall be at the owner's risk after cars are put on private sidings held not illegal, where the shipper knew that the shipment would have to be left on a siding, notwithstanding Rev. St. 1911, art. 6589, protecting freight from damage by exposure. *St. Louis Southwestern Ry. Co. of Texas v. Smith Bros. Grain Co.* (Civ. App.) 164 S. W. 409.

In Texas, by statute, a common carrier may not limit by contract its common-law liability as to domestic shipments, nor can it contract to relieve itself from its common-law liability for damages occasioned by its negligence. *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

5. **Carriage of live stock.**—A statement in a contract for the shipment of live stock that the condition of the cars and bedding was satisfactory did not relieve the carrier from liability for failure to properly bed the cars; a carrier not being permitted to limit its common-law liability. *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925.

A carrier, having failed to furnish proper cars for the transportation of cattle and to see that they were securely fastened, held not relieved from liability for the escape of the cattle from the cars by a stipulation in the contract binding the shipper to inspect the cars, see that they were properly fastened, and report any defect therein. *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

Where a carrier undertook to bed cattle cars before the cattle were loaded or the shipping contract signed, it could not rely on a provision of the contract subsequently executed to relieve it from liability for a failure to provide proper bedding. *Id.*

This article held applicable to the transportation of live stock. *Pecos & N. T. Ry. Co. v. Morrison* (Civ. App.) 169 S. W. 1098.

Provision of a contract for live stock shipment to be accompanied by the shipper's representative, relieving the carrier from all liability for injury, is invalid, as relieving it from its own negligence. *Gulf, C. & S. F. Ry. Co. v. Winn Bros.* (Civ. App.) 178 S. W. 697.

Under arts. 708 and 710, a stipulation freeing a railroad company from liability for injuries to animals because of heat, suffocation, or overcrowding, and declaring that in-

jury should be presumed the result of overloading, is invalid. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

The agreement that a shipper should care for animals in transit is no defense to an action for damages to the same, unless the railroad company showed adequate facilities were provided and the agreement was reasonable. *Id.*

A stipulation in contract for shipment of live stock that the shipper would load the stock, care for and attend them while they were in the stockyards, and that the carrier should not be liable for any loss or damage while the stock were in the shipper's charge, is invalid. *Id.*

An agreement requiring the shipper to inspect the cars, and accept them if in good condition, and declaring that in the event of failure it shall be conclusively presumed that the cars were suitable, is void. *Id.*

Under arts. 708 and 731, all portions of a shipping contract relating to reciprocal rights and duties of the parties are inadmissible in action for damages to live stock shipment. *San Antonio & A. P. Ry. Co. v. Jackson & Allen* (Civ. App.) 187 S. W. 488.

9. **Interstate and foreign commerce.**—The federal, and not the state, statutes control in fixing a railroad company's liability on an interstate shipment. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943; *Gulf, C. & S. F. Ry. Co. v. Brackett-Fielder Mill & Grain Co.* (Civ. App.) 162 S. W. 1191; *Pacific Express Co. v. Krower* (Civ. App.) 163 S. W. 9; *Hovey v. Tankersley* (Civ. App.) 177 S. W. 153; *Atchison, T. & S. F. Ry. Co. v. Smyth* (Civ. App.) 189 S. W. 70.

Where cotton shipped from a point in this state to Galveston on local bills of lading was in fact destined for export, so that the transportation from the place of delivery to Galveston was a part of the journey to a foreign port, the shipment was an interstate shipment. *Texas & P. Ry. Co. v. Langbehn* (Civ. App.) 158 S. W. 244, denying second rehearing 150 S. W. 1188.

Under Carmack Amendment, a receipt of an express company limiting its liability to \$50, unless a higher value was placed on the goods by the shipper, held valid. *Pacific Express Co. v. Krower*, 163 S. W. 9, 106 Tex. 216.

Shipper delivering foreign shipment to carrier under bill of lading, limiting liability, held subject to such limitations in the absence of negligence of carrier or its servants contributing to injury through the excepted cause. *Texarkana & Ft. S. Ry. Co. v. Brass* (Civ. App.) 175 S. W. 778.

The limitation upon the carrier's liability contained in a contract for an interstate shipment of live stock at a reduced rate prescribed by the interstate commerce commission was valid and enforceable. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

Where cars were furnished on request for an interstate shipment of live stock, as required by Interstate Commerce Act, conditions in the contract as to the carrier's liability were controlling. *Atchison, T. & S. F. Ry. Co. v. White* (Civ. App.) 188 S. W. 714.

10. **Negligence or misconduct.**—A common carrier may not stipulate so as to relieve itself from liability arising from its own negligence. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819; *Chicago, R. I. & G. Ry. Co. v. Pavillard* (Civ. App.) 187 S. W. 998; *Western Union Telegraph Co. v. Piper* (Civ. App.) 191 S. W. 817.

16. **Limitation of amount of liability.**—A carrier converting goods shipped under contract limiting liability held liable for full value of the goods. *St. Louis, I. M. & S. Ry. Co. v. Wallace* (Civ. App.) 176 S. W. 764.

A carrier transporting freight to a wrong place, and there selling it as unclaimed freight, converted it and was liable for its full value, notwithstanding limited liability. *Id.*

Under bill of lading limiting a recovery to \$10 for each calf shipped and, in case of injury, to an amount not exceeding the same proportion, the shipper, on jury's finding of 5 per cent. depreciation upon a valuation of \$30, was entitled to 50 cents per head. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

Provision in shipping contract valuing calves in case of total or partial loss held not to apply to the conversion of a calf or its proceeds by the carrier or its agents. *Id.*

In an action for damages to a shipment of live stock, party under a written contract at a reduced rate in consideration of a reduced valuation, the shipper having classified them in the contract as calves, could not claim that they should have been classified as older animals. *Id.*

24. **Limitation as ground of defense—Sufficiency of evidence.**—Evidence held to sustain findings that plaintiff's wife, on tendering the shipment, declared its value to be \$300, and that defendant charged a rate proportionate to such valuation. *Wells Fargo & Co. Express v. Powell* (Civ. App.) 177 S. W. 988.

### Art. 710. [322] [280] Must give bill of lading.

Cited, *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 858.

1. **Bills of lading in general.**—Where a shipper's agent signed a bill of lading, without reading it or knowing its contents, after the shipment had started, the writing was unenforceable for want of mutuality and consideration. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 172 S. W. 1116.

At common law a shipper might rely either on an oral contract or recover for negligent delay where there was no contract. *Panhandle & S. F. Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1.

Under arts. 708 and 710, a stipulation freeing a railroad company from liability for injuries to animals because of heat, suffocation, or overcrowding, and declaring that injury should be presumed the result of overloading, is invalid. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

5. **Construction and operation of bill.**—A clause inserted in a bill of lading by the carrier for its own benefit must be taken to have meant all that the words implied. *St. Louis, B. & M. Ry. Co. v. Hicks* (Civ. App.) 158 S. W. 192.

Recital in bill of lading showing cotton to have been consigned by the seller to a certain named buyer was conclusive that it was consigned to the buyer, and not to the

shipper's order, "notify." *Shippers' Compress & Warehouse Co. v. Cumby Mercantile & Lumber Co.* (Civ. App.) 172 S. W. 744.

**7. Negotiability and transfer of bill.**—A bill of lading is only quasi negotiable and represents personal property and not money. *B. W. McMahan & Co. v. State Nat. Bank of Shawnee* (Civ. App.) 160 S. W. 403.

The transfer of a bill of lading transfers only the title to, and the constructive possession of, the very goods which it represents. *Id.*

Bank which, under agreement with dealer in cotton, paid drafts drawn on him, receiving the attached order bills of lading, held to have the title to and possession of the cotton, and the dealer had no title or interest therein. *Id.*

Where bank which had paid drafts drawn on dealer in cotton intrusted the bills of lading to the dealer for a particular purpose and he by means thereof obtained compress receipts which he transferred to a purchaser, purchaser held to have no title to the cotton as against the bank. *Id.*

**9. Contracts for transportation.**—If a contract for the shipment of freight was procured by the carrier by fraud, it was not binding upon the shipper. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943.

Where the agent signed the contract without having time to read it, and believing that it was merely to be used as a "pass," held, that the shipper was not bound if the contract differed from the oral contract of shipment. *Id.*

To invalidate the written contract of shipment, on the ground that the shipper's agent was compelled to sign it without knowledge of its terms, and believing that it was a mere pass, the evidence must show that he was compelled to sign it without knowledge of its contents, and without being given time to read it, or having his attention called thereto. *Id.*

A consignor of goods, which had been loaded and for which a bill of lading had been issued to his agent, as consignee, before any new interest had intervened, and subject to the carrier's claim for full freight, had the right to cancel the contract of shipment and to require a redelivery. *Texas Midland R. R. v. Hargrove* (Civ. App.) 169 S. W. 925.

The Carmack amendment prohibits oral contracts of shipment only when they are in conflict with the schedules and rates published by the Interstate Commerce Commission. *Gulf, C. & S. F. Ry. Co. v. Vasbinder* (Civ. App.) 172 S. W. 763.

A local agent has authority to make a verbal contract binding his company to furnish cars for the transportation of cattle on a day certain. *Pecos & N. T. Ry. Co. v. Stinson* (Civ. App.) 181 S. W. 526.

Evidence held sufficient to support a judgment for plaintiff, a carrier, for the rent of unused space in a vessel against a shipper failing to furnish merchandise for shipment pursuant to contract requirements. *W. B. Clarkson & Co. v. Gans S. S. Line* (Civ. App.) 187 S. W. 1106.

A shipping contract, binding the shipper to pay for space unused in a vessel by reason of the shipper's failure to furnish a cargo according to contract, held not unilateral. *Id.*

**13. Delivery to carrier.**—Evidence held sufficient to show that a car loaded by shipper on its spur track was delivered to and accepted by defendant road for switching to a connecting road for transport. *Gulf, C. & S. F. Ry. Co. v. D. S. Cage & Co.* (Civ. App.) 174 S. W. 855.

**14. Ownership, custody, and control of goods.**—The term "shipper's order," as used in bills of lading, is well understood and means that the title remains in the shipper until he orders a delivery of the goods. *B. W. McMahan & Co. v. State Nat. Bank of Shawnee* (Civ. App.) 160 S. W. 403.

Evidence, in an action for damage to a piano while being shipped on defendant's railroad, held to sustain a finding of ownership of the piano in plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Western Automatic Music Co.* (Civ. App.) 161 S. W. 380.

That plaintiffs sued as a firm in an action for damages to a shipment of horses consigned by the firm, did not render erroneous a joint judgment in favor of them as the individual members of the firm, where the evidence was conflicting whether the horses belonged to the firm, or part of them belonged to one partner and the rest to the other. *Quannah, A. & P. Ry. Co. v. Chumbley* (Civ. App.) 169 S. W. 1107.

Where a bank purchased a seller's bill of lading with draft attached, but on refusal of the buyer to accept the goods, the seller gave its check to the bank for the amount of the draft, held on the evidence, that at the time of a levy on the goods as the property of the seller the title was in such seller. *Collin County Nat. Bank v. Satterwhite* (Civ. App.) 184 S. W. 333.

**15. Transportation and delivery by carrier.**—A notice of the arrival of goods is not "given" or "sent," under the provisions of a bill of lading, at the time it is posted, where the consignee is in the same town as the agents of the carrier and known to them so that he could be directly notified. *St. Louis, B. & M. Ry. Co. v. Hicks* (Civ. App.) 158 S. W. 192.

A carrier is not entitled to surrender of the bill of lading under all circumstances as a condition precedent to the delivery to the consignee. *Outcault Advertising Co. v. Thornton* (Civ. App.) 164 S. W. 436.

The consignee named in a bill of lading must be treated by the carrier as the absolute owner until he has notice to the contrary, and a delivery to the consignee, without such notice, discharges the carrier. *St. Louis, B. & M. Ry. Co. v. McDavitt Bros.* (Civ. App.) 165 S. W. 5.

Where goods consigned to the purchaser were, on arrival, delivered in accordance with the purchaser's order, he cannot recover from the carrier because it did not collect the purchase price from the person to whom the goods were delivered, as directed by the purchaser. *Id.*

A carrier must furnish a shipper reasonable facilities for unloading, but the shipper must exercise reasonable diligence, and the carrier need not permit him to use the car as a storehouse in which to carry on his business as a seller on the payment of demurrage charges. *Wattam v. International & G. N. R. Co.* (Civ. App.) 168 S. W. 973.

Where a buyer obtained from a carrier with its consent, an article shipped by the

seller to himself with directions to notify the buyer, and no demand was made for a return thereof, and possession was not obtained on a promise to pay the charges on it, the carrier could not pay a draft drawn by the seller and make the buyer liable therefor. *San Antonio & A. P. Ry. Co. v. Smith* (Civ. App.) 171 S. W. 282.

17. **Perishable goods.**—Carrier of perishable freight held not guilty of actionable negligence for failing to maintain a sufficient quantity of ice in a car. *St. Louis & Southwestern Ry. Co. v. Grant* (Civ. App.) 174 S. W. 714.

20. **Presentment of bill of lading before delivery.**—On refusal of carrier's agent to halt on request a shipment of goods and redeliver them without any demand by him for the bill of lading or denial of the consignor's ownership, held that the failure to tender the bill of lading was immaterial to the consignor's right of action for damages. *Texas Midland R. R. v. Hargrove* (Civ. App.) 169 S. W. 925.

Petition alleging ownership of goods shipped under a bill of lading to the shipper's agent as consignee, a demand and a refusal to redeliver before the goods had left the point of shipment, without alleging a tender of the bill of lading or an offer to pay the freight, held to state a good cause of action for damages. *Id.*

21. **Liability for failure or refusal to deliver.**—Where an article, shipped by the seller to himself with directions to notify the buyer, came into possession of the buyer without the consent of the carrier, the buyer, appropriating the article, was liable to the carrier for conversion, the price not having been paid. *San Antonio & A. P. Ry. Co. v. Smith* (Civ. App.) 171 S. W. 282.

In action against carrier for conversion by sale on refusal of shipper to pay excessive freight, the fact that shipper and his attorney purchased most of the property was immaterial. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

An express company held liable to the shippers for delivery to the consignee without production of the company's receipt, contrary to directions. *Wells Fargo & Co. Express v. Pugh* (Civ. App.) 185 S. W. 61.

Where the carrier demands excessive and illegal freight charges, and on the refusal of the shipper to pay them declines to deliver the goods, and sells them for the charges, there is a conversion. *Panhandle & S. F. Ry. Co. v. Hubbard* (Civ. App.) 190 S. W. 793.

25. **Actions for failure to deliver or misdelivery—Damages.**—In an action by a consignee against a carrier for conversion of a car of apples in refusing to deliver them on the production of the bill of lading, the measure of damages was the interest on the value of the property during its retention and any amount that the property depreciated in value while withheld. *Missouri, K. & T. Ry. Co. of Texas v. Long* (Civ. App.) 167 S. W. 769.

A consignor whose goods had been loaded and for which a bill of lading had been issued to his agent, as consignee, on the carrier's refusal to redeliver them at the place of shipment, held entitled to recover the difference, if any, between their market value there and when they were delivered at destination. *Texas Midland R. R. v. Hargrove* (Civ. App.) 169 S. W. 925.

The measure of damages for the conversion of a car of coal is the reasonable market value of the coal at the place where it was taken. *Quanah, A. & P. Ry. Co. v. Campbell* (Civ. App.) 170 S. W. 859.

In determining damages for conversion by carrier, secondhand household fixtures have no recognized value, and court must consider original cost, use, general condition, etc. *Whitley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 183 S. W. 36.

26. **Loss or injury to goods.**—Where, though a shipper of eggs included them with live poultry to make a car load, thus obtaining a lower freight rate than he was entitled to, he did so in good faith, with the knowledge of the carriers' agent, the illegality of the shipment did not absolve the carriers of liability for damages to the eggs through its negligence. *Houston & T. C. R. Co. v. Commons* (Civ. App.) 160 S. W. 1107.

Where carrier afforded the consignee every reasonable opportunity to remove fruit from the car, it was not liable for damages resulting to the fruit because of its refusal to permit the consignee to peddle from the car. *Wichita Falls & N. W. Ry. Co. v. Wat-tam* (Civ. App.) 168 S. W. 398.

Rule of railroad which had been systematically disregarded held not to serve such railroad as a defense in an action against it for destruction of a shipment loaded in violation of the rule. *Gulf, C. & S. F. Ry. Co. v. D. S. Cage & Co.* (Civ. App.) 174 S. W. 855.

30. — **Commencement, duration, and termination of liability.**—Defendant railroad held to have received and accepted delivery of goods for which it issued bill of lading before actual delivery, so as to place it under a liability as insurer as to shipment. *Gulf, C. & S. F. Ry. Co. v. D. S. Cage & Co.* (Civ. App.) 174 S. W. 855.

In an action against a carrier for failure to deliver goods, refusal of an instruction that the carrier was not liable for failure to deliver if the goods were taken under attachment held error. *Gulf, C. & S. F. Ry. Co. v. McKie* (Civ. App.) 191 S. W. 576.

At common law, when property received by a common carrier under contract of shipment is taken from its possession by a sheriff or other officer acting under judicial process, the carrier's liability ceases. *Id.*

32. — **Directions of shipper.**—A carrier of bananas under contract whereby a messenger traveled with the shipment to advise concerning its protection en route, which carrier disregarded two requests of the messenger en route for protection against cold, could not escape liability because the messenger failed to ask that the fruit be protected at destination. *Illinois Cent. R. Co. v. Freeman* (Civ. App.) 182 S. W. 369.

34. — **Negligence.**—Where a contract of carriage contained an absolute and unconditional stipulation requiring the carrier to re-ice the cars at every icing station, the carrier could not excuse noncompliance therewith because its employes in charge did not consider re-icing necessary. *Missouri, K. & T. Ry. Co. v. Texas Packing Co.* (Civ. App.) 167 S. W. 337.

35. — **Act of God, vis major, or inevitable accident.**—A loss by fire, unless caused by lightning, does not come within the exception of the act of God and is chargeable against a common carrier. *American Express Co. v. Duncan* (Civ. App.) 193 S. W. 411.

40. **Action for loss or injury—Sufficiency of evidence.**—In an action against a railway company for injury to a shipment of cabbages on account of the improper icing of the car, evidence held to sustain a verdict against the carrier. *Galveston, H. & S. A. Ry. Co. v. Foetche* (Civ. App.) 166 S. W. 414.

In an action by a shipper against a carrier for damages to a shipment of dressed turkeys, comprising three classes, varying in value, evidence held sufficient to support the verdict, though there was no evidence as to what class the turkeys belonged, where the verdict was less than the loss, whatever class the turkeys belonged in. *Missouri, K. & T. Ry. Co. v. Texas Packing Co.* (Civ. App.) 167 S. W. 337.

Evidence in an action against a carrier by water for injuries to property held insufficient to show negligence. *Mallory S. S. Co. v. Rachal* (Civ. App.) 173 S. W. 216.

Evidence held sufficient to show that a railroad did not enforce its rule regarding the loading of shipments, for which it was to receive no part of the transportation charge, into its service cars. *Gulf, C. & S. F. Ry. Co. v. D. S. Cage & Co.* (Civ. App.) 174 S. W. 855.

In a shipper's action for loss of goods, evidence held to justify a finding that the flood by which they were destroyed was not such an unprecedented and extraordinary flood that defendant railroad was not required to anticipate and guard against it. *International & G. N. Ry. Co. v. Penney* (Civ. App.) 178 S. W. 970.

41. — **Damages.**—The measure of damages for injuries to secondhand household goods and wearing apparel is the difference in their actual value just prior to and just after the injury, and not the difference in the market value of similar goods at secondhand stores at or nearest their destination. *Galveston, H. & S. A. Ry. Co. v. Wallraven* (Civ. App.) 160 S. W. 116.

Where secondhand household furniture and wearing apparel is wholly destroyed, a proper method of arriving at their value at the time of the loss is to take into consideration the cost of the articles, the extent of their use, whether worn or out of date, their condition at the time, etc., and from these and other pertinent facts to determine the present value. *Id.*

In an action against a carrier for damages to a car of fruit and vegetables, expenses incurred by the shipper in preserving and caring for them pending final sale, thereof were recoverable. *Missouri, K. & T. Ry. Co. of Texas v. Gray* (Civ. App.) 160 S. W. 434.

Where the rate of freight for the transportation of goods was not based on market value at the point of shipment, such value was not conclusive of plaintiff's damages in an action for loss of the goods. *St. Louis, B. & M. Ry. Co. v. Gould* (Civ. App.) 165 S. W. 13.

Where property delivered to a carrier is entirely destroyed, the carrier is liable for its full value, but, if not entirely destroyed, the measure of damages is the difference between the sound value and the value of the goods as injured. *Chicago, R. I. & G. Ry. Co. v. Bell* (Civ. App.) 168 S. W. 396.

Where a shipment of goods was only partially destroyed by the carrier's negligence, neither the consignee nor the shipper is justified in abandoning the shipment and charging the carrier with its full value. *St. Louis Southwestern Ry. Co. of Texas v. Burrus Mill & Elevator Co.* (Civ. App.) 168 S. W. 1028.

Where a private car never reached its destination through the negligence of connecting carriers, but the carrier was not informed that the car was to be loaded for plaintiff's business, plaintiff could not recover for loss of profits from failure to receive the freight. *San Antonio & A. P. Ry. Co. v. Houston Packing Co.* (Civ. App.) 169 S. W. 642.

If, to put an automobile injured by defendant in as good repair as before, pneumatic tires must be bought, defendant is liable therefor. *Wells Fargo & Co. Express v. Keeler* (Civ. App.) 173 S. W. 926.

Where household goods, bedding, wearing apparel, farm implements, and tools have been in use for some time, an award of damages for their destruction through negligence based upon their original cost is erroneous. *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 175 S. W. 1106.

Carrier, failing to deliver roofing with knowledge that it was to protect lumber, held liable for injury to the lumber. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 858.

In a suit for damages to 1,000 bushels of shipped corn, it is error to allow recovery of damages suffered on every bushel, where plaintiff admitted that his customer accepted and paid for 367½ bushels at the full price agreed. *Houston & T. C. Ry. Co. v. Lewis* (Civ. App.) 185 S. W. 593.

The action being for injury to freight, and not conversion thereof, by the carrier, and the evidence showing it was rendered worthless, the measure of damages is the market value at time and place of tender. *St. Louis Southwestern Ry. Co. of Texas v. Hughston Grain Co.* (Civ. App.) 186 S. W. 429.

Measure of damages for negligent injury to goods shipped is difference between the market value of the injured goods at the destination and what they would have brought in such market if uninjured; the freight, if not prepaid, being deductible from such amount. *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804.

If goods damaged in transit are not wholly worthless, consignee should receive and handle them to minimize the damage, if possible. *Id.*

The measure of damages for conversion of goods by carrier is the value of such goods at the destination less legal transportation charges. *Texas & N. O. Ry. Co. v. Patterson & Roberts* (Civ. App.) 192 S. W. 585.

### Art. 711. [323] [281] Liability as warehousemen, etc.

**Carrier as warehouseman.**—Where the carrier and shipper contract that the carrier's liability as such shall terminate after 48 hours' notice to the consignee, and the provisions of the contract are not in conflict with the law, they will govern the relations between the



parties, even though they impose a greater burden than is imposed by arts. 711 and 712, upon the carrier. *St. Louis, B. & M. Ry. Co. v. Hicks* (Civ. App.) 158 S. W. 192.

Under arts. 711 and 712, providing that a carrier shall be liable only as warehouseman after it has used due diligence to notify consignee of the arrival of the goods, what is due diligence depends upon the circumstances of the case. *Id.*

Under a clause in a bill of lading making a carrier liable only as warehouseman after 48 hours, exclusive of legal holidays, have elapsed from the time notice is given or sent the consignee, the term "legal holidays" includes Sundays as well as statutory holidays. *Id.*

Where, on delivery, the consignee refused to accept a shipment, and the consignor declined to give orders for its disposition, the carrier was thereafter liable only as a warehouseman. *St. Louis Southwestern Ry. Co. of Texas v. Burrus Mill & Elevator Co.* (Civ. App.) 168 S. W. 1028.

Where a railroad company failed to deliver a trunk checked as personal baggage, claiming that the trunk was destroyed when a depot burned, it is liable therefor as a common carrier and not as a warehouseman, where there was no proof that the trunk was in the depot building destroyed by fire. *San Antonio & A. P. Ry. Co. v. Green* (Civ. App.) 170 S. W. 110.

A carrier is liable as warehouseman for the keeping of goods after the shipper has refused to pay the legal rate. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

A carrier of bananas, independent of the contract of shipment, owed the owner the duty to preserve the property after it reached destination until it was delivered. *Illinois Cent. R. Co. v. Freeman* (Civ. App.) 182 S. W. 369.

Where consignee refused shipment of maize, railway company was not required to store same at place of destination, but was justified in removing it to the most convenient and suitable storage provided it held itself ready to deliver on demand. *Texas & N. O. Ry. Co. v. Patterson & Roberts* (Civ. App.) 192 S. W. 585.

Where a consignee has failed to use due diligence to remove goods after notice of their arrival at destination, the carrier's liability thereafter is that of a warehouseman. *American Express Co. v. Duncan* (Civ. App.) 193 S. W. 411.

Under arts. 707, 711, 712, the liability of a common carrier as such continues until actual delivery or that which may be considered an equivalent or substitute therefor. *Id.*

A consignee who has goods shipped home to himself, but makes no effort to notify his folks while he makes the journey, requiring a week, on horseback, and who has actual notice the day after his arrival that goods have been received, but does not remove them because of inconvenience, cannot hold the carrier liable as such for loss of his property by fire. *Id.*

**Demurrage and storage.**—A carrier is not entitled to storage charges on goods wrongfully detained by it. *Panhandle & S. F. Ry. Co. v. Hubbard* (Civ. App.) 190 S. W. 793; *St. Louis Southwestern Ry. Co. of Texas v. Kelly* (Civ. App.) 173 S. W. 540.

### Art. 712. [324] [282] Diligence as to delivery.

**Limitation of liability.**—Where the carrier and shipper contract that the carrier's liability as such shall terminate after 48 hours' notice to the consignee, and the provisions of the contract are not in conflict with the law, they will govern the relations between the parties, even though they impose a greater burden than that imposed by arts. 711 and 712, upon the carrier. *St. Louis, B. & M. Ry. Co. v. Hicks* (Civ. App.) 158 S. W. 192.

**Due diligence.**—What is due diligence depends upon the circumstances of the case. *St. Louis, B. & M. Ry. Co. v. Hicks* (Civ. App.) 158 S. W. 192.

**Notice.**—See notes under art. 711.

A railway company in discharge of its duties to give notice of arrival of freight at destination is not bound to look for such person at any place other than that of destination. *Texas & N. O. Ry. Co. v. Patterson & Roberts* (Civ. App.) 192 S. W. 585.

Where freight bill provided for notice of arrival to be given to a designated party, notice to such party was sufficient, and thereafter railroad company held property as warehouseman. *Id.*

**How long liability continues.**—Under arts. 707, 711, 712, the liability of a common carrier as such continues until actual delivery or that which may be considered an equivalent or substitute therefor. *American Express Co. v. Duncan* (Civ. App.) 193 S. W. 411.

### Art. 713. [325] [283] Shall forward in good order, etc.

Cited. *Gulf, C. & S. F. Ry. Co. v. D. S. Cage & Co.* (Civ. App.) 174 S. W. 855. See notes under art. 6554, post.

**Increased market price as affecting right to damages.**—Though the market price was higher on the day the shipment reached the point of destination than on the day it should have reached there, the carrier is not entitled to a peremptory instruction, where the shipper sought recovery, not only for depreciation of the market, but for delay. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

### Art. 714. [326] [284] Shall feed and water live stock.

**Duty and liability of carrier in general.**—Carrier held not relieved of liability for injuries to mules by failing to furnish an opportunity to feed and water them, though shipper's act in subsequently watering them without restraint was the immediate cause, unless his act was negligence. *Kansas City, M. & O. Ry. Co. of Texas v. Beckham* (Civ. App.) 168 S. W. 399.

Jury held justified in finding that a carrier's negligent failure to furnish an opportunity to feed and water mules was the proximate cause of injury resulting from watering them without restraint when unloaded in a famished condition. *Id.*

A violation by a carrier of the Twenty-Eight Hour Law, relating to feeding of animals is negligence per se. *Atchison, T. & S. F. Ry. Co. v. Hill* (Civ. App.) 171 S. W. 1028.

A carrier may not justify a violation of the Twenty-Eight Hour Law by relying on rules of the Bureau of Animal Industry, unless it could not provide uninfected pens. *Id.*

In an action by shippers of live stock for delay in transit, where the shipment was

interstate and required at least 60 hours to make, the jury should have been instructed with reference to the requirements of the federal law as to the unloading of cattle for resting, watering, and feeding. *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384.

The federal acts prohibiting carrier of live stock from confining them to the cars without food, rest, or water for more than 28 hours merely prescribe a maximum period and do not authorize the carrier, where it is unreasonable, to keep the animals in confinement for that length of time. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

**Special contract.**—"Feed and water," as used in this article, refers to the internal necessities of the animal, and a contract for the shipment of hogs, requiring the shipper to feed and water the hogs, did not relieve the carrier from the duty to flush the hogs if necessary to prevent injury from overheating. *Pecos & N. T. Ry. Co. v. Morrison* (Civ. App.) 169 S. W. 1098.

This article held to authorize carriers to contract with shippers that the duty to feed and water the stock in transit shall be performed by the keepers in charge. *Dickerson v. San Antonio, U. & G. Ry. Co.* (Civ. App.) 170 S. W. 1045.

This article authorizes a contract shifting the duty to the shipper's representative accompanying the shipment. *Gulf, C. & S. F. Ry. Co. v. Winn Bros.* (Civ. App.) 178 S. W. 697.

In an action for damages to a shipment of live stock, held, in view of plaintiff's execution of a 36-hour release, that his testimony that there was no attempt to feed and water the cattle at any other than a certain place was inadmissible. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

**Sufficiency of evidence.**—Evidence of delays in transportation of live stock, one of two hours, one of seven hours, two of twelve hours each, and one sixteen hours, with no reasons given therefor except the first, is sufficient to support a finding of negligent delay, even assuming that parts of some of them were to enable compliance with this article. *St. Louis, B. & M. Ry. Co. v. Marcofich* (Civ. App.) 185 S. W. 51.

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## CHAPTER TWO

### BILLS OF LADING CERTIFIED, ETC.

Art.	Art.
717. "Straight" and "order" bills of lading defined, and issuance of "order" bills of lading regulated.	719. Bills of lading issued by authorized agent, to be held act of carrier, etc., liability thereon; effect of certificate, etc.

**Article 717. "Straight" and "order" bills of lading defined, and issuance of "order" bills of lading regulated.**

Cited, *St. Louis Southwestern Ry. Co. of Texas v. Smith Bros. Grain Co.* (Civ. App.) 164 S. W. 409.

**Order bill of lading.**—Rights of bank to proceeds of draft drawn by consignee of a car of wheat and attached to a shipper's order bill of lading in favor of consignee. *West Texas Nat. Bank v. Wichita Mill & Elevator Co.* (Civ. App.) 194 S. W. 835.

**Art. 719. Bill of lading issued by authorized agent, to be held act of carrier, etc., liability thereon; effect of certificate, etc.**

**Authority of agent.**—The quotation of interstate freight rates is within the scope of a railroad agent's authority. *Texas & P. Ry. Co. v. Dickson Bros.* (Civ. App.) 167 S. W. 33.

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## CHAPTER THREE

### DISPOSITION OF UNCLAIMED OR PERISHABLE PROPERTY BY CARRIERS

Art.	Art.
725. Unclaimed freight may be sold, when and how.	726. Notice of such sale.
	728. Carrier may sell live stock, when.

**Article 725. [327] [285] Unclaimed freight may be sold, when and how.**

**Mode of sale.**—This article requires a sale in bags, when shipment is of a certain number of bags. *Texas & P. Ry. Co. v. Gate City Fertilizer Co.* (Civ. App.) 176 S. W. 868.

**Liability of consignor for deficiency after sale.**—Consignor of goods shipped "freight collect" to consignee named in bill of lading held liable to carrier for balance due after failure of consignee to pay freight and sale of goods by carrier to enforce its lien for charges. *Miller & Vidor Lumber Co. v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 192 S. W. 354.

**Art. 726. [328] [286] Notice of such sale.**

Cited, *Texas & P. Ry. Co. v. Crowder* (Civ. App.) 165 S. W. 116.

**Art. 728. [330] [288] Carrier may sell live stock, when.**

**Conversion.**—Where cattle are sold by a carrier under arts. 726 and 728, because they remain unclaimed for 48 hours, the carrier is not guilty of a conversion, and the owner can recover only the balance of the proceeds derived at the sale, after deducting expenses, etc. *Texas & P. Ry. Co. v. Crowder* (Civ. App.) 165 S. W. 116.

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## CHAPTER FOUR

### CONNECTING LINES OF COMMON CARRIERS

Art.	Art.
731. Connecting lines of common carriers defined.	732. Liability of such connecting lines.

**Article 731. [331a] Connecting lines of common carriers defined.**

**Through shipment and duties and liabilities of initial carriers in general.**—The common-law liability of each carrier is limited to damages accruing on its own line, in the absence of a special agreement for liability for the entire carriage. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

The initial carrier of an interstate shipment of live stock is liable for all damages, whether occasioned by its acts or default or the acts and default of its connecting carrier. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

An initial carrier held not liable for delay of connecting carrier in delivery of stock at destination. *St. Louis S. W. Ry. Co. of Texas v. Miller & White* (Civ. App.) 176 S. W. 830.

Provision in bill of lading by initial carrier that owner shall pay charges before delivery, if required, does not authorize initial carrier to demand the charges before delivery to connecting carrier. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 858.

Receipt of initial carrier for shipment of goods destined to point on line of connecting railroad held not to show that the shipment was a through shipment within this article. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 184 S. W. 232.

Under this article there must be more than the mere receipt and transportation of goods to show a contract for through shipment. *Id.*

Where the initial carrier agrees to transport only to a certain point, though the shipment is consigned to a point beyond, there is no through contract of shipment, necessary for joint liability of the connecting carriers. *Kansas City, M. & O. Ry. Co. of Texas v. Odom* (Civ. App.) 185 S. W. 626.

Where carrier of live stock, on arrival at connecting point, repairs cars and delivers whole shipment to connecting road as quickly as person of ordinary prudence, similarly situated, would do under same circumstances, it is not liable for delay, though cattle were injured by heating by the stoppage. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

A shipment of a car of corn on a through bill of lading, from a point on the line of one road to a point on the line of another, held a through shipment as regards liability, under article 732, of both to the shipper for injury. *St. Louis Southwestern Ry. Co. of Texas v. Hughston Grain Co.* (Civ. App.) 186 S. W. 429.

Shipper held, as a matter of law, not entitled to recover of initial carrier the value of oats shipped to another state and taken on execution in favor of a broker, to whom he ordered them delivered on consignee's refusal to accept. *Hamilton Mill & Elevator Co. v. Stephenville, N. & S. T. Ry. Co.* (Civ. App.) 189 S. W. 774.

In an action for value of goods taken on execution against the shipper in favor of his consignee, the liability of the initial carrier is to be tested by that of the terminal carrier. *Id.*

At common law the breach of a joint contract for through transportation of freight renders both carriers liable for the damages which result on either road unless there is a valid provision limiting the liability of each to injury occurring on its own line. *Gulf, C. & S. F. Ry. Co. v. Nelson* (Sup.) 192 S. W. 1056.

**Rights, duties and liabilities of connecting and terminal carriers.**—Notice to the agent of an initial carrier contracting to transport an interstate shipment of cattle of an arrangement whereby the consignee was to pay the freight held notice to connecting carriers along the route. *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427.

A connecting carrier held not entitled to stop an interstate shipment of cattle at an intermediate station because of the shipper's refusal to comply with the carrier's demand for payment of freight. *Id.*

Where a carrier of live stock contracted to transport it to designated stockyards, but proceeded to take the stock by a belt line railway, the belt line was but an agency of the carrier, and the shipper, suing for injuries to stock, did not have the burden of proving which carrier inflicted the injuries. *Texas & P. Ry. Co. v. Tomlinson* (Civ. App.) 166 S. W. 446.

Initial and connecting carriers held not liable for negligence of another carrier, to whom, by direction of shipper, shipment was delivered at the point to which the shipment was originally consigned. *St. Louis, B. & M. Ry. Co. v. McClellan* (Civ. App.) 173 S. W. 258.

Under this article a connecting carrier held not liable for injuries to cattle occurring on the line of the initial carrier. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.) 173 S. W. 273.

Connecting carrier, receiving interstate shipment of live stock, held bound by conversation between shipper and agent of the initial carrier as to the market the shipper wished the stock to reach. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

Where there was no competent evidence that defendant receivers notified the initial carrier that their connecting road would not accept shipment, and the damage was due in part to delay on initial carrier's line, judgment against receivers would be reversed and remanded. *Hovey v. Arledge* (Civ. App.) 176 S. W. 896.

Terminal carrier, receiving goods in good condition and delivering them in a damaged condition, held liable. *United S. S. Co. v. Houston Packing Co.* (Civ. App.) 177 S. W. 570.

Notice to one of four connecting carriers, within time provided by contract, of loss to shipper of live stock by delay in transit was notice to all of the carriers. *Gulf, C. & S. F. Ry. Co. v. Bogy* (Civ. App.) 178 S. W. 577.

A connecting carrier negligently handling cattle received from the initial carrier held liable, though the initial carrier negligently delayed delivery. *Andrews v. McGill* (Civ. App.) 179 S. W. 1087.

In the absence of a special contract or course of business, an initial carrier, or an intermediate connecting carrier, is bound only to safely carry and deliver the shipment to the next carrier. *Quannah, A. & P. Ry. Co. v. Warren* (Civ. App.) 184 S. W. 232.

While in intrastate shipments, which are not through shipments, a carrier may by contract limit its liability to damages through negligence on its own line, if the damages proven are shown to have resulted from joint negligence of two carriers, each may be held responsible for proportion which its negligence bears to entire negligence. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

Where negligence of railroad in failing or refusing to accept shipment of live stock at connecting point concurred with negligence of connecting road in failing to deliver shipment in question, on transfer track, both companies were responsible for delays and consequent damages proximately resulting from such negligence. *Id.*

Where cattle are shipped over connecting lines under a through contract of shipment, the final carrier is liable for damages thereto caused by negligence of its connecting carrier. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 194 S. W. 218.

— **Notice of special damages.**—Intermediate connecting carrier which made oral contract for through shipment of goods is liable thereunder for damages to such shipment occurring on connecting line, where it had notice when it accepted the shipment that special damages pleaded would result from delay in shipping. *Gulf, C. & S. F. Ry. Co. v. Nelson* (Sup.) 192 S. W. 1056.

**Interstate commerce.**—Under the direct provisions of the Carmack amendment, the initial carrier, receiving property for interstate transportation from a point in one state to a point in another, is liable to the lawful holder of the receipt or bill of lading for any loss or damage, regardless on which carrier's lines it occurred. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

Under the Carmack Amendment to Hepburn Act, making any common carrier of interstate goods liable for damage caused by it or any connecting carrier and that no contract shall exempt such carrier from such liability, notice of damage may be given to the connecting carrier, though the contract of shipment requires notice to the initial carrier. *Overton v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 160 S. W. 111.

Since Act Cong. June 29, 1906, c. 3591, § 7 (U. S. Comp. St. Ann. § 8592), makes the initial carrier in interstate transportation liable to the holder of the bill of lading for any loss or damage to the goods, a provision in an interstate bill of lading, that the initial carrier or any connecting line should not be liable for the proper carriage of the goods beyond its own line, would be ineffectual. *Gulf, C. & S. F. Ry. Co. v. Brackett-Fielder Mill & Grain Co.* (Civ. App.) 162 S. W. 1191.

In an action against the initial carrier under Carmack amendment of the Interstate Commerce Law for loss of goods, it is immaterial where the loss occurred. *St. Louis, B. & M. Ry. Co. v. Gould* (Civ. App.) 165 S. W. 13.

A stipulation of a contract made by a connecting carrier in the course of transportation under a through contract of shipment was violative of Interstate Commerce Act, § 20, as amended by Act June 29, 1906, § 7, where it attempted to exempt the carriers from liability in case a claim was not filed within 30 days from date of injury, and hence was not enforceable. *Missouri, K. & T. Ry. Co. v. Ward* (Civ. App.) 169 S. W. 1035.

Under Act Cong. June 29, 1906, § 7 (U. S. Comp. St. § 8592), initial carrier held liable for damages to cattle from delay or rough handling on the line of a connecting carrier. *Texas Midland R. R. v. Becker & Cole* (Civ. App.) 171 S. W. 1024.

Under the amendment to the Interstate Commerce Act, § 20, a shipper may sue both the initial and connecting carrier for damages for delay occurring on the connecting carrier's line. *Atchison, T. & S. F. Ry. Co. v. Boyce* (Civ. App.) 171 S. W. 1094.

The Carmack amendment (Act June 29, 1906, § 7) to Interstate Commerce Act Feb. 4, 1887, § 20, does not apply to a shipment through another state to a point in the same state as the point of origin. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

Under the Carmack amendment the initial carrier of live stock is liable, notwithstanding the insolvency of the connecting carrier and the fact that the shipment was accompanied by a caretaker. *Texas Mexican Ry. Co. v. King* (Civ. App.) 174 S. W. 336.

Effect of the Carmack amendment is to impose on the initial carrier, in favor of the shipper, a liability under the common law incurred by connecting carriers. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Civ. App.) 178 S. W. 810.

Terminal carrier in interstate shipment after 48 hours held, under contract of shipment, liable only as a warehouseman, and not under the Interstate Commerce Act. *Hamilton Mill & Elevator Co. v. Stephenville, N. & S. T. Ry. Co.* (Civ. App.) 189 S. W. 774.

**Limitation of liability to carrier's own line.**—Where the liability of carriers was fixed by a through contract with the initial carrier, the shipment being an interstate one, a connecting carrier cannot limit its liability by issuing a new bill of lading; there being no consideration for such new contract. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

Where the contract with the initial carrier provided for notice of claim within 91 days, and it was not alleged that two of the carriers did not acquiesce in the through bill of lading, it was binding on them, as provided by arts. 731 and 732; and hence an allegation that their contracts provided for notice within 120 days, followed by introduction of the 91-day contract, constituted a variance. *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

An initial carrier of an intrastate shipment may limit its liability for damages occurring on its own line. *San Antonio & A. P. Ry. Co. v. Grady* (Civ. App.) 171 S. W. 1019.

Terminal carrier held liable for damage to shipment occurring while in its possession, without reference to the bill of lading limiting liability for injuries to those on its own line. *United S. S. Co. v. Houston Packing Co.* (Civ. App.) 177 S. W. 570.

Under this article initial carrier may limit its liability for negligence to negligence occurring on its own line. *Kansas City, M. & O. Ry. Co. of Texas v. Adams* (Civ. App.) 182 S. W. 365.

Though a railroad company limited its liability to damages occurring on its own line held, that it was liable for injuries to interstate shipment of live stock, caused by its negligence, though the injuries did not develop until after delivery to a connecting carrier. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

Under arts. 708 and 731 all portions of a shipping contract relating to reciprocal rights and duties of the parties are inadmissible in action for damages to live stock shipment. *San Antonio & A. P. Ry. Co. v. Jackson & Allen* (Civ. App.) 187 S. W. 488.

Under separate contracts for shipment of live stock, limiting the carriers' liability to injury to cattle on their respective lines, a terminal carrier could not be charged with negligence of a connecting carrier. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 189 S. W. 765.

**Sufficiency of evidence.**—In action for delay in shipment of live stock in transit, evidence held sufficient to justify finding of negligent refusal or failure of defendant railway to accept shipment at connecting point. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

In action against two railroads for delaying shipment of live stock, evidence as to negligent delay held to support verdict for plaintiff. *Id.*

Initial carrier of an interstate shipment is liable for damages, where undisputed evidence shows contract for through shipment, delivery to carrier in good condition, and arrival at destination in bad condition, where such shipment was unaccompanied by shipper or his representative. *Andrews v. Roberts* (Civ. App.) 192 S. W. 569.

### Art. 732. [331b] Liability of such connecting lines.

Cited, *St. Louis Southwestern Ry. Co. of Texas v. Hughston Grain Co.* (Civ. App.) 186 S. W. 429.

**Liability as between carriers.**—Railroad undertaking to switch loaded car from spur track of shipper to line of connecting road, held liable to such connecting road for a judgment recovered against it by the shipper for destruction of the goods before they had been switched from the spur track. *Gulf, C. & S. F. Ry. Co. v. D. S. Cage & Co.* (Civ. App.) 174 S. W. 855.

## CHAPTER FIVE

### PIPE LINES

Art.	Art.
732½. Certain persons, etc., declared to be common carriers.	732½e. Publication of tariffs; reports to commission; complaints.
732½a. Subject to regulation as carrier and to control of railroad commission.	732½f. Discrimination prohibited.
732½b. Powers of common carriers, telegraph and telephone lines, rights in highways.	732½g. Rules for prevention of waste.
732½c. Regulation of rates and charges and modes of conducting business procedure.	732½h. Penalty for violation of regulations; venue of suits.
732½d. Exchange of facilities between carriers; regulations as to transportation of crude petroleum; extent of powers of railroad commission; orders.	732½i. Transportation of crude petroleum.
	732½j. Employment of expert; salary; assistants; tax on crude petroleum to pay expense.
	732½k. Payment of salary of expert and other expenses.
	732½l. Cumulative of other laws.
	732½m. Partial invalidity.

**Article 732½. Certain persons, etc., declared to be common carriers.**  
—Every person, firm, corporation, limited partnership, joint stock association or association of any kind whatever;

(a) Owning, operating or managing any pipe line or any part of any pipe line within the State of Texas for the transportation of crude petroleum to or for the public for hire, or engaged in the business of transporting crude petroleum by pipe line; or

(b) Owning, operating or managing any pipe line or any part of any pipe line for the transportation of crude petroleum, to or for the

public for hire, and which said pipe line is constructed or maintained upon, along, over or under any public road or highway, or in favor of whom the right of eminent domain exists; or

(c) Owning, operating or managing any pipe line or any part of any pipe line or pipe lines for transportation to or for the public, for hire, of crude petroleum, and which said pipe line or pipe lines is or may be constructed, operated or maintained across, upon, along, over or under the right of way of any railroad, corporation or other common carrier required by law to transport crude petroleum as a common carrier; or

(d) Owning, operating or managing or participating in ownership, operation or management, under lease, contract of purchase, agreement to buy or sell, or other agreement or arrangement of any kind whatsoever, any pipe line or pipe lines, or part of any pipe line, for the transportation from any oil field or place of production within the State of Texas to any distributing, refining or marketing center or reshipping point thereof, within this State, of crude petroleum bought of others:

Is hereby declared to be a common carrier and subject to the provisions hereof. But the provisions of this Act shall not apply to those pipe lines which are limited in their use to the wells, stations, plants and refineries of the owner and which are not a part of the pipe line transportation system of any common carrier as above defined; nor shall such provisions apply to any property of such a common carrier which is not a part of or necessarily incident to its pipe line transportation system. [Act Feb. 20, 1917, ch. 30, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 7321½a. Subject to regulation as carrier and to control of Railroad Commission.**—It is declared that the operation of those pipe lines, to which this Act applies, for the transportation of crude petroleum, in connection with the purchase or purchase and sale of such crude petroleum, is a business in the mode of the conduct of which the public is interested, and as such is subject to regulation by law; and accordingly it is provided that from and after the expiration of thirty (30) days from the time this law takes effect the business of purchasing, or of purchasing and selling crude petroleum, using in connection with such business a pipe line of the class subject to this Act to transport the crude petroleum so bought or sold, shall not be conducted, unless such pipe line so used in connection with such business be a common carrier within the purview of this law and subject to the jurisdiction herein conferred upon the Railroad Commission of Texas. It shall be the duty of the Attorney General to enforce this provision by injunction or other adequate remedy. [Id., § 2.]

**Art. 7321½b. Powers of common carriers; telegraph and telephone lines; rights in highways.**—The right to lay, maintain and operate pipe lines, together with telegraph and telephone lines incidental to and designed for use only in connection with the operation of such pipe lines along, across or under any public stream or highway in this State, is hereby conferred upon all persons, firms, limited partnerships, joint stock associations, or corporations coming within any of the definitions of common carrier pipe lines as hereinbefore made. Any person, firm, limited partnership, joint stock association, or corporation may acquire the right to construct pipe lines and such incidental telephone and telegraph lines along, across or over any public road or highway in this State, by filing with the Railroad Commission an acceptance of the provisions of this law, expressly agreeing in writing that in consideration of the rights so acquired it shall be and become a common carrier pipe line, subject to the duties and obligations conferred or imposed in this Act. This right to run along, across or over any public road or highway, as before provided for, can only be exercised upon condition that the traffic thereon be not interfered with, and that such road or highway be prompt-

ly restored to its former condition of usefulness, and the restoration thereof to be subject also to the supervision of the county commissioners' court or other proper local authority. And provided, that in the exercise of the privileges herein conferred, such pipe lines shall compensate the county or road district, respectively, for any damage done to such public road, in the laying of pipe lines, telegraph or telephone lines, along or across the same; and nothing herein shall be construed to grant any pipe line company the right to use any public street or alley of any incorporated city or town, except by express permission from the city or governing authority thereof; and nothing herein shall be construed to permit any company to use any street or alley of any unincorporated town, except by express permission of the commissioners' court of the county in which such town is situated. [Id., § 3.]

**Damage from escape of gas.**—The owner of a pipe line which carries oil through the ground is liable for damages caused by its escape regardless of his negligence. *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28.

**Art. 732½c. Regulation of rates and charges and mode of conducting business; procedure.**—The Railroad Commission shall have the power to establish and enforce rates of charges and regulations for gathering, transporting, loading and delivering crude petroleum by such common carriers in this State, and for the use of storage facilities necessarily incident to such transportation, and to prescribe and enforce rules and regulations for the government and control of such common carriers in respect to their pipe lines and receiving, transferring and loading facilities, and it shall be its duty to exercise such power upon petition by any person showing a substantial interest in the subject. No order establishing or prescribing rates, rules and regulations shall be made except after hearing and at least ten days and not more than thirty days' notice to the person, firm, corporation, partnership, joint stock association, or association owning or controlling and operating the pipe line or pipe lines affected. In the event any rate shall be filed by any pipe line and complaint against same or petition to reduce same shall be filed by any shipper, and such complaint be sustained, in whole or in part, all shippers who shall have paid the rates so filed by the pipe line shall have the right to reparation or reimbursement of all excess in transportation charges so paid over and above the proper rate as finally determined on all shipments made after the date of the filing of such complaint. [Id., § 4.]

**Art. 732½d. Exchange of facilities between carriers; regulations as to transportation of crude petroleum; extent of powers of Railroad Commission; orders.**—Every common carrier as above defined shall exchange crude petroleum tonnage with each like common carrier and the commission shall have the power to require such connections and facilities for the interchange of such tonnage to be made at every locality reached by both pipe lines whenever a necessity therefor exists and subject to such rates and regulations as may be made by the commission; and any such common carrier under like rules and regulations shall be required to install and maintain facilities for the receipt and delivery of crude petroleum of patrons at all points on such pipe line. No carrier shall be required to receive or transport any crude petroleum except such as may be marketable under rules and regulations to be prescribed by the commission, which they are hereby empowered and required to prescribe. The commission is also empowered and required to make rules for the ascertainment of the amount of water and other foreign matter in oil tendered for transportation, and for deduction therefor and for the amount of deduction to be made for temperature, leakage and evaporation. It is provided, however, that the recital herein of particular powers on the part of said commission shall not be construed to limit the general powers conferred by this Act. Until set aside or vacated by some decree or order of a court of competent jurisdiction, all orders of the

commission as to any matter within its jurisdiction shall be accepted as prima facie evidence of their validity. [Id., § 5.]

**Art. 732½e. Publication of tariffs; reports to commission; complaints.**—Such common carriers of crude petroleum shall make and publish their tariffs under such rules and regulations as may be prescribed by said commission, and the commission shall require them to make reports and may investigate their books and records kept in connection with such business. The commission shall require of such common carrier pipe lines monthly reports, duly verified under oath, of the total quantities of crude petroleum owned by such pipe lines and of that held by them in storage for others, as also of their unfilled storage capacity, provided no publicity shall be given by the commission to the reports as to stock of crude petroleum on hand of any particular pipe line; but the commission in its discretion may make public the aggregate amounts held by all the pipe lines making such reports, and of their aggregate storage capacity. The commission shall have the power and authority to hear and determine complaints, to require attendance of witnesses, pay their expenses out of the fund herein created, and to institute suits and sue out such writs and process as may be necessary for the enforcement of its orders. [Id., § 6.]

**Art. 732½f. Discrimination prohibited.**—No such common carrier in its operations as such shall discriminate between or against shippers in regard to facilities furnished or service rendered or rates charged under same or similar circumstances in the transportation of crude petroleum; nor shall there be any discrimination in the transportation of crude petroleum produced or purchased by itself directly or indirectly. In this connection the pipe line shall be considered as a shipper of the crude petroleum produced or purchased by itself directly or indirectly and handled through its facilities. No such carrier in such operations shall directly or indirectly charge, demand, collect or receive from any one a greater or less compensation for any service rendered than from another for a like and contemporaneous service; provided this shall not limit the right of the commission to prescribe rates and regulations different from or to some places from other rates or regulations for transportations from or to other places, as it may determine; nor shall any carrier be guilty of discrimination when obeying any order of the commission. When there shall be offered for transportation more crude petroleum than can be immediately transported, the same shall be equitably apportioned. The commission may make and enforce general or specific regulations in this regard. No such common carrier shall at any time be required to receive for shipments from any person, firm, corporation or association of persons, exceeding three thousand barrels of petroleum in any one day. [Id., § 7.]

**Art. 732½g. Rules for prevention of waste.**—The commission, when necessary, shall make and enforce rules and regulations either general in their nature or applicable to particular oil fields for the prevention of actual waste of oil or operations in the field dangerous to life or property. [Id., § 8.]

**Art. 732½h. Penalty for violation of regulations; venue of suits.**—Any common carrier as herein defined who shall violate any provision of this Act or who shall fail to perform any duty herein imposed or any valid order of the commission when not stayed or suspended by order of court, shall be subject to a penalty of not less than one hundred dollars nor more than one thousand dollars for each offense, such penalty to be recoverable at suit of the Attorney General of the State of Texas in the name of the State and for its use. Such penalty may also be recorded by and for the use of any person, corporation or association of persons against whom there shall have been an unlawful discrimination as herein



defined; such suit to be brought in the name of and for the use of party aggrieved and may be maintained in any court of proper jurisdiction, having due regard to the ordinary statutes of venue. \* \* \* [Id., § 9.]

**Explanatory.**—This section of the act also makes it a misdemeanor to willfully violate the provisions as to discrimination, and that part of the section is set forth, post, as art. 1522p of the Penal Code.

**Art. 732½i. Transportation of crude petroleum.**—Subject to the provisions of this Act and the rules of regulations which may be prescribed by the commission, every such common carrier shall receive and transport crude petroleum delivered to it for transportation and shall so receive and transport same and perform its other duties with respect thereto without discrimination. [Id., § 10.]

**Art. 732½j. Employment of expert; salary; assistants; tax on crude petroleum to pay expenses.**—It shall be the duty of the commission to employ an expert who shall gather information and assist the commission in the performance of its duties under this Act. The salary of this expert shall be at the rate of thirty-six hundred dollars per annum, payable in equal monthly installments. And the commission shall employ such other assistants as may be necessary. These salaries and expenses and the expenses of the hearings and investigations conducted by said commission shall be paid out of a fund to be derived from a tax of one-twentieth of one per cent of the market value of crude petroleum produced within this State, which tax is hereby levied, and which tax shall be in addition to and collected in the same manner as the present gross receipts production tax on crude petroleum. Producers of crude petroleum are hereby required to make reports of production in the same manner and under the same penalties as for the gross production tax. The tax thus collected shall be paid into the State treasury as other revenue, and shall be paid out in warrants as other State funds. Any yearly excess of the tax over and above the requirements of the commission shall become a part of the general revenue of the State and any deficit shall be made up out of the general revenue of the State. [Id., § 11.]

Sec. 12 makes an appropriation to carry out the provisions of the act.

**Art. 732½k. Payment of salary of expert and other expenses.**—The salary of the expert for the commission shall be paid by monthly warrants drawn by the State Comptroller on the State Treasurer. Other expenses of the commission, such as traveling expenses, expenses of witness, stenographers and stationery, shall be paid by like warrants issued upon duly verified statements of the persons entitled, with the approval of the chairman of the commission endorsed thereon. [Id., § 13.]

**Art. 732½l. Cumulative of other laws.**—This Act shall be cumulative of all the laws of this State, which are not in direct conflict herewith, regulating the control of pipe line companies or similar corporations, in this State. [Id., § 14.]

**Art. 732½m. Partial invalidity.**—If any provision of this Act shall be held unconstitutional or for any other reason shall be held to be void, or if more than one provision of this Act shall be held to be void, such holding shall not have the effect to nullify the remaining parts of this Act, but the parts not so held to be void shall nevertheless remain in full force and effect. [Id., § 15.]

## TITLE 21

## CERTIORARI

- |                                    |  |                                    |
|------------------------------------|--|------------------------------------|
| Chap.                              |  | Chap.                              |
| 1. Certiorari to the county court. |  | 2. Certiorari to justices' courts. |

## CHAPTER ONE

## CERTIORARI TO THE COUNTY COURT

- |                       |  |   |
|-----------------------|--|---|
| Art.                  |  | Art.  |
| 734. Application for. |  | 740. Trial de novo, judgment to be certified below. |

**Article 734. [333] [291] Application for.**

**Pleading.**—A petition for certiorari to the county court which merely alleged that a purported will was void and probate was improperly granted is insufficient for indefiniteness. *Hall v. Davison* (Civ. App.) 176 S. W. 642.

— **Amendment.**—The denial of leave to file an amended petition for a writ of certiorari to review the action of the county court in probating a will changing the cause of action held not error under arts. 734 and 740. *Hall v. Davison* (Civ. App.) 176 S. W. 642.

**Art. 740. [339] [297] Trial de novo; judgment to be certified below.**

**Amendment.**—See *Hall v. Davison* (Civ. App.) 176 S. W. 642.

## CHAPTER TWO

## CERTIORARI TO JUSTICES' COURTS

- |   |  |  |
|---|--|--|
| Art.  |  | Art.   |
| 742. Certiorari to justices' courts.                    |  | 748. Bond with sureties required.                  |
| 743. On order of the county or district court or judge. |  | 754. Motion to dismiss at first term.              |
| 745. Affidavit of sufficient cause.                     |  | 758. Issues, made up under direction of the court. |
| 746. What application for certiorari must show.         |  | 759. New matter may be pleaded, etc.               |
| 747. Within what time granted.                          |  | 760. Trial de novo.                                |

**Article 742. [341] [299] Certiorari to justices' courts.**

**Grounds for.**—See *Hughes v. Underwood Typewriter Co.* (Civ. App.) 187 S. W. 399; note under art. 745.

**Art. 743. [342] [300] On order of the county or district court or judge.**

Cited, *Johnson v. State* (Cr. App.) 193 S. W. 674.

**Art. 745. [344] [302] Affidavit of sufficient cause.**

Cited, *Maury-Cole Co. v. Lockhart Grocery Co.* (Civ. App.) 173 S. W. 262.

**Necessity and requisites of affidavit.**—Under arts. 742 and 745 a petition for certiorari to a justice purporting to be that of the applicant's next friend, signed by third party, together with verification by third party stating he "believed the facts set forth above to be true and correct," was insufficient. *Hughes v. Underwood Typewriter Co.* (Civ. App.) 187 S. W. 399.

**Art. 746. [345] [303] What application for certiorari must show.**

Cited, *Maury-Cole Co. v. Lockhart Grocery Co.* (Civ. App.) 173 S. W. 262.

**Art. 747. [346] [304] Within what time granted.**

**Time within which writ must be sued out.**—Under arts. 747 and 2393 order of justice's court more than two years after judgment refusing to enter nunc pro tunc order setting aside the judgment, and granting new trial, held not appealable. *Southwestern Land Corporation v. Neese* (Civ. App.) 161 S. W. 1090.

Defendant, against whom a justice of the peace judgment had been rendered, held not to have exercised due diligence to sue out certiorari, and therefore not to be entitled to a bill of review. *Ferguson v. Sanders* (Civ. App.) 176 S. W. 782.

**Art. 748. [347] [305] Bond with sureties required.**

**Necessity and requisites of bond.**—Under art. 754, and in view of this article, and the petition for a writ of certiorari supplemented by transcript of proceedings in justice court, a bond on certiorari from a judgment against appellant "for costs" held to sufficiently identify the court and the judgment. *Turner v. Fowler* (Civ. App.) 189 S. W. 1038.

**Art. 754. [353] [311] Motion to dismiss at first term.**

**Must move at return term.**—Under arts. 754, 2399, 2397, held, that motion to dismiss writ of certiorari for defect in bond was properly filed in the county court term succeeding that in which the justice had failed to file his transcript. *Beck v. Arkansas Motor Co.* (Civ. App.) 180 S. W. 942.

Where a motion to dismiss a writ of certiorari to a justice court was contested, it would not be assumed that the county court's failure to pass on it at the term to which it was returnable was due to appellant's failure to call it up for action. *Id.*

**Grounds for dismissal.**—See *Turner v. Fowler* (Civ. App.) 189 S. W. 1038, note under art. 748.

**Art. 758. [357] [315] Issues made up under direction of the court.**

Cited, *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

**Art. 759. [358] [316] New matter may be pleaded, etc.**

Cited, *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133; *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

**Application in general.**—The provision authorizing plaintiff to plead new matter held to apply to appeals. *Young Men's Christian Ass'n of Dallas v. Schow Bros.* (Civ. App.) 161 S. W. 931.

Where a consignor brought two suits in justices' courts in different counties for a single injury arising out of the same transaction and recovered in one of them, the defendant, being authorized to plead such recovery on appeal to the circuit court of the other in bar of that action under this article, could not enjoin the prosecution of the second action. *Texas & P. Ry. Co. v. Southern Produce Co.* (Civ. App.) 168 S. W. 999.

**Amendment in general.**—Defective pleadings in a justice court may be amended in the county court if the amended pleadings do not set up a new cause of action. *Hufstutler v. Western Union Telegraph Co.* (Civ. App.) 170 S. W. 1053.

In an action for failure to send a telegram, an amended petition in the county court, on certiorari to a justice court, which fails to distinctly allege the manner and extent of plaintiff's damage, such matters appearing inferentially, is not subject to a general demurrer, though such petition would be demurrable in a court of record. *Id.*

A railroad company appealing to the county court from an adverse judgment may amend its pleading and allege that at the time of injuries its railroad was operated by a receiver. *Ft. Worth & R. G. Ry. Co. v. Ballou* (Civ. App.) 174 S. W. 337.

**New cause of action, defense, set-off or counterclaim.**—Where defendant's counterclaim was beyond the jurisdiction, defendant cannot complain that the county court improperly allowed plaintiffs to interpose a defense thereto not pleaded in the justice court. *Willett v. Herrin* (Civ. App.) 161 S. W. 26.

Either party to an appeal from a justice to the county court may plead new matter not presented to the justice, so long as a new cause of action is not set up by the amended pleading. *McSpadden v. Eads* (Civ. App.) 163 S. W. 634.

An amendment of the petition on appeal from a justice to the county court, which merely amplifies the statement of the cause of action alleged, is not objectionable as pleading a new cause of action. *Id.*

Where the amended account, filed in the county court on appeal from a justice's judgment, only amplified and enlarged the grounds of negligence originally alleged as a ground for recovery, and the county court determined that all the matters presented by the amended account had been orally pleaded in justice's court, refusal to strike out the amended account was proper. *Texas & N. O. R. Co. v. Cook* (Civ. App.) 167 S. W. 158.

On appeal from a judgment of a justice for services rendered at an agreed compensation, an amendment alleging employment without an agreed compensation sets up a new cause of action, contrary to this article. *Missouri, K. & T. Ry. Co. of Texas v. Ryan* (Civ. App.) 170 S. W. 858.

In an action for failure to send a telegram brought to the county court by certiorari to a justice court, an amended petition changing those allegations only which affected the measure of damages does not state a new cause of action. *Hufstutler v. Western Union Telegraph Co.* (Civ. App.) 170 S. W. 1053.

Where, by the third amended pleading in a county court on certiorari to a justice court, the other pleadings are abandoned, it is immaterial that it sets up a new cause of action. *Id.*

Discharge of receiver by court appointing him held available on appeal to county court, though not pleaded in justice's court. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

On appeal to the county court held, that plaintiffs could plead as defense to cross-action for breach of warranty, settlement of the controversy as to breach of warranty by arbitration, though such defense was not presented in the justice court. *Holcomb v. Blankenship* (Civ. App.) 180 S. W. 918.

Act of county court in permitting plaintiffs in suit on note in justice court to amend on appeal to allege that they were a partnership and not a corporation, as alleged in justice court, held not violative of this article. *Scott & Co. v. O. D. Mann & Sons* (Civ. App.) 190 S. W. 847. See, also, notes under art. 2397.

**Art. 760. [359] [317] Trial de novo.**

Cited, *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133.

## TITLE 22

## CITIES AND TOWNS

## Chap.

1. General provisions relating to cities.
2. Officers and their election.
3. Duties and powers of officers.
4. General powers and duties of the city council.
5. Corporation courts.
6. Taxation.
7. Assessment and collection of taxes.
8. Fire department.
9. Sanitary department.
10. Streets and alleys.

## Chap.

11. Street improvements.
- 11a. Parks.
12. Public utility corporations, rates and charges—regulation by council, etc.
14. Towns and villages.
15. Commission form of government.
16. Abolition of corporate existence.
17. Cities having more than 5,000 inhabitants—adoption and amendment of charter.
18. Consolidation of cities.

## CHAPTER ONE

## GENERAL PROVISIONS RELATING TO CITIES

## Art.

762. Cities, towns and villages may accept provisions of this title.
763. Provisions of this title do not apply until accepted.
764. General powers of the corporation.
768. City exempt from giving bond in suits.
- 768a. Condemnation of right of way, etc., for water works.
- 768b. Same; compensation.
- 768c. Same; procedure.
769. Powers of city, etc., owning water-works, sewers, gas and electric lights, to own land within or without limits.
770. May purchase, construct and operate systems inside or outside limits, and regulate, etc.
773. Limits of corporation to remain the same until extended, etc.
774. Cities, towns and villages may incorporate under.

## Art.

- 774a. Cities, towns and villages incorporated under laws of former republic may accept existing laws of states.
- 774b. Same; on acceptance to possess powers and liabilities of cities, etc., under laws of this state.
- 774c. Same; property rights.
- 774d. Same; detachment of uninherited territory and readjustment of boundaries.
775. Validating incorporations.
776. Validating incorporations.
777. Territorial boundaries of cities and towns, etc.
778. Excessive territory to be relinquished.
779. Validating certain incorporations.
781. Adjoining inhabitants may become part of city, how.
782. Segregating territory from city.

**Article 762.** [381] [340] **Cities, towns and villages may accept provisions of this title.**—Any incorporated city, town or village in this State containing six hundred inhabitants or over, including those incorporated under Chapter 14 of this Title or Chapter 11 of Title 18 of the Revised Statutes of 1895, and other laws, general and special, may accept the provisions of this title relating to cities and towns, in lieu of any existing charter, by a two-thirds vote of the council of such city, town or village, which action by the council shall be had at a regular meeting thereof and entered upon the journal of their proceedings, and a copy of the same, signed by the mayor and attested by the clerk or secretary under the corporate seal, filed and recorded in the office of the clerk of the county court of the county in which such city, town or village is situated, and the provisions of this title shall be in force, and all acts theretofore passed incorporating said city, town or village which may be in force by virtue of any existing charter shall be repealed from and after the filing of said copy of their proceedings as aforesaid. When such city, town or village is so incorporated as herein provided, the same shall be known as a city or town, subject to the provisions of this Title relating to cities and towns, and vested with all the rights, powers, privileges, immunities and franchises therein conferred. [Acts 1881, p. 115; Acts 1885, p. 57; Act March 5, 1915, ch. 34, § 1.]

**Explanatory.**—Took effect 90 days after adjournment on March 20, 1915.  
Cited, *Young v. City of Colorado* (Civ. App.) 174 S. W. 986; *Waldschmidt v. City of New Braunfels* (Civ. App.) 193 S. W. 1077.

**Art. 763.** [382] [341] Provisions of this title do not apply until accepted.

Cited, *Woodruff v. Deshazo* (Civ. App.) 181 S. W. 250.

**Art. 764.** [383] [342] **General powers of the corporation.**

2. **Power of legislature.**—The state can authorize its municipal corporations to make acts an offense therein under the police power, even though it does not make the same act a state offense. *Strauss v. State*, 76 Tex. Cr. R. 132, 173 S. W. 663.

4. **Powers—In general.**—Municipal corporations are creatures of statute, and have no power excepting those expressly or impliedly granted by the statute creating them. *Waldschmit v. City of New Braunfels* (Civ. App.) 193 S. W. 1077; *Stevens v. City of Dublin* (Civ. App.) 169 S. W. 188; *Tharp v. Blake* (Civ. App.) 171 S. W. 549; *Dibrell v. City of Coleman* (Civ. App.) 173 S. W. 550.

Under Const. art. 11, § 5, the power of the city to pass an ordinance is not dependent on grant from the Legislature, but is to be governed only by the limitations found in the acts of the Legislature. *Le Gois v. State* (Civ. App.) 190 S. W. 724.

6. — **Police power.**—An ordinance of a city incorporated under the general law, requiring railroads to furnish gates or watchmen at crossings, held authorized by the general welfare clause of this article. *City of Waxahachie v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 183 S. W. 61.

Laws essential for the welfare, good order, and prosperity of the citizens resident in a city fall within the "police powers" of the government. *Spann v. City of Dallas* (Civ. App.) 189 S. W. 999.

Notwithstanding Final Title, § 3, Rev. St. 1911, power of municipality to enact ordinance is to be strictly construed, especially where object may work deprivation of citizens' life, liberty, property, privileges, or immunities. *Waldschmit v. City of New Braunfels* (Civ. App.) 193 S. W. 1077.

13. **Contracts—In general.**—The power of a municipal corporation to contract is limited by its power to tax. *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312.

14. — **Validity.**—A de facto municipal corporation cannot urge the invalidity of its incorporation as a defense in a suit to collect a debt contracted by it. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

21. **Ultra vires contracts.**—City, which purchased lands for reservoir, used only part, and failed to pay part of price, could not retain the lands, while repudiating its obligation to pay on ground that its promise was illegal, because no provision was made for payment, as required by Const. art. 11, §§ 5, 7. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

**Actions by or against.**—A judgment against a city in an action against it for a nuisance should order execution against it, in the absence of any statute forbidding it. *City of Clarendon v. Betts* (Civ. App.) 174 S. W. 958.

**Art. 768.** [570] [499] **City exempt from giving bond in suits.**

**Injunction bond.**—Under arts. 768 and 4654, city held not required to give a bond as a condition of the issuance of a temporary injunction. *Athens Telephone Co. v. City of Athens* (Civ. App.) 163 S. W. 371.

**Art. 768a. Condemnation of right of way, etc., for waterworks.**—That incorporated cities and towns owning their own waterworks system shall have the right to condemn private property for public use in and outside of the city or town limits of such cities and towns, for the purpose of acquiring rights of way for digging or excavating canals, laying mains, pipe lines, for the purpose of conducting water through the same into the cities or towns for the use of the public. [Act March 22, 1915, ch. 110, § 1.]

**Explanatory.**—See art. 1003 et seq. The act took effect 90 days after March 20, 1915, date of adjournment.

**Art. 768b. Same; compensation.**—Said cities or towns shall pay just compensation to the owners of such property upon the award being made. [Id., § 2.]

**Art. 768c. Same; procedure.**—The procedure to condemn property under this law shall be as is now provided by law in the case of condemning property by railroads of this state, and all the laws on such subject shall be applicable hereto. [Id., § 3.]

**Art. 769. Powers of city, etc., owning waterworks, sewers, gas and electric lights, to own land within or without limits.**

**Oral contract.**—An oral contract by a city to furnish electricity held binding on it, arts. 769-771, not specifying how such a contract shall be made. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

**Construction of highway to waterworks.**—This article authorizes cities owning waterworks to improve a highway to their plants even though they be without the corporate limits, and the city may use gravel and soil removed from a street within its corporate limits for the purpose of improving such highway. *City of La Grange v. Brown* (Civ. App.) 161 S. W. 8.

**Art. 770. May purchase, construct and operate systems inside or outside limits, and regulate, etc.**

**Contracts for construction.**—Contracts for municipal improvements were not abrogated by a subsequent agreement of the city to deliver in advance the warrants for the work on the execution of an indemnity bond. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

Contracts for municipal improvements cannot be abrogated by a subsequent contract, if it be illegal and void because authorized by no ordinance or resolution of the city council. *Id.*

**Diversion of city warrants.**—There was no diversion from their purpose of city warrants for improvement and extension of its waterworks, consisting of a well, where the city thereafter from other funds dug a bigger well a few feet away, and had the contractor connect with this instead of the old well. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

**Art. 773. [384] [343] Limits of corporation to remain the same until extended, etc.**

**Extension of limits.**—The legality of charter provisions for the annexation of territory cannot be attacked in a suit to restrain the issuance of bonds, where the city had been exercising government control over the annexed territory. *Cohen v. City of Houston* (Civ. App.) 176 S. W. 809.

The Legislature can authorize a city to annex additional territory without the consent and even against the remonstrance of the residents of such territory, though the territory is thereby subjected to taxation to discharge a pre-existing debt of the city. *Id.*

**Art. 774. [385] Cities, towns and villages may incorporate under.**—Any city or town containing six hundred inhabitants or over may be incorporated as such, with all the powers, rights, immunities and privileges mentioned and described in the provisions of this Title relating to cities and towns, in the manner prescribed in Chapter 14 of this Title for incorporating towns and villages, except that the application to become incorporated shall be signed by at least fifty electors, residents of such city or town, and except that when an election is held according to the provisions of such chapter the words "towns and villages" shall be construed to read and mean "cities and towns." When the entry by the county judge, provided in Article 1041, in said Chapter 14, is made with reference to a city or town of six hundred inhabitants and over, such city or town shall be invested with all the rights and privileges of such cities conferred by this Title. [Acts 1881, p. 63; Acts 1881, p. 115; Act March 5, 1915, ch. 34, § 1.]

Took effect 90 days after adjournment on March 20, 1915.

Cited, *State ex rel. Burchill v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

**Art. 774a. Cities, towns and villages incorporated under laws of former Republic may accept existing laws of state.**—That any city, town or village within this State, incorporated under any law, general or special, of the Republic of Texas, regardless of the extent of the boundaries thereof, or the number of its population, may accept the provisions of Chapters one to thirteen, both inclusive, of Title Twenty-two of the Revised Statutes of Texas of 1911, and the amendments of 1911, 1913 and 1915 thereto, relating to cities and towns, in lieu of any existing charter created by any such law of the Republic of Texas, by a two-thirds vote of the council of such city, town or village; which action by the council shall be had at a regular meeting thereof and entered upon the journal of their proceedings, and a copy of the same, signed by the Mayor and attested by the Clerk or Secretary under the corporate seal, filed and recorded in the office of the Clerk of the County Court of the county in which such city, town or village is situated, and the provisions of said chapters one to thirteen, both inclusive, of Title Twenty-two of the Revised Statutes of Texas of 1911 and the amendments of 1911, 1913, and 1915, thereto shall be in force, and all acts theretofore passed incorporating said city, town or village, which may be in force by virtue of any existing charter shall be repealed from and after the filing of said copy of their proceedings as aforesaid, when such city, town or village is so incorporated as herein provided, the same shall be known as a city or town, subject to the provisions of title twenty-two, and all amendments thereto relating to cities

and towns and vested with all the rights, powers, privileges, immunities and franchises therein conferred. [Act Feb. 27, 1917, ch. 48, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 774b. Same; on acceptance to possess powers and liabilities of cities, etc., under laws of this state.**—All the inhabitants of each city, town or village so accepting the provisions of chapters one to thirteen of Title twenty-two of the Revised Statutes of Texas, and the amendments thereto, shall continue to be a body corporate, with perpetual succession, by the name and style by which such city, town or village was known before the acceptance of the provisions of such title, and as such they and their successors by that name shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises possessed and enjoyed by the same at the time of the acceptance of the provisions of such title twenty-two of the Revised Statutes of Texas and the amendments thereto, and those herein granted and conferred, and shall be subject to all the duties and obligations pertaining to or incumbent on the same as a corporation at the time of the acceptance of the provisions of such title, and may ordain and establish such acts, laws, regulations and ordinances, not inconsistent with the constitution and laws of this State, as shall be needful for the government, interest, welfare and good order of said body politic, and, under the same name, shall be known in law, and be capable of contracting and being contracted with, suing and being sued, impleading and being impleaded, answering and being answered unto, in all courts and places, and in all matters whatever, may take, hold and purchase, lease, grant and convey such real and personal or mixed property or estate as the purposes of the corporation may require, within or without the limits thereof; and may make, have and use a corporate seal and change and renew the same at pleasure. [Id., § 2.]

**Art. 774c. Same; property rights.**—Be it further enacted that all property, real, personal or mixed, belonging to any such city, town or village, so incorporated under and by virtue of any law of the Republic of Texas, general or special, accepting the provisions of chapters one to thirteen of Title twenty-two of the Revised Statutes of Texas of 1911, and the amendments of 1911, 1913 and 1915, is hereby vested in the corporation thus created, and the council of such city, town or village is hereby authorized and empowered to sell and alienate such property and to appropriate the proceeds of such sale to the acquisition or construction, maintenance or operation of a water, sewer, gas and electric light and power system, or any one or more of such systems, within or without the limits of such city or town, or for any other public improvement within said city or town, as the council thereof may determine. [Id., § 3.]

**Art. 774d. Same; detachment of uninhabited territory and readjustment of boundaries.**—Be it further enacted that whenever there shall exist within the boundaries of any such city, town or village accepting the provisions of chapters one to thirteen of Title twenty-two of the Revised Statutes of Texas, and the amendments thereto, under the provisions of this Act, territory to the extent of at least ten acres, contiguous, uninhabited and adjoining the lines of such city or town, the Mayor and Council of such city or town shall, within one year, from the filing in the office of the Clerk of the County Court of the action of the Council accepting the provisions of this Act, or as soon thereafter as practicable, and before they shall levy any taxes for said city or town, by ordinance duly passed discontinue said territory as a part of said city or town and shall redefine the bounds and limits of such city or town so that they shall conform as nearly as practicable to the requirements of Article 777 of the Revised Statutes of Texas; and when said ordinances has been duly passed, the clerk shall enter an order to that effect on the minutes or records of the city or town council; and from and after the entry of

such order, said territory shall cease to be a part of said city or town; provided that should there be situated within the said territory, so discontinued, any property of any description belonging to said city or town, the title to said property, so situated, shall remain in such city or town and may be sold, alienated and disposed of by such city or town, the same as if it were situated within the bounds and limits of such city or town. [Id., § 4.]

**Art. 775. [386] [340c] Validating incorporations.**—That all towns and cities of one thousand inhabitants or more which have heretofore attempted to accept the provisions of this Title and to become incorporated cities of one thousand inhabitants or more, under the general laws of Texas, and have failed to comply with all the requirements of said general laws, or which are not included within the literal meaning of those cities which are authorized to accept the provisions of said general laws, and all towns and villages incorporated under Chapter 14 of this Title or Chapter 11 of Title 18 of the Revised Civil Statutes of 1895, or by special charter, or otherwise, but which now have six hundred inhabitants or more, and which have heretofore attempted to accept the provisions of this Title in lieu of their said town or village charter and become incorporated cities of one thousand inhabitants or more, but which said cities have from and after the dates of their several attempted incorporations and their several efforts to accept the provisions of this Title exercised the functions of cities of the class named, and were by the State of Texas recognized as such cities are hereby declared to be cities of six hundred inhabitants or more; and the several acts whereby they attempted to accept the provisions of said law are hereby, in all things validated; and that all subsequent acts of said cities and towns done and performed as a city of one thousand inhabitants or more, after they had attempted to accept the provisions of said law as aforesaid are hereby validated and declared to be as binding as if said cities had been duly and legally incorporated; provided, that nothing herein shall be construed as validating any act of said cities or the councils thereof, unless same were authorized by the general laws of the State under which they were attempting to act at the several dates when said acts were done; and provided, further, that the provisions of this Article shall not validate the act of any town or city in unlawfully adding additional territory to such town or city without the consent of such inhabitants so added to said town or city. [Acts 1891, p. 26; Act March 5, 1915, ch. 34, § 1.]

Took effect 90 days after adjournment on March 20, 1915.

**Art. 776. Validating incorporations.**

**Application.**—This article, held not to apply to city incorporation proceedings which were subject to the defect named but which had been dissolved by an election prior to the taking effect of the act. *Wilson v. Carter* (Civ. App.) 161 S. W. 411.

**Art. 777. [386a] Territorial boundaries of cities and towns, etc.**

**Territory included.**—Under this article a city with less than 2,000 inhabitants could not be lawfully incorporated so as to include more than two square miles of territory, and, an attempt having been made to do it, the defect could not be cured by eliminating the excess. *Wilson v. Carter* (Civ. App.) 161 S. W. 411.

— **Effect of including too much.**—Under arts. 777 and 1034, a town of 3,000 inhabitants may incorporate four square miles of territory, including territory extending beyond aggregation of residences and pertinent structures if such territory is to be used for strictly town purposes. *State v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

**De facto corporation.**—Where a municipal corporation was illegally incorporated so as to contain more than two square miles of territory but with less than 2,000 inhabitants in violation of this article, but officers were elected and debts incurred, it was a corporation de facto. *Wilson v. Carter* (Civ. App.) 161 S. W. 411.

**Art. 778. [386b] Excessive territory to be relinquished.**

**Retroactive effect.**—This article does not apply to cities incorporated prior to its enactment in 1895. *Wilson v. Carter* (Civ. App.) 161 S. W. 411.

**Art. 779. [386c] Validating certain incorporations.**—All cities and towns in this State whose charters may be void by reason of a failure to properly define their limits or that may have included in such limits



more territory than was provided for in Article 386a, Revised Civil Statutes of Texas, 1895, that shall have, within ninety days from the taking effect of this Act, complied with Article 386b, Revised Civil Statutes, 1885, are hereby declared to be valid; and such charters and incorporations are hereby in all things validated, the same as if such territorial limits had at first been properly established. [Acts 1903, p. 68; Act March 5, 1915, ch. 34, § 1.]

Took effect 90 days after adjournment on March 20, 1915.

**Application.**—This article, as enacted in 1897, and validating incorporation of cities which had included more than two square miles of territory and whose city councils had restricted the limits to prescribed bounds, held not applicable to a city so incorporated in 1911. *Wilson v. Carter* (Civ. App.) 161 S. W. 411.

**Art. 781. [574] [503] Adjoining inhabitants may become part of city, how.**

**Effect of authorization of home rule charters.**—Since Vernon's Sayles' Ann. Civ. St. 1914, arts. 1096a–1096i, superseded this article so far as home rule cities were concerned, a provision in a charter adopted by the city under the amendment to Const. art. 11, § 5, authorizing the annexation of territory without a vote of the inhabitants of such territory, does not conflict with a general law. *Cohen v. City of Houston* (Civ. App.) 176 S. W. 809.

**Art. 782. [575] [503a] Segregating territory from city.**

Cited, *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

## CHAPTER TWO

### OFFICERS AND THEIR ELECTION

Art.	Art.
784. Municipal government to consist of certain officers to be elected, etc.	796. Power of city council to remove officers.
793. Member of city council ineligible to other office, and shall not be contractor, surety, etc.	800. Outgoing officer shall deliver books, etc., to his successor.

**Article 784. [387] [344] Municipal government consists of what.**

**Creation of offices and employments.**—Under the charter of a municipality, giving the city council power to select officers, among them a city scavenger, held that the city council had power to appoint a municipal scavenger. *Ex parte Howell*, 71 Tex. Cr. R. 71, 158 S. W. 535.

Under San Antonio City Charter, § 56, the city was authorized to employ expert attorneys to pass on the validity of a bond issue and agents to sell the bonds on commission; the judgment of the council as to the necessity therefor being final, unless fraudulent or unreasonable. *Davis v. City of San Antonio* (Civ. App.) 160 S. W. 1161.

*Beaumont City Charter*, § 27, providing that there shall be such other officers, besides those named, as may be provided by ordinance, authorized an ordinance, creating the office of superintendent of the garbage department. *Ex parte London*, 73 Tex. Cr. R. 208, 163 S. W. 968.

The employment of an attorney by a city or town council, if otherwise authorized, could only be accomplished by an ordinance or resolution. *Tharp v. Blake* (Civ. App.) 171 S. W. 549.

Under San Antonio City Charter, § 16, par. 3, providing for creation by commission of "offices and employments," reference is not had to elective and appointive offices already enumerated and limited in the charter, but the words "offices or employment" are necessarily synonymous. *Brown v. Uhr* (Civ. App.) 187 S. W. 381.

**Reduction of salary.**—Under arts. 784 and 816, the attempted reduction, during the term for which he was elected, of the salary of the city attorney of a city incorporated under the title, was void. *City of Brownsville v. Kinder* (Civ. App.) 180 S. W. 623.

**Art. 793. [566] [495] Member of city council ineligible to other office, and shall not be contractor, surety, etc.**

**Alderman receiving no salary.**—An alderman for whom no salary is provided by statute or ordinance, though holding another salaried office, is not within Const. art. 16, § 40, prohibiting a person holding more than one office of emolument. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

**Art. 796. [564] [493] Power of city council to remove officers.**

**Abandonment of office.**—That a municipal officer wrongfully removed did not, before the end of his term, institute proceedings to test the validity of the removal, does not show an abandonment of the office. *City of San Antonio v. Steingruber* (Civ. App.) 177 S. W. 1023.

**Art. 800. [565] [494] Outgoing officer shall deliver books, etc., to his successor, etc.**

**Duty of city treasurer as to funds.**—Under this article an outgoing city treasurer is required to turn over funds belonging to the city and its liable in a civil suit in case of failure as well as for other penalties. *Brown v. City of Amarillo* (Civ. App.) 180 S. W. 654.

— **Liability on bond.**—Under this article, where city treasurer retained commissions in excess of amount to which he was entitled, he and his bondsmen held liable therefor. *Brown v. City of Amarillo* (Civ. App.) 180 S. W. 654.

## CHAPTER THREE

### DUTIES AND POWERS OF OFFICERS

<p><b>Art.</b> 803 Officers shall take official oath. 806. Powers of the mayor. 807. Ordinances and resolutions adopted shall not take effect until, etc. 808. May appoint police officers; salary, fees, tenure, etc.; bond; powers.</p>	<p><b>Art.</b> 808a. Hours of work of patrolmen in certain cities; proviso. 811. Treasurer shall give bond; his duties, etc.</p>
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**Article 803. [400] [356] Officers shall take official oath.**

**Liability for acts of officers.**—A municipal corporation is not liable for the wrongful assault and imprisonment of the plaintiff by its officers without a showing of some wrongful act by the corporation itself. *Swanson v. Nacogdoches* (Civ. App.) 161 S. W. 83. And see *Chicago, R. I. & G. Ry. Co. v. Porter* (Civ. App.) 166 S. W. 37.

**Art. 806. [403] [359] Powers of the mayor.**

**Contracts.**—Where city by ordinance empowered mayor to make contract for street paving, the work to be controlled by the city engineer, it was beyond the mayor's powers to include in the contract an arbitration agreement, and the city was not bound thereby. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549.

**Special provisions.**—Under City Charter of San Antonio, the provision giving mayor "all powers and duties not distributed or assigned to another department," being a general provision, will not affect a special provision, section 16, enumerating and defining the nominating powers of mayor. *Brown v. Uhr* (Civ. App.) 187 S. W. 381.

In San Antonio City Charter, § 16, pars. 1 and 2, touching appointive officers, the words "unless otherwise provided" refer to other provisions made in the charter and not to ordinances that may be passed. *Id.*

**Art. 807. [404] [360] Ordinances and resolutions adopted shall not take effect until, etc.**

**Mode of action.**—Under arts. 807, 811, 816, held that city council could fix salary of city treasurer by resolution as well as by ordinance. *Brown v. City of Amarillo* (Civ. App.) 180 S. W. 654.

**Art. 808. May appoint police officers; salary, fees, tenure, etc., bond; powers.**

**Nature of office of policeman.**—A policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of contract between himself and the city; the word applying equally to every member of the police force. *Ex parte Preston*, 72 Tex. Cr. R. 77, 161 S. W. 115.

**Creation of office.**—The position of policeman or patrolman being a creation of municipal governments, the establishment of such office must be shown to entitle a patrolman to recover against a city for salary of the office. *City of San Antonio v. Coultress* (Civ. App.) 169 S. W. 917.

Under San Antonio charter, the position of policeman must be created by ordinance, and cannot be created by resolution or approval of appointment of one as policeman. *Id.*

Where the city council enacted an ordinance declaring that the police force should consist of such patrolmen as the mayor and city council might deem necessary, it cannot, by resolution, create the office of patrolman. *Id.*

**Nature of office of marshal.**—Under City Charter of San Antonio, as amended in 1915, enumerating elective and appointive officers of city and providing that officers and employes shall hold office for two years, the city marshal not being enumerated, although an officer contemplated by Const. art. 16, § 17, providing that officers of state shall continue to perform duties until successors are duly qualified, is an employe, and not officer appointed by mayor. *Uhr v. Lancaster* (Civ. App.) 187 S. W. 379, 381.

An ordinance providing that the police force of San Antonio shall consist of a chief marshal, assistant marshals, and patrolmen, although not establishing a police force, created the office of marshal, because specially named. *Uhr v. Lancaster* (Civ. App.) 187 S. W. 379.

Under San Antonio City Charter, amendment 1915, § 16, par. 2, where plaintiff admits that defendant had been appointed in 1913 in accordance with an ordinance creating position of marshal, and does not allege that a successor has been appointed and qualified, an injunction restraining defendant from exercising the duties of the position will not be allowed. *Id.*

**Confirmation of appointments.**—Under commission charter of city of San Antonio an ordinance creating a police department, persons previously appointed as policemen,

but whose appointments were not confirmed as required, held to have no legal title to office of captain of detectives, and detective in police department. *Uhr v. Brown* (Civ. App.) 191 S. W. 379.

**De facto officers.**—See *Uhr v. Brown* (Civ. App.) 191 S. W. 379.

**Special police.**—Where a city charter authorized the commissioners of police and fire departments to appoint all members of the two departments, an ordinance authorizing the mayor to appoint special police to hold office during his term, unless otherwise determined by him, is invalid. *Uhr v. Lambert* (Civ. App.) 188 S. W. 946.

**Art. 808a. Hours of work of patrolmen in certain cities; proviso.**—That in all incorporated cities and towns of this State, whether incorporated by general or special law, or under any other law or any provision of the constitution of this State in whatsoever manner, having a population of fifty-thousand inhabitants or more, according to the last United States census, and which maintains a regular police department, the patrolmen thereof, or those performing duties ordinarily performed by patrolmen, shall be required to serve on actual duty as patrolmen not longer than eight hours in every twenty four hours of the day; provided that in cases of riot or other emergency such patrolmen shall perform such duty and for such time as the directing authority of the department shall require. [Act April 2, 1917, ch. 182, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 811. [409] [365] Treasurer shall give bond; his duties, etc.**

**Mode of action by city council in fixing salary.**—Under arts. 807, 811, 816, held, that city council could fix salary of city treasurer by resolution as well as by ordinance. *Brown v. City of Amarillo* (Civ. App.) 180 S. W. 654.

**Commissions.**—If ordinance and resolution of city council did not warrant payment to city treasurer of certain commissions claimed by him, the mayor could give no order therefor under this article. *Brown v. City of Amarillo* (Civ. App.) 180 S. W. 654.

Approval by city council of city treasurer's reports held not to show intent to allow him the entire commissions shown therein unless the report showed payment on the mayor's order pursuant to this article. *Id.*

Where city treasurer merely retained excessive commissions without paying them to himself on city council's order under this article, held, that there was no payment under mistake of law preventing recovery. *Id.*

## CHAPTER FOUR

### GENERAL POWERS AND DUTIES OF THE CITY COUNCIL

<p>Art. 816. Salary of officers shall be fixed by city council, etc.</p> <p>817. Power to pass, etc., ordinances, etc., and other powers.</p> <p>819. Ordinances, when and how published.</p> <p>821. Published ordinances admissible in evidence.</p> <p>836. May compel convicts to labor on streets, etc.</p> <p>838. May do, etc., to promote health and suppress disease.</p> <p>844. May define nuisances and punish persons guilty thereof, etc.</p> <p>845. May abate nuisances.</p> <p>854. Control over streets, alleys, etc., work on streets by inhabitants; vacation of alleys.</p> <p>856. City council may cause dangerous buildings, etc., to be removed.</p> <p>857. May construct bridges, etc., sewers, sidewalks, etc.</p> <p>860. May establish pounds, etc.</p> <p>862. May regulate street railways.</p> <p>863. May control, etc., the laying of railroad tracks, etc.</p>	<p>Art. 865. To provide city with water, etc., water system not to be leased without vote, etc.</p> <p>866. May establish market house, etc.</p> <p>870. May license hackmen and prescribe their compensation, etc.</p> <p>871. May license, etc., peddlers, theaters, etc.</p> <p>873. May license, etc., circuses, etc.</p> <p>874. May authorize proper officers to grant license, etc.</p> <p>877. Power to appropriate money, etc.</p> <p>879. To appropriate revenues, and for what purposes; to issue bonds, etc.</p> <p>884. Interest and sinking fund tax to be levied, interest paid and bonds sold, etc.</p> <p>884a. May appropriate net revenues of public utility systems to payment of interest and principal of bonds issued therefor.</p> <p>884b. Appropriation of such net revenues before levying taxes.</p> <p>884c. What amount sufficient for purpose tax therefor not to be levied.</p>
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**Article 816. [569] [498] Salary of officers shall be fixed by city council, etc.**

**Right to salary.**—Before the emoluments of an office can be recovered, the claimant must show that the office has been created and that he is a legal incumbent. He must

also show that he is a de jure officer. *City of San Antonio v. Coultriss* (Civ. App.) 169 S. W. 917.

Where plaintiff was deprived of an office without authority of law, the fact that another discharged his duties will not deprive him of his right to salary. *City of San Antonio v. Steingruber* (Civ. App.) 177 S. W. 1023.

An officer who discharged no duties cannot recover salary incident to the office because of the defective appointment of his successor. *Id.*

An officer who was unlawfully removed and whose place was taken by another may recover the salary incident to the office, regardless of the ability of the city to recover from the unlawful incumbent. *Id.*

**Resolution fixing salaries.**—Resolution, providing that city secretary and treasurer should receive \$10 a month and "fees as set by ordinance" up to \$2,000 per annum, held to fix compensation as required by statute. *Brown v. City of Amarillo* (Civ. App.) 180 S. W. 654.

Resolution that city secretary and treasurer should receive certain salary and fees as fixed by ordinance up to \$2,000 held to include commissions in such fees. *Id.*

Under arts. 807, 811, 816, held, that city council could fix salary of city treasurer by resolution as well as by ordinance. *Id.*

While ordinance cannot be repealed by resolution, held, that resolution fixing compensation of city treasurer did not repeal ordinance, but that ordinance ceased to operate by reason of its temporary nature under Rev. St. 1911, art. 816. *Id.*

Resolution, fixing salary of city secretary and treasurer at \$10 a month and fees "as set by ordinance" up to \$2,000, held to contain no ambiguity authorizing resort to executive interpretation. *Id.*

**Reduction of salary during term.**—Under arts. 784 and 816, the attempted reduction, during the term for which he was elected, of the salary of the city attorney of a city incorporated under the title, was void. *City of Brownsville v. Kinder* (Civ. App.) 180 S. W. 623.

**Action for salary after expiration of term.**—An action to recover salary incident to an office, begun after expiration of the term, cannot be defeated on the ground that such proceeding was only collateral to the adjudication of the right to the office. *City of San Antonio v. Steingruber* (Civ. App.) 177 S. W. 1023.

**Art. 817. [464] [418] Power to pass, etc., ordinances, etc., and other powers.**

1. **Not subject to judicial control except, etc.**—Under Houston Heights Charter, art. 7, § 4, a declaration of the council that an emergency requires the immediate adoption of an ordinance increasing the mayor's salary is conclusive on the courts. *Bradshaw v. Marmion* (Civ. App.) 188 S. W. 973.

4. **Ordinances—In general.**—City ordinances operate against both residents and non-residents within a city, and against the property of nonresidents within the corporate limits. *Shows v. City of Dallas* (Civ. App.) 172 S. W. 1137.

6. — **Approval or veto.**—Under the initiative provisions of the charter of the city of Dallas, held that an initiative ordinance, if valid, was effective when the board of commissioners ascertained and declared the result of an election. *City of Dallas v. Dallas Consol. Electric St. Ry. Co.* (Civ. App.) 159 S. W. 76. See *Holland v. Cranfill* (Civ. App.) 167 S. W. 308.

Under Houston Heights Charter, art. 5, § 6, it is not necessary that a majority of the qualified voters of the city, but only a majority of those voting, approve an ordinance increasing the mayor's salary. *Bradshaw v. Marmion* (Civ. App.) 188 S. W. 973.

The provision of Houston Heights Charter, art. 4, § 1, that in elections to determine the expenditure of money only taxpayers can vote, does not apply to an election under article 5, § 6, on the increase of the mayor's salary. *Id.*

9. — **Validity in general.**—In order to meet the requirements of Const. art. 1, § 3, all laws affecting a particular class of business or vocation must affect all of the specified class uniformly and alike. *Davis v. Holland* (Civ. App.) 168 S. W. 11.

Where a city's authority to pass an ordinance is based on a general grant of power, the ordinance must be reasonable and must not contravene a common right. *Royal Indemnity Co. v. Schwartz* (Civ. App.) 172 S. W. 581.

In suit to compel issuance of building permit and for injunction restraining interference with erection of storehouse, despite building ordinance regulating erection of business buildings in residence districts, testimony that suburban stores detract from comfort and destroys value of home held admissible. *Spann v. City of Dallas* (Civ. App.) 189 S. W. 999.

Question as to reasonableness or unreasonableness of ordinance is open to inquiry, unless expressly authorized by the Legislature. *Munger Oil & Cotton Co. v. City of Groesbeck* (Civ. App.) 194 S. W. 1121.

10. — **Partial invalidity.**—Any invalidity in a provision regulating the use of elevators requiring the operators to be at least 16 years of age would not render invalid another provision requiring an operator to have had 10 days' instruction before pursuing such occupation. *Modern Order of Prætorians v. Nelson* (Civ. App.) 162 S. W. 17.

If a section of building ordinance were obnoxious to Constitution and laws, held that, as it does not affect other provisions prescribing character of buildings in residence district of city, remaining portions are valid. *Spann v. City of Dallas* (Civ. App.) 189 S. W. 999.

11. — **Police regulations in general.**—The Legislature and municipal corporations, when authorized by their charters, may classify persons according to their business, and apply different rules to different classes of persons. *Ex parte Bradshaw*, 70 Tex. Cr. R. 166, 159 S. W. 259.

Under the law giving the city of Dallas power to protect the lives, health, and property, it could enact an ordinance requiring elevator operators to have had 10 days of actual experience under competent instruction and be 18 years of age before being employed. *Modern Order of Prætorians v. Nelson* (Civ. App.) 162 S. W. 17.

An ordinance prohibiting any person under 18 to operate an automobile within the

limits of a city held void for unreasonableness. *Royal Indemnity Co. v. Schwartz* (Civ. App.) 172 S. W. 581.

Ordinance of city of Ft. Worth, making it unlawful for white person and negro to have sexual intercourse, each act to constitute a separate offense, held a valid exercise of the police power. *Strauss v. State*, 76 Tex. Cr. R. 132, 173 S. W. 663.

21. — **Right to question validity.**—Where a jitney owner had never applied for a license, he could not complain that the ordinance requiring licenses was invalid because it gave the city authorities arbitrary power to grant or refuse a license. *Ex parte Bogle* (Cr. App.) 179 S. W. 1193.

**Art. 819. [557] [486] Ordinances, when and how published.**

**Failure to publish.**—Under arts. 819 and 821, held that where publication of an ordinance was not proven as prescribed thereby, it was inadmissible. *Woodruff v. Deshazo* (Civ. App.) 181 S. W. 250.

**Art. 821. [558] [487] Published ordinances admissible in evidence.**

**Effect of failure to publish.**—Under arts. 819 and 821, held that where publication of an ordinance was not proven as prescribed thereby, it was inadmissible. *Woodruff v. Deshazo* (Civ. App.) 181 S. W. 250.

**Evidence of publication.**—Whether an ordinance was adopted is a question of fact, to show which one may, if necessary, show a mistake in the minutes, reciting it was adopted as a chapter, instead of a title. *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619.

Evidence held insufficient to justify finding that an amendment to a penal ordinance had been published as required by law. *Texas Traction Co. v. Scoggins* (Civ. App.) 175 S. W. 1128.

**Art. 836. [455] [410] May compel convicts to labor on streets, etc.**

Cited, *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334.

**Art. 838. [448] [404] May do, etc., to promote health and suppress disease.**

**Removal of garbage.**—A municipal ordinance, prohibiting any person save the city scavenger from removing night soil and other refuse, is not unreasonable or oppressive, being a proper exercise of a municipality's police power. *Ex parte Howell*, 71 Tex. Cr. R. 71, 158 S. W. 535.

The Legislature could confer authority on the city council to pass an ordinance regulating the removal of garbage and night soil; it being the policy of the American system of government to subdivide the country and allow such subdivisions to regulate their internal affairs. *Ex parte London*, 73 Tex. Cr. R. 208, 163 S. W. 968.

Beaumont City Charter, § 32, empowering the council to take measures to prevent disease and to adopt sanitary measures, as well as other provisions of the charter, especially section 76, authorized an ordinance prohibiting the removal of garbage and night soil, except by the superintendent of the garbage department. *Id.*

An ordinance, conferring on the superintendent of the garbage department the exclusive right of removing garbage and night soil for others, is not violative of Const. art. 1, § 26, prohibiting the creation of perpetuities and monopolies. *Id.*

**Vaccination of school children.**—In view of Acts 34th Leg. c. 49, post, art. 2779a et seq., held, that ordinance of municipality requiring vaccination of children as condition precedent to their attendance at school cannot be sustained under this article. *Waldschmit v. City of New Braunfels* (Civ. App.) 193 S. W. 1077.

Municipal ordinance requiring vaccination as a condition precedent to attendance of children in school, held not sustainable on the ground that there were Mexicans and others in the vicinity who were subject to and carried smallpox. *Id.*

**Maintenance of septic tank.**—See *Cardwell v. Austin* (Civ. App.) 168 S. W. 385.

**Art. 844. [453] [408] May define nuisances and punish persons guilty thereof, etc.**

**Power to define and abate nuisances in general.**—A planing mill, erected within about 70 feet of a residence in a densely settled residential portion of a city, held to constitute a permanent nuisance. *Citizens' Planing Mill Co. v. Tunstall* (Civ. App.) 160 S. W. 424.

Under arts. 844, 856, and 965, a city council by resolution held authorized to require the removal of a dilapidated wooden building located within the fire limits, where it was likely to fall and endanger human life or to burn. *Howell v. City of Sweetwater* (Civ. App.) 161 S. W. 948.

That which is not in fact a nuisance or injurious to public health cannot be made so by a declaration of the Legislature or a city council. *Ray v. City of Belton* (Civ. App.) 162 S. W. 1015.

Though this article authorizes a city to define nuisances, Const. art. 1, § 19, prevents a municipality from making that a nuisance which is not one of itself. *Dibrell v. City of Coleman* (Civ. App.) 172 S. W. 550.

Under arts. 844 and 845, held that closing of an alley by owners of adjacent lots under authority of ordinance was not justified on theory that alley was a nuisance. *Bowers v. Machir* (Civ. App.) 191 S. W. 758.

**Keeping stock pens.**—Beaumont City Ordinance, art. 991, regulating keeping of stock pens, held a valid exercise of the police power, and not unconstitutional for inequality. *Ex parte Broussard*, 169 S. W. 660, 74 Tex. Cr. R. 333.

**Art. 845. [447] [403] May abate nuisances.**

See *Bowers v. Machir* (Civ. App.) 191 S. W. 758, note under art. 844.

**Art. 854. Control over streets, alleys, etc.; work on streets by inhabitants; vacation of alleys.**—Any incorporated city or town containing

not more than five thousand (5,000) population in this State shall have the exclusive control and power over the streets, alleys and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, extend, establish, regulate, grade, clean and otherwise improve said streets; to put drains or sewers therein, and prevent incumbering thereof in any manner, and to protect same from encroachment or injury; and to cause all able-bodied male inhabitants above twenty-one years of age and not over forty-five years of age, except ministers of the Gospel, to work thereon not to exceed five days in any one year, or furnish a substitute or sum of money not to exceed one dollar (\$1.00) for each days work demanded; to employ such substitute and to enforce same by appropriate ordinances, including provisions for fines and penalties; and to regulate and alter the grade of premises; to require the filling up and raising of same; and such city council shall also have power to alter or vacate the alley in any block of ground in the city upon written application of the owner of the block, or if there be more than one owner of such block, then upon the written application of all owners thereof uniting in such application; such alley so vacated shall thereupon revert to and become the property of the owner of the block of which it was a part, or if more than one, then to the owners of the adjoining lots therein, each extending to the center of the alley so vacated. [Acts 1913, p. 326, § 1; Act March 30, 1917, ch. 144, § 1.]

**Explanatory.**—Took effect 90 days after March 21, 1917, date of adjournment. The act amends art. 854, ch. 4, tit. 22, Rev. St. of 1911, as amended by ch. 152, p. 326, General Laws 33rd Leg., regular session.

Cited, *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

**Vacation of streets.**—The general powers of a municipality to alter, widen, and, in the interest of public safety, temporarily close a street do not authorize a permanent closing of a public street to the damage of an abutting owner. *Stevens v. City of Dublin* (Civ. App.) 169 S. W. 188.

A city under the police power, given by Rev. St. tit. 22, c. 4, could not close a street because its continued existence was dangerous to school children attending a school abutting thereon, since the general public was only affected indirectly. *Id.*

Under Sp. Acts 31st Leg. c. 31, subc. 4, § 1, and *Vernon's Sayles' Ann. Civ. St. 1914*, art. 854, city of Ft. Worth held to have right to vacate a dedicated alley as a public alley, but not to close it. *Bowers v. Machir* (Civ. App.) 191 S. W. 758.

Under this article, city of Ft. Worth might close an alley for special benefit of owners of property in block, but one having property interest in keeping abutting alley open acquired by purchase with reference to plat, so as to furnish more convenient access to rear of his lot, had such special interest as to have a cause of action therefor. *Id.*

If an ordinance, permitting owners of adjacent lots to close an alley was based on the fact that it was a nuisance, as well as by reason of the fact that owners of property in the block had filed an application therefor, that should appear in the record. *Id.*

Where lot owners, purchasing by plat dedicating an alley, had a special right in having the alley left open, the city could not destroy it without making itself liable for compensation. *Id.*

**11. Control over streets and sidewalks thereon.**—A city ordinance making it unlawful to use the streets or alleys embraced within the fire limits of the city for the purpose of vending, displaying, or peddling goods, provided the ordinance shall not apply to one who offers for sale any products raised upon property controlled by himself, is valid. *Ex parte Bradshaw*, 70 Tex. Cr. R. 166, 159 S. W. 259.

A city having exclusive control over its streets may impose reasonable conditions on the right to use them. But the regulation must be reasonable. The city may prohibit private business on a street, or grant the privilege to do business thereon. *Greene v. City of San Antonio* (Civ. App.) 178 S. W. 6.

Under *Houston City Charter*, art. 2, § 4, empowering the city to lay out, widen, and vacate streets and sidewalks, the city could regulate the width of sidewalks and abolish them if traffic should warrant, unless some private rights protected by Constitution were impaired. *Jones v. City of Houston* (Civ. App.) 188 S. W. 688.

**12. May not alienate street.**—A municipality authorized by charter to lay out, regulate, widen, etc., its streets, is not bound by dedication to maintain sidewalks but may appropriate the street from time to time to such uses as are conducive to the public good, and equity will not interfere with its discretion in that respect. *Jones v. City of Houston* (Civ. App.) 188 S. W. 688.

**15. Grant of franchises and privileges in streets—Power of city.**—A city authorized to grant franchise for the use of its streets may grant a franchise for the operation of jitneys. *Greene v. City of San Antonio* (Civ. App.) 178 S. W. 6.

A charter of a city, authorizing granting of franchises for use of streets for any public purpose, covers any franchise in the interest of the public. *Id.*

A city may give permission for the use of its streets by jitneys and compel the payment of a license fee therefor. *Id.*

Municipalities may not, under grant of exclusive control of streets under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 854, legislate on every phase of manner and means of

business permitted use of the streets. *City of Terrell v. Terrell Electric Light Co.* (Civ. App.) 187 S. W. 966.

If municipality, although without power to do so, annexes a condition to a grant to enter upon its streets, grantee, voluntarily accepting the grant, is bound by the condition. *Id.* See *Galveston Commercial Ass'n v. Ort* (Civ. App.) 165 S. W. 907.

16. — **Construction of grant.**—The grant of a franchise to maintain a waterworks system in a city must be construed strictly in favor of the public. *City of Memphis v. Browder* (Civ. App.) 174 S. W. 982.

Franchise permitting use of streets for public water supply must be strictly construed in favor of city, and ambiguity or fair doubt is to be resolved in favor of the public. *Green v. San Antonio Water Supply Co.* (Civ. App.) 193 S. W. 453.

**Art. 856. [550] [479] City council may cause dangerous buildings, etc., to be removed.**

**Removal of buildings.**—Under arts. 844, 856, and 965, a city council by resolution held authorized to require the removal of a dilapidated wooden building located within the fire limits, where it was likely to fall and endanger human life or to burn. *Howell v. City of Sweetwater* (Civ. App.) 161 S. W. 948.

**Art. 857. [420] [376] May construct bridges, etc., sewers, sidewalks, etc.**

**Judicial supervision.**—Where the proper authorities of a city have determined that a proposed system of drainage is necessary, the questions whether such system is the most feasible or the least expensive cannot be considered by the courts. *City Com'rs of Port Arthur v. Fant* (Civ. App.) 193 S. W. 334.

**Liability of city for defects in sewers.**—A city incorporated under the general laws, with authority under its charter to provide a sewer system, must exercise its authority in a proper manner and it may not create or maintain a nuisance. *Cardwell v. Austin* (Civ. App.) 168 S. W. 385.

Where a method can be adopted by which city sewage may be purified and discharged free from any odor, which will interfere with the comfortable enjoyment of plaintiff's home, that the proximity of a septic tank to the residence of an individual will produce mental annoyance or tend to lessen the value of his property will not prevent its establishment. *Id.*

Where a city maintains a nuisance to the injury of a private person, the question of negligence is not in issue. *City of Clarendon v. Betts* (Civ. App.) 174 S. W. 958.

— **Notice of defect and of claim for damages.**—Under Const. art. 1, § 17, where private property has been damaged by a city's negligence in building an insufficient sewer, the charter requirements of notice of defects and of claim for damages are not applicable to prevent recovery. And this is so where the negligence in building a sewer is that of the city itself, and plaintiff's health was injured by its breaking. *Shows v. City of Dallas* (Civ. App.) 172 S. W. 1137.

**Art. 860. [444] [400] May establish pounds, etc.**

**Liability for injury to animal running at large.**—Where an ordinance prohibited the running at large of horses, the owner of a horse killed by falling into a ditch in a street opened by a gas company cannot recover where the animal was unattended, and had escaped from the owner's inclosure. *Dallas Gas Co. v. Wheat* (Civ. App.) 160 S. W. 980.

In action for death of horse by falling into defendant's cistern, ordinance prohibiting the running at large of live stock held complete defense, unless defendant was guilty of gross negligence in permitting the cistern to remain open. *Woodruff v. Deshazo* (Civ. App.) 181 S. W. 250.

**Art. 862. [461] [415] May regulate street railways.**

**Restoring street and grading or paving same.**—Where the charter of a street railway company required it, at its own cost, to pave that portion of the street it occupied in the same manner as the city might pave the remainder, the railway company is entitled to reasonable notice of the contemplated improvement, and to either pave the street itself, or itself to contract for the improvement of such street. *Texas Bitulithic Co. v. Abilene St. Ry. Co.* (Civ. App.) 166 S. W. 433.

Street railroads, in constructing their tracks, must restore the street used to its original condition so as to not unnecessarily impair its usefulness. *Cleburne St. Ry. Co. v. Dickey* (Civ. App.) 168 S. W. 475.

**Violation of ordinance.**—Failure of an interurban car to stop in front of a station on its way to the rear to unload baggage and freight, in course of which it collided with an automobile at a street crossing adjoining the station, was not a violation of an ordinance requiring cars to stop at stations, and was not negligence under the law. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

The violation by a motorman of a speed ordinance for street cars was negligence per se, subject to the limitation that, on discovery of the danger, the motorman was only bound to use such care to stop his car as ordinarily prudent persons would have exercised in similar circumstances. *Texas Traction Co. v. Scoggins* (Civ. App.) 175 S. W. 1128.

**Art. 863. [460] [414] May control, etc., the laying of railway tracks, etc.**

**Regulation of railroads—Speed.**—In an action against an electric railroad for injuries in a collision with plaintiff's automobile at a street crossing, it was error to admit a speed ordinance relating to railway trains, such an ordinance having no application to trains propelled by electricity. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

— **Watchman at crossing.**—An ordinance requiring railroads to keep a watchman at each crossing "all during the day" held void as unreasonable on its face. *City of Waxahachie v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 183 S. W. 61.

**Subways.**—Where a city granted to a railway company certain permits upon condition that, if accepted, it would construct subways, the construction of such subways was not a purely public improvement in the sense that it did not enure to the benefit of the railway company. *Galveston, H. & S. A. Ry. Co. v. Walker* (Civ. App.) 163 S. W. 1038.

**Art. 865. [418] [374] To provide city with water, etc.; water system not to be leased without vote, etc.**

See notes under art. 1282, post.

**Municipal plant—Rates, charges, and regulations.**—A municipality which owns only waterworks system in city for supplying inhabitants with water cannot adopt unreasonable regulations. *City of Galveston v. Kenner* (Civ. App.) 193 S. W. 208.

Regulation of municipality controlling only waterworks system which provided that water could only be furnished on application of owner of buildings, and that only one meter and service pipe should be allowed to one building, held unreasonable and void, and separate connections should be furnished several lessees of building. *Id.*

**Franchise to water company—Rates and charges.**—Where a waterworks franchise in its list of maximum rates that might be charged included a provision "churches free," the company was obliged to furnish water to a church for the operation of a pipe organ. *City of Memphis v. Browder* (Civ. App.) 174 S. W. 982.

Where franchise for public water supply prescribed express definite flat rate and definite rate for water measured through meter, which company was required to install on request of a consumer, the company could not require the consumer to pay meter rent in addition to the meter rate for water. *Green v. San Antonio Water Supply Co.* (Civ. App.) 193 S. W. 453.

Water company having franchise from city held not entitled to collect prescribed rate, plus meter rent, in spite of special contract to that effect required by it as prerequisite to furnishing meter. *Id.*

**Art. 866. [422] [378] May establish market house, etc.**

**Regulation of market.**—That land was granted to a city to be used for a public trading and market square open to the public generally did not deprive the city of its right in the proper exercise of its police powers to regulate trading thereon. *Bruce v. City of Gainesville* (Civ. App.) 183 S. W. 41.

An ordinance prohibiting the use of the public market square and streets and alleys adjacent thereto to sell or display farm products, and exempting therefrom those who sold or displayed products grown on land owned or controlled by them, was not invalid because of discrimination. *Id.*

An ordinance prohibiting nonproducers from selling and displaying products on the public market square held not merely to confer a special privilege on producers, but to give opportunity to buy fresh products. *Id.*

**Art. 870. [430] [386] May license, etc., hackmen, and prescribe their compensation, etc.**

**Regulation of hackmen, jitneys, etc.—Validity.**—A city, having exclusive control over its streets and the right to license and regulate business, may regulate jitney business and require a bond to protect citizens. An ordinance regulating jitneys does not deny due process of law because it provides for forfeiture of rights for infractions of the ordinance. Such an ordinance, applying to all persons using streets of a city for vehicles engaged in local passenger transportation, is not invalid as class legislation. *Greene v. City of San Antonio* (Civ. App.) 178 S. W. 6.

Under Ft. Worth Charter an ordinance regulating automobiles carrying passengers for hire, and requiring the operators of such machines to procure special licenses, as well as to furnish indemnity bonds, is valid. *Ex parte Sullivan* (Cr. App.) 178 S. W. 537.

Provision of ordinance licensing and regulating motor busses, requiring an inspection and a new certificate weekly, held not objectionable, as a municipal delegation of police power intrusted to it by the state. *Booth v. City of Dallas* (Civ. App.) 179 S. W. 301.

Provision of ordinance requiring licensed motor bus to run at least six hours a day, and making it unlawful to operate it on any route not designated by its license certificate, held not in derogation of the right to pursue any lawful occupation. *Id.*

City of Dallas, under its charter, held to have the right to fix an annual license of \$75 for privilege of operating a motor bus over its streets. *Id.*

Ordinance imposing annual fee of \$75 for privilege of operating motor bus, in comparison with ordinance licensing and regulating rent cars, held not discriminatory, since they were engaged in different classes of street traffic. *Id.*

A city, authorized to enact ordinance for licensing and regulating motor busses, held authorized to make an additional charge of \$1 for a new certificate, for a change of route, or for an increase in the seating capacity. *Id.*

Under Austin city charter, held, that the city could enact all reasonable ordinances necessary to regulate the handling of automobiles, including jitneys, and the use of street by persons operating them in the carriage of passengers for hire. *Ex parte Bogle* (Cr. App.) 179 S. W. 1193.

A jitney ordinance requiring an indemnity bond or filing of insurance policy as prerequisite to a license held not objectionable as creating a liability against the licensee or his bondsmen in favor of strangers to the licensee and licensor. *Id.*

A jitney owner who came only within the provisions of an ordinance prescribing a \$50 license fee held not entitled to complain of conditions prescribing \$75 and \$100 license fees. *Id.*



An ordinance regulating the use of jitneys held not class legislation, in violation of Const. art. 1, § 3, though it did not apply to the street car system and other automobiles or vehicles carrying passengers for hire. *Id.*

Ordinance regulating jitneys or motor busses and their operation, and requiring a bond conditioned for payment of damages for injuries or death, etc., held authorized by the Ft. Worth charter. *Auto Transit Co. v. City of Ft. Worth* (Civ. App.) 182 S. W. 685.

Such ordinance held not invalid generally, or as violating Const. art. 1, § 17, as to taking property without compensation nor is it invalid as giving monopoly to street car company, taxicabs, and other rent vehicles, as violating Const. art. 1, § 19, in that it deprives citizens of property without due course of law or impairs obligations of contracts in violation of Const. art. 1, § 16. Neither does it violate Const. art. 1, § 3, as to grants of exclusive privileges. *Id.*

Such ordinance held not invalid, though there was no similar provision as to taxicabs, rent cars, or individuals operating their own cars not for hire, and though operators of jitneys or motor busses are not able to comply with ordinance and will be required to abandon operation of their vehicles. *Id.*

That parties operating jitneys or motor busses will suffer a pecuniary injury from the enforcement of an ordinance regulating such vehicles does not tend to establish the invalidity of the ordinance. *Id.*

#### Art. 871. [428] [384] May license, etc., peddlers, theaters, etc.

**Power to regulate.**—Persons have no vested rights to make a market of the streets and public places of an incorporated town. *Ex parte Bradshaw*, 70 Tex. Cr. R. 166, 159 S. W. 259.

A city ordinance making it unlawful to use the streets or alleys embraced within the fire limits of the city for the purpose of vending, displaying, or peddling goods, provided the ordinance shall not apply to one who offers for sale any products raised upon property controlled by himself, is valid, and does not violate Const. art. 1, § 3, providing that all free men have equal rights, and no man is entitled to exclusive privileges. *Id.*

#### Art. 873. [429] [385] May license, etc., circuses, etc.

**Power to regulate public amusements.**—Assuming that delegation of legislative authority is prerequisite to exercise by city councils of regulatory powers over public amusements, there is sufficient delegation by arts. 873 and 874, relating to power to license. *Xydias Amusement Co. v. City of Houston* (Civ. App.) 185 S. W. 415.

**Censorship over exhibitions.**—Though the city council may regulate public amusement only in the absence of legislative regulation, where the Legislature merely provides the penalty for showing improper pictures, without provision as to censors, the city may create a board of censors and require their permit to issue before exhibition. *Xydias Amusement Co. v. City of Houston* (Civ. App.) 185 S. W. 415.

Moving picture exhibitions are subject to police surveillance and control in the interest of public morals, and it is the right of the city of Houston, under its charter, sections 2, 16, and under its police powers, to regulate, permit, or forbid such exhibitions, and to appoint a board of censors. *Id.*

**Permit.**—The mere fact that an exhibitor of motion pictures has paid the state occupation tax for such exhibition does not relieve him from compliance with the city ordinance, requiring the securing of a permit as a prerequisite to the showing of pictures. *Xydias Amusement Co. v. City of Houston* (Civ. App.) 185 S. W. 415.

#### Art. 874. [432] [388] May authorize proper officer to grant license, etc.

See *Xydias Amusement Co. v. City of Houston* (Civ. App.) 185 S. W. 415; notes under art. 873.

#### Art. 877. [415] [371] Power to appropriate money, etc.

**Debts—What are.**—If landowner's petition against city presented only action on its contract to pay him more per acre for land purchased for reservoir, if another owner secured certain price or over in condemnation proceedings, sum sued for was "debt" within Const. art. 11, §§ 5, 7. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

#### Art. 879. [466] [420] To appropriate revenues and for what purposes; to issue bonds, etc.

**Limitation of amount.**—City's proposed issue of bonds to refund part of an original issue still outstanding, which under Const. art. 8, § 9, as amended, then in force was void to the extent of its excess over the limitation prescribed, held unauthorized. *City of Laredo v. Looney* (Sup.) 185 S. W. 556. And see *Cohen v. City of Houston* (Civ. App.) 176 S. W. 809.

**Resolution of council.**—*McCarthy v. McElvaney* (Civ. App.) 182 S. W. 1181.

#### Art. 884. [483] Interest and sinking fund tax to be levied, interest paid and bonds sold at not less than par.

Cited, *Hunter v. Rice* (Civ. App.) 190 S. W. 840.

**Art. 884a. May appropriate net revenues of public utility systems to payment of interest and principal of bonds issued therefor.**—That the city council or board of aldermen or other governing body of any city or town in this State, whether operating under special charter or under the general law, may appropriate and apply at the end of each fiscal year so much of the net revenues of its water works system or other public utility system, service or enterprise as said governing body shall deem to be the best interest of said city or town, to the payment of the sinking fund and

interest due by said city or town, on the bonded indebtedness incurred on account of said water works system or other public utility system, service or enterprise, producing such revenues. [Act April 4, 1917, ch. 200, § 1.]

**Explanatory.**—This act supersedes Act March 30, 1917, ch. 147, its exact duplicate, passed at the same session.

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 884b. Appropriation of such net revenues before levying taxes.**—That whenever said city council, board of aldermen or other governing body of any city or town in this State, as described in Section one [art. 884a], shall desire to take advantage of the provisions of this Act, it shall at the end of the fiscal year of said city or town, and before the passage of any ordinance levying taxes for that year, appropriate and set aside out of the net revenues of said waterworks system, or other public utility system, service or enterprise, such sum or sums as such governing body shall deem to the best interest of the city or town, for the purpose of paying the interest and sinking fund on the bonded indebtedness of such water works system, or other public utility system, service or enterprise producing said revenues, which sum or sums so set aside and appropriated shall be applied on said sinking fund and interest on said bonded indebtedness and for no other purpose. [Id., § 2.]

**Art. 884c. Where amount sufficient for purpose tax therefor not to be levied.**—That where the sum or sums so set aside and appropriated under the preceding sections shall be sufficient to pay in full the amounts needed for such sinking fund and interest for the fiscal year in which said revenues are produced, it shall not be thereafter necessary for the city council to levy any tax for such sinking fund or interest for which this appropriation is made; but when said sum or sums so appropriated shall not be sufficient to meet the required amounts for such sinking fund and interest, then in such event the governing power of said city or town shall include in the general tax ordinance for that year a tax sufficient to meet the deficiency in such sinking fund and interest allowance for that year, provided nothing herein shall be construed to authorize said city or town to exceed the authorized tax limit. [Id., § 3.]

## CHAPTER FIVE

### CORPORATION COURTS

<p><b>Art.</b> 903. Corporation court created. 904. Jurisdiction. 905. Judge or recorder elected or appoint-</p>	<p><b>Art.</b> ed, how; term; mayor ex officio recorder when. 921. Appeals to what court; trial de novo; appeals, how governed.</p>
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**Article 903. Corporation court created.**

Cited, *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334; *Tippett v. State* (Cr. App.) 189 S. W. 485.

**Art. 904. Jurisdiction.**

Cited, *Hickman v. State* (Cr. App.) 183 S. W. 1180.

**Constitutionality.**—Under Const. art. 5, § 1, as amended in 1891, Legislature held authorized to enact this article, establishing a corporation court with jurisdiction to try offenses against state criminal law. *State v. Travis County Court*, 76 Tex. Cr. R. 147, 174 S. W. 365.

Under Const. art. 5, § 1, a corporation court created by Acts 26th Leg. c. 33, is a valid court with power to try offenses against city ordinances or state laws. *Hickman v. State* (Cr. App.) 183 S. W. 1180.

**Jurisdiction—Criminal.**—Prosecution held based on Pen. Code 1911, arts. 634, 639, defining vagrancy and the punishment therefor so as to be within the jurisdiction of the corporation court under this article. *State v. Travis County Court*, 76 Tex. Cr. R. 147, 174 S. W. 365.

**Art. 905.** Judge or recorder elected or appointed, how; term, mayor ex officio recorder, when.

**Judge as peace officer.**—Under Const. art. 5, § 12, and Pen. Code 1911, arts. 475, 476, judge of city's corporation court, held a peace officer, authorized to carry pistol when not in actual discharge of duties. *Tippett v. State* (Cr. App.) 189 S. W. 485.

**Art. 921.** Appeals to what courts; trial de novo; appeals how governed.

**Constitutionality.**—Under Const. art. 5, §§ 16, 22, the Legislature has full authority to confer on the county court jurisdiction to entertain appeals from corporation court. *Hickman v. State* (Cr. App.) 183 S. W. 1180.

**Appellate jurisdiction.**—Under Const. art. 5, §§ 16, 22, Code Cr. Proc. 1911, art. 106, defining the appellate jurisdiction of the county court, and Rev. Civ. St. 1911, arts. 903-922, establishing recorder's courts, an appeal does not lie from the recorder's court in a case arising under an ordinance to the county court, but only in such cases as the recorder's court had concurrent jurisdiction with a justice of the peace. *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334.

Where the corporation court had jurisdiction to try an offense under the criminal law of the state, the county court had jurisdiction on appeal. *State v. Travis County Court*, 76 Tex. Cr. R. 147, 174 S. W. 365.

Under Acts 26th Leg. c. 33, §§ 2, 16, and Code Cr. Proc. 1911, art. 101, a county court has jurisdiction of an appeal from a conviction in the corporation court of violation of city ordinances. *Hickman v. State* (Cr. App.) 183 S. W. 1180.

**Appeal to Court of Criminal Appeals.**—Where accused on appeal to the county court from a conviction in the corporation court is deprived of the right to a trial de novo, he may enforce such right by a further appeal to the Court of Criminal Appeals. *Matula v. State*, 72 Tex. Cr. R. 189, 161 S. W. 965.

Under the statutes, one convicted in the recorder's court of violating an ordinance, and on appeal to the county court again convicted, and fined \$20, cannot appeal to the Court of Criminal Appeals. *Holman v. State*, 166 S. W. 506, 73 Tex. Cr. R. 576.

## CHAPTER SIX

### TAXATION

<p>Art. 923. Ad valorem tax.</p> <p>924. May levy and collect tax for improvements, buildings, etc.</p> <p>925. May levy tax for interest and sinking fund on certain bonds; for current expenses, permanent improvements, roads, schools; independent school districts included; boundaries.</p>	<p>Art. 928. Occupation tax.</p> <p>931. Power of city council to provide for assessing, etc., taxes.</p> <p>933. Occupation license to be suspended or revoked, etc., when.</p> <p>936. City council may provide for the exemption of property from taxation, etc.</p>
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#### Article 923. [484] [425] Ad valorem tax.

Cited, *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

**Property taxable.**—Securities in which insurance corporation's capital stock was invested deposited with state treasurer, pursuant to Acts 30th Leg. c. 170, § 8, thereby giving it a better financial standing, held not employed by it in its business in Austin so as to be taxable there, but their situs was in Austin, and they were taxable there under Const. art. 8, § 11. *Guarantee Life Ins. Co. of Houston v. City of Austin* (Civ. App.) 165 S. W. 53.

Though telegraph company was authorized to place poles and wires in streets of city which were post roads, under Act Cong. July 24, 1866, held that municipality might impose reasonable regulations upon such use of streets, and so could tax franchise, which tax would not be tax on privilege granted by United States. *Western Union Telegraph Co. v. City of Houston* (Civ. App.) 192 S. W. 577.

**Illegal assessment by one city as precluding assessment at proper situs.**—The illegal assessment and voluntary payment, in the city where a corporation was domiciled, of a tax on securities having a situs in another city was not a defense to the enforcement of a tax thereon by the city where they were situated. *Guarantee Life Ins. Co. of Houston v. City of Austin* (Civ. App.) 165 S. W. 53.

**Art. 924. [485] May levy and collect tax for improvements, buildings, etc.**

Cited, *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

**Art. 925. [486] [425c] May levy tax for interest and sinking fund on certain bonds; for current expenses, permanent improvements, roads, schools; independent school districts included; boundaries.**—The city or town council or board of aldermen of any city or town or commission of any city or town in this State, incorporated under the general laws, shall have the power, by ordinance, to levy and collect an annual ad valorem tax sufficient to meet interest payments and to create a sinking

fund on all indebtedness legally incurred prior to the adoption of the constitutional amendment in 1883, regarding the power of a city or town to levy and collect taxes, etc., and may levy and collect twenty-five cents on the one hundred dollar valuation of all property in such city or town for current expenses, and may levy and collect an additional twenty-five cents on the one hundred dollar valuation for the purpose of the erection and equipment or the purchase of public buildings, water works, sewers and other permanent improvements, except building sites and buildings for the public free schools, within the limits of such city or town, and shall have power, by ordinance, to levy and collect a tax not to exceed fifteen cents on the one hundred dollar valuation of property for the construction and improvement of the roads, bridges and streets of such city or town within its limits, and shall have power, by ordinance, to annually levy and collect such ad valorem tax for the support and maintenance of public free schools and for the erection and equipment of public free school buildings in the city or town, where such city or town is a separate and independent school district, as the electors of any such district may determine under the provisions of Chapter 169, Acts of the Thirty-fifth Legislature [Arts. 2876-2880, post]. Within the meaning of this Article shall be included all such separate and independent school districts that the management and control of the public free schools therein has been assumed or may hereafter be assumed by a city or town under the provisions of Chapter 17, Title 48, Revised Civil Statutes of Texas, 1911, and amendments thereto; the boundaries of such districts shall be coincident with the city or town, as incorporated, in such cities and towns as have not extended their lines for school purposes only, and in such cities and towns as have extended their lines or may hereafter extend their lines for school purposes only, under the provisions of Article 2883, Revised Civil Statutes of Texas, 1911, the boundaries of such districts shall be coincident with the boundaries of the city or town as extended for school purposes only, and all such separate and independent districts shall be classified as municipal districts. // [Act Oct. 10, 1917, ch. 14, § 1.]

**Explanatory.**—The act amends art. 925, ch. 6, title 22, Rev. Civ. St. 1911.

**Art. 928. [490] [429] Occupation tax.**

**Constitutionality—Uniformity.**—Under Const. art. 1, § 17, as to privileges, though a telephone company pays a city for entering, a subsequent ordinance for an annual privilege fee does not impair obligation of contracts, or disturb vested rights. *Southwestern Telegraph & Telephone Co. v. City of Dallas* (Civ. App.) 174 S. W. 636.

Const. art. 1, § 3, and Const. U. S. art. 14, § 1, held not violated by an ordinance for annual payment on poles in streets, except street railroads and companies paying part of receipts. *Id.*

Ordinance regulating jitneys or motor busses and imposing license fee held not to violate Const. art. 8, § 2, as to equality and uniformity of occupation taxes. *Auto Transit Co. v. City of Ft. Worth* (Civ. App.) 182 S. W. 685.

**Discretionary power.**—That an ordinance requiring procurement of a license as a condition to the right to operate a jitney gave the city authorities discretionary power to grant or refuse a license did not render it void. *Ex parte Bogle* (Cr. App.) 179 S. W. 1193.

**Tax for revenue.**—Under the charter of a city, a license fee imposed for the use of streets by jitneys held not an occupation tax. *Greene v. City of San Antonio* (Civ. App.) 178 S. W. 6.

Annual license fee for privilege of operating motor bus in streets of a city held a charge based upon the cost of regulation, and not a tax. *Booth v. City of Dallas* (Civ. App.) 179 S. W. 301.

An ordinance prescribing a license fee of \$50 for each jitney with a seating capacity of five or less held not objectionable as a tax for revenue for city purposes, instead of a police regulation. *Ex parte Bogle* (Cr. App.) 179 S. W. 1193.

**Property or license tax.**—A tax imposed upon value of franchise in public streets and grounds of city in which telegraph company had placed its poles and wires must be construed a property tax, and not a license tax upon right of company to do business in city. *Western Union Telegraph Co. v. City of Houston* (Civ. App.) 192 S. W. 777.

**Art. 931. [493] [432] Power of city council to provide for assessing, etc., taxes.**

**Correction of record of city council.**—On direct raising of the issue of clerical mistake, in a taxpayer's suit to enjoin collection of tax, on the ground that the levy was not voted for by the proportion of aldermen required by this article, all the parties being

before the court, correction of the record of the city council, in accordance with the evidence, to show enough voted, may be directed. *Graves v. M. Griffin O'Neil & Sons* (Civ. App.) 189 S. W. 778.

**Art. 933. [554] [483] Occupation license to be suspended or revoked, etc., when.**

Cited, *Xydias Amusement Co. v. City of Houston* (Civ. App.) 185 S. W. 415.

**Art. 936. [497] [436] City council may provide for the exemption of property from taxation, etc.**

**Necessity of ordinance.**—The deliberate omission of certain property from taxation by a city and its taxing officers held the same in legal effect as if done under an ordinance. *City of Houston v. Baker* (Civ. App.) 178 S. W. 820.

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## CHAPTER SEVEN

### ASSESSMENT AND COLLECTION OF TAXES

Art. 945. Board of equalization, how constituted.	Art. 947. Value of property, how fixed.
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**Article 945. [505] Appointment and duties of board of equalization.**

**Independent school district.**—Under arts. 945, 947, 965, 2853, 2862, an independent school district whose taxes are collected by county officials need not have any board of equalization. *Miller v. Vance* (Sup.) 180 S. W. 739, reversing judgment (Civ. App.) *Vance v. Miller*, 170 S. W. 838.

**Art. 947. [507] Shall value property.**

See *Miller v. Vance* (Sup.) 180 S. W. 739, reversing judgment (Civ. App.) *Vance v. Miller*, 170 S. W. 838; note under art. 945.

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## CHAPTER EIGHT

### FIRE DEPARTMENT

Art. 965. City council may regulate and control the erection of wooden buildings.	Art. 978c. Members of fire department to receive annual vacation.
978a. Number of days of service per week.	978d. Same; designation of vacation days.
978b. Same; designation of day of rest.	978e. Hours of service act not affected.

**Article 965. [523] [453] City council may regulate and control the erection, etc., of wooden buildings.**

See *Miller v. Vance* (Sup.) 180 S. W. 739, reversing judgment (Civ. App.) *Vance v. Miller*, 170 S. W. 838; note under art. 945.

**Fire limits—Regulations as to buildings.**—Under Rev. Civ. St. 1911, arts. 844, 856, and 965, a city council by resolution held authorized to require the removal of a dilapidated wooden building located within the fire limits, where it was likely to fall and endanger human life or to burn. *Howell v. City of Sweetwater* (Civ. App.) 161 S. W. 948.

A city having properly condemned a wooden building within the fire limits, and the owner having refused to remove the same, the city could enjoin the construction of improvements, and compel the removal of the building as a nuisance. *Id.*

Evidence held insufficient to show that fire ordinance prohibiting repairs or erection of buildings of inflammable material within certain areas of city was unreasonable. *Munger Oil & Cotton Co. v. City of Groesbeck* (Civ. App.) 194 S. W. 1121.

**Art. 978a. Number of days of service per week.**—No member of any paid fire department in any city containing twenty-five thousand inhabitants or more, according to the last United States census, shall be required to be on duty for more than six days in any one week, except in cases of emergency. [Act May 29, 1915, 1st C. S., ch. 9, § 1.]

Took effect 90 days after May 28, 1915, date of adjournment.

**Art. 978b. Same; designation of day of rest.**—The city official having supervision of the fire department shall designate the day of the week

upon which each member of such department shall not be required to be on duty. [Id., § 2.]

Sec. 3 makes it an offense to violate the provisions of the act. See Vernon's Pen. Code 1916, art. 1451g.

**Art. 978c. Members of fire department to receive annual vacation.**—Each member of any paid fire department in any city containing more than 30,000 inhabitants, according to the last United States census, shall be allowed fifteen days vacation in each year, with pay, not more than fourteen men to be on vacation at the same time. [Act April 2, 1917, ch. 185, § 1; Act May 17, 1917, 1st C. S., ch. 14, § 1.]

Sec. 5 repeals ch. 185, Acts Regular Session 35th Legislature. Took effect 90 days after May 17, 1917, date of adjournment.

**Art. 978d. Same; designation of vacation days.**—The city official having supervision of the fire department shall designate days upon which each member of such department shall be allowed to be on vacation. [Act April 2, 1917, ch. 185, § 2; Act May 17, 1917, 1st C. S., ch. 14, § 2.]

**Art. 978e. Hours of service act not affected.**—Nothing in this Act shall be construed to affect Chapter 9, page 22 [Arts. 978a, 978b, ante], Acts of first called session of the Thirty-fourth Legislature. [Act April 2, 1917, ch. 185, § 3; Act May 17, 1917, 1st C. S., ch. 14, § 3.]

Sec. 4, imposing a criminal penalty, is set forth post, as art. 1451gg, Penal Code.

## CHAPTER NINE

### SANITARY DEPARTMENT

<p><b>Art.</b> 984. Cities of 35,000 inhabitants may cleanse city, abate unhealthful places, etc.; may pass ordinances, impose fines, etc.; notice to owners of property; city may do work and assess cost against property; lien; enforcement.</p>	<p><b>Art.</b> 986. Cities to regulate sewer, etc., connections, draining, plumbing. 987. Examining and supervising board of plumbers. 988. Composition of board. 997. No license until examination passed. 998. Every plumbing firm to have one member a practical plumber.</p>
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**Article 984. [542] [472] Cities of 35000 inhabitants may cleanse city, abate unhealthful places, etc.; may pass ordinances, impose fines, etc.; notice to owners of property; city may do work and assess cost against property; lien; enforcement.**—In cities of 35000 population, or over, the city or town council, city commissioners, or other governing body of a city or town whether acting under a special charter or incorporated under the general laws of the state, shall have power to require the filling up, drainage and regulating of any lot or lots, grounds or yards, or any other places in the city or town which shall be unwholesome, or have stagnant water therein, or from any other cause be in such condition as to be liable to produce disease; also to cause all premises to be inspected and to impose fines on the owners of houses under which stagnant water may be found, or upon whose premises such stagnant water may be found, and to pass such ordinances as they may deem necessary for the purposes aforesaid and for making, filling up, altering or repairing of all sinks, and privies, and directing the mode and material for constructing them in future, and for cleansing and disinfecting the same; and for cleansing of any house, building, establishment, lot, yard or ground from filth, carrion or impure or unwholesome matter of any kind; also to require the owner of any lot or lots within such city or town to keep the same free from weeds, rubbish, brush and any and all other objectionables, unsightly or unsanitary matter of whatever nature, and in the event such owner fails or refuses so to do, within ten days after notice in writing, or by letter addressed to such owner at his post-

office address, or by publication as many as two times within ten consecutive days, if personal service may not be had as aforesaid, or the owner's address be not known, such city or town may do such work or may cause the same to be done and pay therefor and charge the expenses incurred in doing or having such work done or improvements made to the owner of such property, as herein provided; and to punish any owner or occupant violating the provisions of any ordinance so passed, as aforesaid; and the city or town council, city commissioners, or other governing body of such town or city, shall also in addition to the foregoing remedy, have the power to cause any of the improvements above mentioned to be done at the expense of the city or town, on account of the owners, and cause the expense thereof to be assessed on the real estate, or lot or lots upon which such expense is incurred; and, on filing with the county clerk of the county in which the city or town is situated a statement by the mayor or city health officer of such city or town of such expenses, such city or town shall have a privileged lien thereon, second only to tax liens and liens for street improvements to secure the expenditures so made, and ten per cent interest on the amount from the date of such payment. For any such expenditures, and interest, as aforesaid, suit may be instituted and recovery and foreclosure had in the name of the corporation, in any court having jurisdiction; and the statement so made, as aforesaid, or a certified copy thereof, shall be prima facie proof of the amount expended in any such work or improvements. [Acts 1909, p. 340, § 124; Act April 2, 1917, ch. 184, § 1.]

**Explanatory.**—Sec. 2 repeals all laws in conflict. The act amends art. 984, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**Regulating business of scavengers.**—In dealings with matters necessary to the preservation of the public health, such as the cleaning of privies, etc., the city council can prescribe regulations, and make it the duty of some officer or agent to see that they are complied with, and can also prevent others from engaging in that occupation as a means of livelihood. Ex parte Loudon, 73 Tex. Cr. R. 208, 163 S. W. 968.

#### **Art. 986. Cities to regulate sewer, etc., connections, draining, plumbing.**

**Application of statute to special charter cities.**—Arts. 986-998, requiring all cities "organized under the general laws \* \* \* or by special act," having underground sewers, to regulate house draining and plumbing and create an examining and supervising board of plumbers, etc., were intended to and do apply to the city of Dallas, though organized under special charter, especially in view of Dallas Charter, art. 2, § 2. The city of Dallas is not exempted from such laws, because Dallas Charter, art. 14, § 29, gives the city the exclusive right to control such matters, as such provision in effect confers upon the city the right to suspend the state laws, which authority cannot be conferred. Davis v. Holland (Civ. App.) 168 S. W. 11.

**Violation of ordinance.**—Where it was not shown that the town had underground sewers or cesspools, and it appeared that it had no plumbing examiners' board, and refused to provide for such examinations, one conducting a plumbing business there could not be convicted of doing so without a license under arts. 986, 987, 988. Brown v. State, 167 S. W. 348, 74 Tex. Cr. R. 108.

To constitute a violation of an ordinance punishing refusal to pay a sanitary closet tax, demand for payment must be made. Christman v. State, 76 Tex. Cr. R. 261, 174 S. W. 342.

#### **Art. 987. Examining and supervising board of plumbers.**

See Brown v. State, 167 S. W. 348, 74 Tex. Cr. R. 108; note under art. 986.

#### **Art. 988. Composition of board.**

See Brown v. State, 167 S. W. 348, 74 Tex. Cr. R. 108; note under art. 986.

#### **Art. 997. No license until examination passed.**

**Constitutionality.**—The general laws regarding house draining and plumbing (arts. 986-998) violate Const. art. 1, § 3, declaring that no man or set of men is entitled to exclusive privileges, because articles 997 and 998 permit a firm of plumbers to practice their trade if only one member has passed the examination, though another has failed, while all not members of such a firm are required to pass the examination. Davis v. Holland (Civ. App.) 168 S. W. 11.

#### **Art. 998. Every plumbing firm to have one member a practical plumber.**

See Davis v. Holland (Civ. App.) 168 S. W. 11; notes under arts. 986, 997.

## CHAPTER TEN

### STREETS AND ALLEYS

<p>Art. 999. Power of city council to have streets, etc., graded, etc.</p> <p>1003. Condemnation of property.</p>	<p style="text-align: right;">Art.</p> <p>1005. Rules for condemning property for railways followed.</p>
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#### Article 999. [544] [474] Power of city council to have streets, etc., graded, etc.

3. **Assessments—Constitutionality.**—An assessment of benefits for a local improvement is not a tax, within the Constitution. *Eubank v. City of Ft. Worth* (Civ. App.) 173 S. W. 1003.

The power of the Legislature over assessments for local improvements is absolute, in the absence of any constitutional restriction. *Id.*

By Houston City Charter, art. 4a, defining improvements, section 5, providing for a petition for improvements, section 7, providing for a hearing, and section 8, providing that within ten days after the close of such hearing a contest may be instituted by any person, due process of law is provided. *Jones v. City of Houston* (Civ. App.) 188 S. W. 688.

8. **Liability of city for injury to property.**—Where city was expressly authorized by statute and by its charter to improve an alley by filling it so as to prevent water standing therein, it was its duty to do so, if the public health demanded it. *Bowers v. Machir* (Civ. App.) 191 S. W. 758.

10. **Liability for defective streets—"Streets" as to which liable.**—A municipality is not bound by a common-law dedication of a street by the owner so as to impose the obligation of caring for it, unless it accepts the dedication. *Poindexter v. Schaffner* (Civ. App.) 162 S. W. 22.

15. — **Notice of defect or obstruction.**—Where a city itself directed the digging of a ditch across a sidewalk, and at the time of an accident it was in practically the same condition as when it was opened, the city could not claim ignorance of the defect. *City of Henderson v. Fields* (Civ. App.) 194 S. W. 1003.

Testimony that streets were among those most traveled and intersected a block from the public square held to warrant finding of notice of defect at such intersection. *Id.*

18. — **Contributory negligence of person injured.**—Testimony held not to show conclusively that plaintiff knew she could have procured a light or assistance to cross a ditch across sidewalk into which she fell. *City of Henderson v. Fields* (Civ. App.) 194 S. W. 1003.

It was not contributory negligence as a matter of law for plaintiff to attempt to cross a ditch which crossed the sidewalk, in the dark, though she knew of the existence of the ditch. *Id.*

21. — **Sufficiency of evidence.**—In action for injuries caused by falling into ditch across sidewalk, evidence held to warrant finding that city, though only incorporated in 1911, did not lack funds to place crossing in safe condition. *City of Henderson v. Fields* (Civ. App.) 194 S. W. 1003.

#### Art. 1003. [548] Condemnation of property.

See arts. 768a-768c.

**In general.**—Private property cannot be taken without allowing the owner his day in court. *Ray v. City of Belton* (Civ. App.) 162 S. W. 1015.

**Power of eminent domain in general.**—There is no law which authorizes a judgment in a city's proceeding to condemn land for a reservoir site limiting its effect and use to any specified number of years, after which the use would be abandoned, and the land revert to the former owners. *City of Ft. Worth v. Morgan* (Civ. App.) 168 S. W. 976.

Water rights can be condemned for public ways as can any right connected with land. *Gibson v. Carroll* (Civ. App.) 180 S. W. 630.

**Compensation—Necessity.**—Where complainants' lots abutted on a street, a portion of which, where it crossed certain railroad tracks, was closed by the city, impairing access to the lots and egress therefrom, such impairment constituted "damage" within the meaning of the Constitution. *City of Texarkana v. Lawson* (Civ. App.) 168 S. W. 867.

The closing of a street by a city is not a "taking" of property of an abutting owner within Const. art. 1, § 17, providing that no person's property shall be taken, etc., for any public use without adequate compensation being made. *Stevens v. City of Dublin* (Civ. App.) 169 S. W. 188.

Private lands cannot be taken from owner by a city for public use as a reservoir by an exercise of the right of eminent domain without paying therefor at time of taking. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

The constitutional denial of any legislative power to take property for public benefit without compensation therefor applies with special force when the taking is for the sole purpose of donating it to a few individuals. *Bowers v. Machir* (Civ. App.) 191 S. W. 758.

A city's neglect of its statutory and charter duties to fill in an alley to prevent water from standing therein, if the public health demanded it, would not furnish a lawful excuse for depriving a lot owner of his special interest in abutting alley, acquired by purchase, without compensating him therefor. *Id.*

The construction by a city of an open drainage ditch along one side of a street of which it owns the fee is not a "taking" of the property of abutting owners within Const. art. 1, § 17. *City Com'rs of Port Arthur v. Fant* (Civ. App.) 193 S. W. 334.

— **Measure.**—Under the charter of a city empowering it to condemn land for reservoir purposes according to the general law, and art. 6519, the market value in the mar-



ket in which it is located was the proper measure of compensation. *City of Ft. Worth v. Morgan* (Civ. App.) 168 S. W. 976.

In case of injury by appropriation of lands, the measure of the landowner's damages is the diminution of its market value for any lawful purpose to which he might have elected to put it and to which it might be put at the time of the injury or appropriation. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

— **Evidence.**—In condemnation proceedings, where, upon the issue of damages, the owner had testified as to the quality and character of the land condemned and given his opinion of its value, the jury could properly consider the fact of plaintiff's long residence upon the land as bearing upon the weight of the testimony. *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387.

In condemnation proceedings, upon the issue of the value and character of the property condemned, the jury could properly consider the fact that the owner had raised his family upon the land as showing its adaptability to homestead uses. *Id.*

— **Notice of claim.**—Under Const. art. 1, § 17, where private property has been damaged by a city's negligence in building an insufficient sewer, the charter requirements of notice of defects and of claim for damages are not applicable to prevent recovery. *Shows v. City of Dallas* (Civ. App.) 172 S. W. 1137.

### Art. 1005. [549] Rules for condemning property for railroads followed.

Cited, *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387; *City of Ft. Worth v. Morgan* (Civ. App.) 168 S. W. 976.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Establishment of streets by prescription.**—See notes under art. 6859.

**Abandonment of street.**—Vacation of streets, see art. 854 and notes.

While the rights of the public in a street may be lost by abandonment, mere nonuser by the public or delay in opening or improving it, or permitting a railroad to occupy a part thereof, will not ordinarily show abandonment. *Holt v. Texas Midland R. R.* (Civ. App.) 160 S. W. 327.

**Title and rights of abutting owners.**—Even though the abutting owner owns the fee of the street, the city is entitled to remove soil or gravel therefrom when necessary to properly grade it, and to use the gravel or soil in improving the streets in another locality. *City of La Grange v. Brown* (Civ. App.) 161 S. W. 8.

The owner of property abutting on a street owns the fee to the center thereof, unless the grant otherwise provides. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

One acquiring the fee in a street may not obstruct it so as to interfere with its use by abutting owners. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

Where plaintiff bought certain real property with reference to a map showing that it abutted on certain streets, he acquired a property interest in the street, and was entitled to use it free from obstructions whether opened or not. *Id.*

Right to the unobstructed use of streets is appurtenant to the right of possession rather than to title in fee to adjoining property. *Id.*

Where heirs received in partition lots abutting on unplatted street, which was afterwards abandoned, fee in street did not revert to them in common. *Amerman v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 182 S. W. 54.

The construction by a city of an open drainage ditch along one side of a street of which it owns the fee is not a "taking" of the property of abutting owners within Const. art. 1, § 17. *City Com'rs of Port Arthur v. Fant* (Civ. App.) 193 S. W. 334.

— **Remedies as to obstructions.**—Independent of the question of nuisance, an owner of property abutting on a street is entitled to sue to compel the removal of an obstruction constructed under purported municipal authority, though it may not have depreciated the value of his property, or injured him by way of discomfort, inconvenience, or annoyance. *Galveston Commercial Ass'n v. Ort* (Civ. App.) 165 S. W. 907.

One whose property did not abut on a street partially obstructed by a baseball park fence, in the absence of proof that his property had been depreciated in value thereby, or that he had suffered annoyance different in kind from the community in general, could not maintain a suit to compel the removal of the fence. *Id.*

Where a city, without authority, permitted the obstruction of certain streets by the construction of a baseball park, an abutting owner was entitled to enjoin the obstruction, and was not limited to an action for damages. *Id.*

Where, in an action to restrain the obstruction of a street, the title to plaintiff's abutting property was not in issue, evidence of his deed, proof of prior possession, and recognition of his title by defendant, in the absence of rebutting evidence, was sufficient to show his capacity to sue. *Id.*

**Liability of persons other than city for defects in streets.**—To leave a wagon loaded with bricks in a public street by night without placing red lights thereon, as required by city ordinance, was gross negligence of defendants. *Keevil v. Ponsford* (Civ. App.) 173 S. W. 518.

Where a property owner is negligent in failing to maintain a coalhole properly, he must be presumed to have anticipated any injuries to pedestrians, such as broken limbs, caused by falling into the hole. *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867.

Where a property owner maintains a coalhole in the sidewalk, and he instructed one delivering coal to replace the cover, failure of the latter to do so renders him liable to the property owner for the amount recovered from the owner by one injured thereby. *Id.*

Evidence held to sustain finding that cotton gin was not so constructed and operated as to escape of steam from the exhaust pipe, as a person of ordinary prudence would have constructed it, so as to render the owner liable for injuries when a horse became frightened by the exhaust. *Scott v. Shine* (Civ. App.) 194 S. W. 964.

Evidence held to sustain finding that a person of ordinary prudence would have anticipated that the exhaust from a gin would have frightened a horse under the circumstances under which plaintiff's horse was frightened and she was injured. *Id.*

See Schumm v. Anderson (Civ. App.) 172 S. W. 1121.

**Negligence in use of street.**—Operation of motor vehicles, see art. 7012½ et seq.

In an action for injuries caused by the pole of defendant's wagon coming in contact with plaintiff's leg while plaintiff was on horseback, evidence held not to show negligence by defendant's driver. *Riegler Ice Cream Co. v. Thomas* (Civ. App.) 165 S. W. 3.

— **Contributory negligence.**—In an action for injuries by the pole of defendant's wagon coming in contact with plaintiff's leg while he was on horseback, evidence held to show that plaintiff was guilty of contributory negligence. *Riegler Ice Cream Co. v. Thomas* (Civ. App.) 165 S. W. 3. See *Schumm v. Anderson* (Civ. App.) 172 S. W. 1121.

## CHAPTER ELEVEN

### STREET IMPROVEMENTS

Art.	Art.
1006. Powers acquired by accepting benefits of this chapter, and by whom.	1013. Notice and hearing before assessment, etc.; no assessment in excess of benefit.
1008. Governing body to order improvement of highways, etc.	1015. Suit to set aside or correct assessment.
1011. Cost how assessed; certificates; costs; attorneys' fees; liens.	1016. Referendum on adoption of provisions of this chapter; ordinances to carry out same.
1012. No lien on exempt property; owner personally liable, etc.	

#### Article 1006. Powers acquired by accepting benefits of this chapter, and by whom.

Cited, *Texas Bitulithic Co. v. Abilene St. Ry. Co.* (Civ. App.) 166 S. W. 433; *Riley v. Town of Trenton* (Civ. App.) 184 S. W. 344.

**Submission to popular vote of question of adoption of law.**—Acts 31st Leg. (2d Called Sess.) c. 14, relative to the improvement of streets, alleys, etc., was in full force after the adoption of the Revised Statutes, and the submission of the question of adopting its provisions was properly had under section 11 thereof instead of under articles 1006-1017 of the Revised Statutes, especially in view of section 16 of the final title of the Revised Statutes. *Lindsey v. City of Nacogdoches* (Civ. App.) 169 S. W. 1126.

**Due process of law.**—Houston City Charter, art. 4a, defining improvements, section 5, providing for a petition for improvements, section 7, providing for a hearing, and section 8, providing that within ten days after the close of such hearing a contest may be instituted, by any person, due process of law is provided, and one who fails to sue within ten days cannot avoid the assessment. *Jones v. City of Houston* (Civ. App.) 188 S. W. 688.

#### Art. 1008. Governing body to order improvement of highways, etc.

**Ordinance or resolution for improvement.**—Under Loc. & Sp. Acts 31st Leg. c. 31, subc. 12, §§ 5, 8, 10, the determination by the commission of the public necessity of an improvement is not conclusive as to its necessity and benefit to an objecting property owner. *Rudolph S. Blome Co. v. Herd* (Civ. App.) 185 S. W. 53.

**Necessity of submission to competition.**—Under city charter and general improvement ordinance, upon abandonment of street improvement contract, city held entitled to complete the contract without again advertising for bids. *City of Paris v. Bray* (Sup.) 175 S. W. 432, reversing judgment (Civ. App.) 142 S. W. 927.

**Acceptance of work.**—Evidence held sufficient to warrant an inference of fraud in the acceptance of street paving. *Rudolph S. Blome Co. v. Herd* (Civ. App.) 185 S. W. 53.

A fraudulent acceptance of street paving substantially different from that contracted for is not conclusive against a property owner. *Id.*

**Completion of work by surety of contractor.**—Defendant city and persons furnishing material for use on a public work held not liable to plaintiff, which, in contracting to complete the work on default of the original contractor, for whom it was surety, had assumed all liability for such material. *General Bonding & Casualty Ins. Co. v. City of Dallas* (Civ. App.) 175 S. W. 1098.

#### Art. 1011. Cost, how assessed; certificates; costs; attorney's fees; liens.

**Attorney's fees.**—Acts 33d Leg. c. 147, § 6, and this article, did not apply to an improvement assessment made by city under its charter pursuant to Acts 33d Leg. c. 147, and hence did not authorize city to impose attorney's fees. *Gallahar v. Whitley* (Civ. App.) 190 S. W. 757.

**Assignment of certificate.**—If assignment of improvement certificate was subsequent to filing suit thereon, assignor could prosecute suit for benefit of assignee, and assignee would not be a necessary party. *Kernagan v. City of Ft. Worth* (Civ. App.) 194 S. W. 626.

#### Art. 1012. No lien on exempt property; owner personally liable, etc.

**Personal liability.**—An assessment of benefits for a local improvement may be made a personal liability against the owner and collectible out of his property generally. *Eubank v. City of Ft. Worth* (Civ. App.) 173 S. W. 1003.

**Art. 1013. Notice and hearing before assessment, etc.; no assessment in excess of benefit.**

**Benefit to property.**—Loc. & Sp. Acts 31st Leg. c. 31, subc. 12, § 7, forbidding assessments in excess of the proposed benefits, is but a declaration of existing law, since assessments in excess of the special benefits is taking property without due process of law, contrary to Const. §§ 17, 19, and Const. U. S. Amend. 14, § 1. *Rudolph S. Blome Co. v. Herd* (Civ. App.) 185 S. W. 53.

Evidence that the improvement as contemplated or as laid did not benefit the property held admissible to answer the city's evidence, and sufficient to support findings of the court that property against which special assessments for paving were levied was not benefited and that the paving was unnecessary. *Id.*

**Notice—Necessity.**—A paving assessment against the property of a street railway company, made under this article, without any notice or opportunity for hearing to the company, on the question of the amount of the assessment or benefits is, despite Const. art. 1, § 17, void, as working a deprivation of property without due process, contrary to Const. art. 1, § 19, and U. S. Const. Amend. 14. *Texas Bitulithic Co. v. Abilene St. Ry. Co.* (Civ. App.) 166 S. W. 433.

An assessment of property for a street improvement can in no case be made without proper notice of the contemplated assessment to the owner and an opportunity given him to resist it for any legal cause. *Gallahar v. Whitley* (Civ. App.) 190 S. W. 757.

**Hearing.**—The provision of this article that no assessment for the improvement of streets shall be made against any property abutting until a fair hearing shall have first been given does not apply to the property of street railroads, although the provision that the governing body of the city shall by ordinance adopt regulations for hearings and notice is applicable. *Texas Bitulithic Co. v. Abilene St. Ry. Co.* (Civ. App.) 166 S. W. 433.

A city cannot by proceeding with paving and accepting it, and bringing an action for the assessment, deprive a property owner of his right to question the necessity and benefit of the paving by proceedings under Loc. & Sp. Acts 31st Leg. c. 31, subc. 12, §§ 8, 10. *Rudolph S. Blome Co. v. Herd* (Civ. App.) 185 S. W. 53.

**Art. 1015. Suit to set aside or correct assessment.**

**Premature suit on improvement certificate.**—That suit upon an improvement certificate was brought within the ten days in which, under charter, defendant might have instituted suit to set assessment aside, was immaterial, where it did not appear how the suit prevented such suit by defendant, or that defendant could have successfully maintained such suit. *Gallahar v. Whitley* (Civ. App.) 190 S. W. 757.

**Art. 1016. Referendum on adoption of provisions of this chapter; ordinances to carry out same.**

**Constitutionality.**—This article is not a delegation of legislative power, or a violation of Const. art. 11, § 4, requiring a general law for incorporation of a city any more than is article 1034 requiring an election for incorporation, nor is it a violation of Const. art. 11, § 4, requiring a general law for incorporation of a city. *Riley v. Town of Trenton* (Civ. App.) 184 S. W. 344.

**Law under which submission is to be had.**—Acts 31st Leg. (2d Called Sess.) c. 14, relative to the improvement of streets, alleys, etc., was in full force after the adoption of the Revised Statutes, and the submission of the question of adopting its provisions was properly had under section 11 thereof instead of under articles 1006–1017 of the Revised Statutes, especially in view of section 16 of the final title of the Revised Statutes. *Lindsey v. City of Nacogdoches* (Civ. App.) 169 S. W. 1126.

**Petition for election.**—This article does not make a petition by the electors a prerequisite to the calling of an election to make the provisions of the chapter applicable to the city. *Riley v. Town of Trenton* (Civ. App.) 184 S. W. 344.

## CHAPTER ELEVEN A

### PARKS

Art.  
1017½. Levy of tax for parks.  
1017½a. Number and location.  
1017½b. Control; maintenance tax.

Art.  
1017½c. Improvement of parks.  
1017½d. Use and management.

**Article 1017½. Levy of tax for parks.**—That the City Council, Board of Commissioners or City Manager of any incorporated city in this State is hereby authorized to levy and collect a tax not to exceed five cents on each \$100.00 of assessed valuation of the city for the purchase and improvement of lands for use as City Parks. [Act March 15, 1917, ch. 79, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1017½a. Number and location.**—The city parks provided for in this Act shall not exceed two in number for each two thousand inhabitants; and it is further provided, that where the city council, Board of

Commissioners or City Manager desires to establish more than one of such city parks it shall be their duty to locate such parks in widely separated portions of the city so as to place them as near as practicable within the convenient reach of all the citizens of the city. [Id., § 2.]

**Art. 1017½b. Control; maintenance tax.**—Said City Council, Board of Commissioners or City Manager shall have full power and control over any and all city parks as provided for in this Act, and they shall have the right to levy and collect an annual tax sufficient in their judgment to properly maintain such parks, not to exceed five cents on each one hundred dollars of assessed valuation of the city. [Id., § 3.]

**Art. 1017½c. Improvement of parks.**—The improvement of lands for use as City Parks, as provided for in Section 1 of this Act [Art. 1017½] authorizes the City Council, Board of Commissioners or City Manager to build and construct pavilions and such other buildings as they may deem necessary, to lay out and open driveways and walks, to pave the same or any part thereof, in such manner and of such material as said City Council, Board of Commissioners or City Manager may deem advisable; to set out trees and shrubbery, construct ditches or lakes, and to make such other improvements as they may deem proper and necessary. [Id., § 4.]

**Art. 1017½d. Use and management.**—City parks established under the provisions of this Act shall remain open for the free use of the public under such reasonable rules and regulations as the City Council, Board of Commissioners or City Manager may prescribe. But no person, firm or association of persons shall have the right to offer for sale or barter, exhibiting anything or conduct any place of amusement where a fee is charged within said parks without first obtaining the consent of the City Council, Board of Commissioners or City Manager or its duly authorized agent or agents, paying for such privilege or concession such sum as may be agreed upon by the person, firm or association of persons and the City Council, Board of Commissioners or City Manager, or its duly authorized agent or agents; and provided further, that all revenues derived from the sale of such rights, privileges or concessions shall go into a fund for the maintenance of said parks. [Id., § 5.]

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## CHAPTER TWELVE

### PUBLIC UTILITY CORPORATIONS, RATES AND CHARGES— REGULATION BY COUNCIL, ETC.

Art.  
1018. City council may regulate rates.

Art.  
1024a. Sale or lease of franchise.

#### Article 1018. City council may regulate rates.

Cited, *Ingraham v. City of Nacogdoches* (Civ. App.) 169 S. W. 1134.

**Delegation of power.**—Power to prescribe rates to be paid to water company enjoying franchise to use streets furnishing water is governmental, and can be exercised only by the body to whom it is intrusted, and is nondelegable. *Green v. San Antonio Water Supply Co.* (Civ. App.) 193 S. W. 453.

Governmental power to regulate rates for water is inherent in state, and because there is no constitutional inhibition, the Legislature can delegate it to a municipality, which must exercise it as required by the charter. *Id.*

**Art. 1024a. Sale or lease of franchise.**—Any individual, association, or corporation now or hereafter organized under the laws of this state, including any municipal corporation of this state, engaged in manufacturing, producing, supplying or selling electricity, natural or artificial gas, steam, or water, or owning or operating any street railway system within any incorporated city, town or village within this state, where the rates charged for such service are subject to regulation under the

authority of the laws of this state, may, by a majority vote of the qualified voters at an election held for that purpose, of said city, town or village, first obtained, lease, sell or otherwise dispose of its entire plant or business or any part thereof, to any other individual, association or corporation which, at the time of said sale, lease or other disposition of said plant or business, or any part thereof, is doing, or has authority to do, a like business in said incorporated city, town or village; provided, however, that nothing herein contained shall be construed to permit any corporation to engage in any kind of business not authorized by its charter. [Act March 22, 1915, ch. 79, § 1.]

Took effect 90 days after March 20, 1915, date of adjournment of legislature.

**Sale of property to pay debts.**—Acts 34th Leg. c. 79, authorizing consolidation of public service corporations by the sale of the property of one to another, does not prevent a quasi public corporation from selling its property to pay its debts. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

## CHAPTER FOURTEEN

### TOWNS AND VILLAGES

<b>Art.</b>	<b>Art.</b>
1033. May be incorporated, when.	1053. Additional officers may be appointed.
1034. Towns and villages incorporated, when.	1064. Property of re-incorporating city or town, vested how; assumption of indebtedness.
1040. Returns of election.	1068. Duty of railroad to keep in condition for travel portion of roadbed and right of way crossed by street; penalty.
1041. Duty of county judge to make an entry.	
1042. Powers of corporation.	
1048. Quorum may pass by-laws.	
1049. May prevent and remove nuisances, regulate markets, etc.	

**Article 1033. [579] [506] May be incorporated, when.**—When a town or village may contain more than four hundred and less than ten thousand inhabitants, it may be incorporated as a town or village in the manner prescribed in this chapter. [Acts 1381, p. 63; Acts 1897, p. 193; Act March 22, 1915, ch. 78, § 1.]

Took effect 90 days after March 20, 1915, date of adjournment of legislature.

Cited, *Wilson v. Carter* (Civ. App.) 161 S. W. 411; *Tharp v. Blake* (Civ. App.) 171 S. W. 549; *Young v. City of Colorado* (Civ. App.) 174 S. W. 986; *Riley v. Town of Trenton* (Civ. App.) 184 S. W. 344.

**Art. 1034. [580] [507] Towns and villages incorporated, when.**

See *Riley v. Town of Trenton* (Civ. App.) 184 S. W. 344; note under art. 1016.

**Territory included.**—Under arts. 777 and 1034, a town of 3,000 inhabitants may incorporate four square miles of territory, including territory extending beyond aggregation of residences and pertinent structures if such territory is to be used for strictly town purposes. *State v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

**Art. 1040. [585] [512] Returns of election.**

Cited, *Ferguson v. Leigh* (Civ. App.) 193 S. W. 206.

**Art. 1041. [586] [513] Duty of county judge to make entry, etc.**

Cited, *Ferguson v. Leigh* (Civ. App.) 193 S. W. 206.

**Art. 1042. [587] [514] Powers of corporation.**

**Contracts.**—The adoption by a town council of a statement of account presented to it by the town attorney for services over and above collections made by him for the town, and the issuance of a warrant in his favor for such amount, had the same effect as an account stated struck between individuals. *Smith v. Town of Anson* (Civ. App.) 160 S. W. 114.

An incorporated town can enter into valid contracts and incur debts only when the making of such contracts is within the scope of its general corporate functions or of authority conferred by statute. *Tharp v. Blake* (Civ. App.) 171 S. W. 549.

Under art. 1042 et seq., and art. 3078, an incorporated town had no authority to employ an attorney to contest an election by which it was voted to abolish the corporation or to bind the town for the fees for such services. *Id.*

**Art. 1048. [593] [520] Quorum may pass by-laws.**

See *Tharp v. Blake* (Civ. App.) 171 S. W. 549.

**Art. 1049. [594] [521] May prevent and remove nuisances, regulate markets, etc.**

Cited, *Williams v. Carroll* (Civ. App.) 132 S. W. 29.

**Art. 1053. [598] [525] Additional officers may be appointed.**

**Rights under invalid appointment.**—Where an incorporated town had no authority to employ an attorney to perform certain legal services, he could not recover the reasonable value thereof on a quantum meruit. *Tharp v. Blake* (Civ. App.) 171 S. W. 549.

**Art. 1064. [616] [541] Property of any reincorporating city or town vested, how; assumption of indebtedness.**

**Liability of new city for debts of old.**—A statute which forbids a city embracing only the territory of a prior city dissolved from levying a tax to pay a judgment against the dissolved city, impairs a contract with the dissolved city. Where pending receivership proceedings of a dissolved city, a new city embracing the same territory was incorporated, the new city must levy a tax to satisfy a judgment. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Art. 1068. Duty of railroad to keep in condition for travel portion of roadbed and right of way crossed by streets; penalty.**

See notes under art. 6534, note 26; art. 6618, note 35.

Cited, *State ex rel. Cavanaugh v. Nelson* (Civ. App.) 170 S. W. 814.

**Jurisdiction of action.**—An action by a city against a railroad company for the penalty imposed by this article, is for a money judgment within the jurisdiction of a justice's court. *City of San Marcos v. International & G. N. Ry. Co.* (Civ. App.) 167 S. W. 292.

**Restraining prosecutions.**—A railroad company, prosecuted by a city in courts having jurisdiction for the penalties imposed by this article for failure to place its roadbed over a street in a proper condition for travel, has an adequate remedy at law, and may not sue to restrain actions at law. *City of San Marcos v. International & G. N. Ry. Co.* (Civ. App.) 167 S. W. 292.

**Instructions in action for injuries.**—Under this article an instruction, in an action for injury to plaintiff from having his shoe caught between the rails, that he had a right to presume that the tracks were in proper condition held not objectionable as relieving him from the exercise of any care, or as not defining the term "proper condition." *St. Louis Southwestern Ry. Co. of Texas v. Matthews* (Civ. App.) 164 S. W. 1092.

## CHAPTER FIFTEEN

### COMMISSION FORM OF GOVERNMENT

Art.  
1070. Election to determine.  
1075. Commissioners, powers and duties.

Art.  
1076a. Laws unrepealed; incorporations and bonds validated, etc.

**Article 1070. Election to determine.**

**Denial of petition.**—Under the Enabling Act, providing that the governing authority of cities upon petition of 10 per cent. of the qualified voters should call an election, the refusal of the mayor and council to call such election held not void because evidenced by resolution instead of an ordinance. *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

**Art. 1075. Powers and duties of board of commissioners.**

**Powers of city.**—Loc. & Sp. Acts 31st Leg. c. 31, incorporating city of Ft. Worth with commission form of government, and subchapter 9, § 4, thereof, held to give the city all the police power of the state as to acts which could be made a minor offense. *Strauss v. State*, 76 Tex. Cr. R. 132, 173 S. W. 663.

**Art. 1076a. Laws unrepealed; incorporations and bonds validated, etc.**

**Constitutionality.**—This article is constitutional; the act of which it is a part not containing more than one object which is mentioned in caption of act. *State v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

**Construction and operation.**—This article validates boundary as well as contents within boundary of city adopting commission form of government. *State v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

## CHAPTER SIXTEEN

## ABOLITION OF CORPORATE EXISTENCE

<p>Art. 1077-1079.</p> <p>1080. Receiver of abolished corporation; appointment; bond, etc.</p> <p>1081. Duties of receiver.</p> <p>1082. Claims against city, proceedings to collect.</p>	<p>Art. 1083. Limitation not to run, when.</p> <p>1086. Payment of claims, and priority; sale of property in hands of receiver.</p> <p>1096. Corporation may be abolished, how.</p>
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**Articles 1077-1079.**

Cited, *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Art. 1080. Receiver of abolished corporation; appointment; bond, etc.**

Cited, *Wilson v. Carter* (Civ. App.) 161 S. W. 411.

**Constitutionality.**—The method prescribed by this act for the appointment of a receiver for a dissolved city on giving notice is due process of law. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Partial invalidity.**—See *Young v. City of Colorado* (Civ. App.) 174 S. W. 986; note under art. 1082.

**Notice.**—Under this article notices for the hearing of an application for appointment of a receiver of a dissolved town need not be posted under the direction of the judge. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Validity of appointment of receiver.**—See *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Collateral attack.**—An order appointing a receiver for a dissolved city and an order establishing a creditor's claim against the city are not subject to collateral attack by the successor of the city. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Mandamus to compel succeeding city to levy tax.**—In mandamus to compel a city to levy a tax to satisfy a judgment rendered against its dissolved predecessor, the receiver of the dissolved city is not a necessary party. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Art. 1081. Duties of receiver.**

Cited, *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Art. 1082. Claims against city; proceedings to collect.**

**Validity of act.**—The provision relating to the establishment of claims against a dissolved city held not to deny to taxpayers thereof due process of law, though they are given no right of appeal. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Partial invalidity.**—Invalidity of provision that a receiver of a dissolved city shall not plead limitations against demands, against the city, does not render the other provisions invalid. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Approval of claims.**—This article is directory only so far as it provides for the approval of claims against a dissolved city, and a premature approval is but an irregularity. An order approving the claim of a creditor of a dissolved city, taken in connection with an order appointing a receiver of the city, is a judgment, and precludes any question of liability of the city. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Liability of new city.**—A city, incorporated after the appointment of a receiver of a dissolved city, embracing the same territory and pending the receivership proceedings, is liable for the debts of the dissolved city, and must levy a tax to satisfy a judgment. And, if it is a de facto municipal corporation, it cannot urge the invalidity of its incorporation as a defense in a suit to collect the debt. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Contest of claims against dissolved city.**—A city incorporated more than a year after this act became effective could not complain because it was denied right to contest claims against the dissolved city. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Art. 1083. Limitation not to run, when.**

**Constitutionality.**—Provision of a statute that a receiver of a dissolved city cannot plead limitations against demands does not grant a special privilege to a creditor of a dissolved city, or deny to a dissolved city the equal protection of the law. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Art. 1086. Payment of claims, and priority; sale of property in hands of receiver.**

Cited, *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Art. 1096. [615] [540] Corporation may be abolished, how.**

Cited, *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

## CHAPTER SEVENTEEN

## CITIES HAVING MORE THAN 5,000 INHABITANTS—ADOPTION AND AMENDMENT OF CHARTER

Art.	Art.
1096a. May adopt or amend charter; election; limitations of charter and ordinances; taxation; debts.	1096f. Former powers preserved, etc.
1096d. Full power of local self government; enumerated powers.	1096h. Improvement districts, etc.
1096e. Effect of enumeration of powers.	1096j. Validation of charters and amendments to charters adopted under this chapter.
	1096k. Validation of charter amendments.

**Article 1096a. May adopt or amend charter; election; limitations of charter and ordinances; taxation; debts.**

Cited, *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105; *Uhr v. Lancaster* (Civ. App.) 187 S. W. 379.

**Nature of power to adopt charter.**—Under Const. art. 11, § 5, providing that cities of certain population may adopt or amend charters, delegation of powers to city councils by the Legislature is unnecessary, their powers being derived directly from the sovereign people. *Xydlas Amusement Co. v. City of Houston* (Civ. App.) 185 S. W. 415.

Under Const. art. 11, § 5, the power of the city to adopt a charter is not dependent on grant from the Legislature, but is to be governed only by the limitations found in the acts of the Legislature. *Le Gois v. State* (Cr. App.) 190 S. W. 724.

**Art. 1096d. Full power of local self government; enumerated powers.**

**Note.**—Act April 9, 1917, ch. 207, § 23, post, art. 820r of the Penal Code, regulates the speed of motor vehicles and prohibits local regulations on that subject, except as to certain vehicles specified.

**Annexation of territory.**—Since this act superseded, so far as home rule cities were concerned, art. 781, a provision in a charter adopted by the city under the amendment to Const. art. 11, § 5, authorizing the annexation of territory without a vote of the inhabitants of such territory, does not conflict with a general law. *Cohen v. City of Houston* (Civ. App.) 176 S. W. 809.

**Sale of liquor.**—Under this article the city is empowered to prohibit absolutely or license the sale of liquor in certain districts. *Le Gois v. State* (Cr. App.) 190 S. W. 724.

An ordinance of a city prohibiting license to sell liquors in certain territory held not subject to the criticism that it does not prohibit sale of liquors in view of Pen. Code 1911, art. 130, and Acts 31st Leg. c. 17, § 1. *Id.*

**Assessment for improvements.**—Reassessment of a paving assessment to correct mistake in owner's name made under charter adopted in accordance with this article held not a taking of property without compensation in violation of Const. art. 1, § 17. *Gallahar v. Whitley* (Civ. App.) 190 S. W. 757.

**Art. 1096e. Effect of enumeration of powers.**

**Operation and effect.**—Under this article the city may prohibit sale of liquors in certain districts even if the specific power of section 4 to establish saloon districts and prohibit sales of liquor did not cover such prohibition. *Le Gois v. State* (Civ. App.) 190 S. W. 724.

**Art. 1096f. Former powers preserved, etc.**

**Effect as to special charter city.**—This article and art. 1011 do not apply to an improvement assessment made by city under its charter pursuant to Acts 33d Leg. c. 147, and hence did not authorize city to impose attorney's fees. *Gallahar v. Whitley* (Civ. App.) 190 S. W. 757.

**Art. 1096h. Improvement districts, etc.**

**Assessment certificates.**—Under charter of city of Mineral Wells adopted August 19, 1913, in accordance with this article, city's assignable certificates for special assessments, fixing interest not to exceed 8 per cent. might be enforced, notwithstanding general statute relating to interest. *Gallahar v. Whitley* (Civ. App.) 190 S. W. 757.

In absence of any power given to city to impose any penalty for failure to promptly pay special assessment, no attorney's fee could be added to amount of certificate for special assessment, with interest. *Id.*

**Art. 1096j. Validation of charters and amendments to charters adopted under this chapter.**—That each charter and each amendment to a charter, and each act of incorporation adopted by the qualified voters of the cities of Ennis, Marshall, Houston, El Paso, Dallas, Beaumont, Waco, McKinney, Terrell, Galveston, Taylor, Corsicana, Amarillo, Houston Heights, Bonham, Denton, Mineral Wells, Sweetwater, Wichita Falls, San Antonio, Brownwood, Orange, Belton and Cleburne, respectively, since the enactment of Chapter 147, page 307, of the Acts of the



Regular Session of the Thirty-third Legislature, and filed in the office of the Secretary of State, be and the same are hereby validated and are hereby declared to be in as full force and effect the same as if each had been enacted by the Legislature and approved by the Governor. [Act March 22, 1915, ch. 94, § 1.]

**Explanatory.**—The title of the act enumerates all of the cities affected except Taylor, which it omits. The act took effect 90 days after March 20, 1915, date of adjournment.

**Art. 1096k. Validation of charter amendments.**—That each charter, and each amendment to a charter, adopted by any city of more than five thousand inhabitants in this State, or where such city has amended or attempted to amend or adopt such charter, since the enactment of Chapter 147, Acts of the Regular Session of the Thirty-Third Legislature, 1913, and all proceedings had with reference thereto, are hereby validated, and are hereby declared to be in full force and effect, the same as if adopted in strict compliance with the requirements of said Chapter 147, Acts of the 33rd Legislature, and this Act shall take effect and be in force from and after its passage. [Act Oct. 16, 1917, ch. 30, § 1.]

## CHAPTER EIGHTEEN

### CONSOLIDATION OF CITIES

<p><b>Art.</b> 1096½. Certain cities may consolidate. 1096½a. Petition for election; order; election officers. 1096½b. Form of ballots. 1096½c. Definition of "consolidation." 1096½d. Returns of election; certification to</p>	<p><b>Art.</b> secretary of state; fee for recording; record of election. 1096½e. Transfer of books, property, etc., to larger city; abolition of offices; adjustment of liabilities. 1096½f. Disposition of existing improvement funds.</p>
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**Article 1096½. Certain cities may consolidate.**—When two or more cities in this State, over five thousand in population, adjoining and contiguous to each other in the same county, shall be desirous of being consolidated, it shall be lawful for them to adopt or amend their respective charters so as to consolidate under one government and take the name of the larger of said cities, in the manner, and subject to the provisions hereinafter prescribed in this Act. [Act Feb. 23, 1917, ch. 43, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1096½a. Petition for election; order; election officers.**—Whenever as many as one hundred qualified voters of each of said cities shall petition the city council of their respective cities to order an election for the purpose of voting on the consolidation of such cities into one city, said city councils may at their next regular meetings order an election to be held at the usual voting places of the cities, on the same day, not less than thirty days after such order is made. If said petitions be signed respectively, however, by qualified electors equal to fifteen per cent, of the total vote cast at the last preceding general election for city officials in each of said cities, next preceding the filing of said petitions, the respective councils shall, within ten days after the receipt thereof, order an election to be held. The mayor and city council, or other governing board of each of said cities, shall appoint from among the qualified voters of their respective cities judges and clerks of said elections, and such elections shall be conducted under the ordinances of said cities, and in conformity with the general laws of the State of Texas. [Id., § 2.]

**Art. 1096½b. Form of ballots.**—All persons voting at such election in favor of consolidation shall have written or printed on their ballots the words "For Consolidation," and all persons voting at such election not in favor of consolidation shall have written or printed on their ballots the words "Against Consolidation." [Id., § 3.]

**Art. 1096½c. Definition of "Consolidation."**—The term "consolidation," as used in this Act, shall be held to mean the adoption by the smaller cities of the charter and name of the larger of said cities, and the amendment of the charter of the larger cities so as to include in its boundaries the territory of the smaller city or cities so consolidated with it. [Id., § 4.]

**Art. 1096½d. Returns of election; certification to Secretary of State; fee for recording; record of election.**—In the event that a majority of the qualified voters voting at said election in each of said cities shall vote in favor of consolidation, it will be the duty of the mayor or chief executive officer exercising like or similar powers of each of said cities as soon as practicable after the returns of said elections have been made to certify to the Secretary of State an authenticated copy under the seal of the said cities, showing the approval of the qualified voters of the consolidation of the two cities, and the Secretary of State shall thereupon file and record the same in a separate book to be kept in his office for such purpose; provided, that the Secretary of State shall not be allowed any greater fee for the recording of such certificate than fifteen cents per hundred words, provided such fees shall not be less than two dollars. The returns of such elections shall be recorded at length in the record books of the respective cities, and the consolidation of such cities shall be held thereupon to be consummated. [Id., § 5.]

**Art. 1096½e. Transfer of books, property, etc., to larger city; abolition of offices; adjustment of liabilities.**—After the consummation of such consolidation all record books, public property, money on hand, credits, accounts and other assets of the smaller of the annexed cities shall be turned over to the officers of the larger city, who shall be retained in office as the officials of the consolidated city during the remainder of their respective terms, and by such consolidation the offices existing in the smaller municipality shall be abolished and declared vacant, and the persons holding such offices shall not be entitled, after the consummation of such consolidation, to further remuneration or compensation. All outstanding liabilities of the two cities so consolidated shall be assumed by the consolidated city. [Id., § 6.]

**Art. 1096½f. Disposition of existing improvement funds.**—Whenever at the time of any such consolidation the respective cities shall have on hand any bond funds voted for public improvements and not already appropriated or contracted for such money shall be kept in a separate fund and devoted to public improvements in the territory for which such bonds were voted, and shall not be diverted to any other purpose. [Id., § 7.]

## TITLE 24

## CONVEYANCES

Art.	Art.
1103. Conveyances must be in writing, signed and delivered.	1110. Conveyance by sheriff or other officer will pass title, when.
1105. Conveyance of the greater estate passes the less.	1111. Estates in futuro.
1106. An estate deemed a fee simple, when.	1112. Implied covenants.
1107. Form of conveyance.	1113. "Incumbrances" embraces, what.
1108. Other forms and clauses valid.	1114. Conveyance of the separate lands of the wife, how made.
	1115. Conveyance of homestead, how made.

### Article 1103. [624] [548] Conveyances must be in writing, signed and delivered.

1. **Necessity of writing in general.**—After location a land certificate becomes a chattel real, and title thereto cannot pass by parol. *McCullough v. Randall* (Civ. App.) 158 S. W. 219.

Where a deed of trust on certain land was invalid because executed by the landowner's agent without written authority, a subsequent deed of trust executed by the landowner on the same land was prior in right. *Texas Moline Plow Co. v. Klapproth* (Civ. App.) 164 S. W. 399.

A parol agreement fixing a disputed boundary is binding on the parties, though it may be subsequently discovered that the agreed line is not the true line, but it is essential that the line be in dispute, and that its true location be unknown. *Voigt v. Hunt* (Civ. App.) 167 S. W. 745.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1103, verbal agreement by father's grantees and a daughter that they would waive and abandon conflicting claims to the land involved and share it equally could not operate to pass title to her share to the daughter. *Lindley v. Lindley* (Civ. App.) 178 S. W. 782.

Under *Rev. St. 1911*, art. 1103, title to lots of incorporator, orally agreed to be transferred to company in return for stock, which was issued to him, such lots not being mentioned in the charter or the affidavit thereto, did not pass to the company. *McGough v. Finley* (Civ. App.) 179 S. W. 918.

Cancellation of vendor's lien notes would not affect superior title held by vendor, except in so far as it would form basis for recovery of such title in suit other than suit to cancel notes. *Bright v. Briscoe* (Civ. App.) 193 S. W. 156.

Since a parol reservation of a silo by a grantor of land would be ineffectual, the buyer of the silo after grant of the land could not, on breach of warranty, make good tender of it on rescission of contract of purchase. *Potter v. Mobley* (Civ. App.) 194 S. W. 205.

2. — **Easement or license.**—An easement over land is such an interest in land as must be conveyed with the same formality as is required in a conveyance of a fee. *King v. Driver* (Civ. App.) 160 S. W. 415.

An easement over the land of another may be acquired by verbal agreement in the nature of estoppel. *Bowington v. Williams* (Civ. App.) 166 S. W. 719.

A perpetual easement in land liable to be divested only if the use of the dominant tenement be changed must be created by deed; parol license being insufficient. *Id.*

An "easement" is a right which one proprietor has to some profit, benefit, or lawful use out of or over the estate of another proprietor; while a "servitude" is the burden imposed on one tract of land for the benefit of another. Easements or servitudes may arise by deed or express grant, by prescription, by oral covenants, and by implication. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

Where a verbal way over land is granted, possession under such grant is adverse; the verbal grant being void under the statute of frauds. *Heard v. Bowen* (Civ. App.) 184 S. W. 234.

In action to enjoin obstruction of alley or way, testimony of plaintiff as to grantor's statement that he wanted the alley kept open held not inadmissible as seeking to establish an easement by parol. *Miles v. Bodenheim* (Civ. App.) 184 S. W. 633.

Oral agreement that owner of lots should have easement of way to his adjoining building in consideration of use of its wall by grantee, even if use of wall might be considered in payment of purchase price, was within statute of frauds. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

An easement may be created by grant, in which case it must be done with same formality as is necessary for conveyance of fee. *Id.*

An easement to maintain an irrigation dam on another's land is an interest in land within statute of frauds (*Rev. St. 1911*, art. 1103), and must be created in writing. *Popham v. Eggleston* (Civ. App.) 193 S. W. 181.

To sustain easement to maintain an irrigation dam on another's land by possession and performance, no written grant being claimed, an irrevocable license must be shown. *Id.*

Though an instrument in writing, as provided by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1103, is necessary to convey an easement, a conveyance in writing duly signed and acknowledged is sufficient to convey an easement appurtenant to the land conveyed, though the easement is not named therein. *Miles v. Bodenheim* (Civ. App.) 193 S. W. 693.

5. — **Partition.**—The statutes prohibiting the conveyance of land or an interest therein by parol have no application to a partition of lands. *Scott v. Watson* (Civ. App.) 167 S. W. 268.

A verbal partition of land followed by delivery of possession is valid. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 181 S. W. 756.

A parol partition is not a conveyance of land, in a sense that it must be evidenced by an instrument in writing under the statute of frauds. *Moore v. Reid* (Civ. App.) 186 S. W. 245.

6. **Appointment of agent.**—If the lease provided the landlord was to receive as rent one-fourth of the cotton raised, so that title to one-fourth of the cotton raised and gathered vested in him, then an agreement by him or his successor in title to the land, with the tenant to sell the landlord's part of the cotton, would be merely an appointment to do so as agent of the landlord. *Mason v. Ward* (Civ. App.) 166 S. W. 456.

Parol authority from buyers of land to their trustee to reconvey part to grantor upon repayment of proportionate part of price is not within statute of frauds. *King v. Lane* (Civ. App.) 186 S. W. 392.

8. — **Authority of agent.**—Under Rev. St. 1911, art. 1103, an agent cannot execute a valid deed of trust, on land belonging to his principal, without written authority. *Texas Moline Plow Co. v. Klapproth* (Civ. App.) 164 S. W. 399.

Where a deed of trust executed by the agent of the owner of land was invalid for want of written authority, it could not be ratified by the owner's oral assent or acquiescence, but only by an instrument in writing. *Id.*

An owner may be bound by a deed of trust executed by an agent without written authority, by acts sufficient to create an estoppel in pais, with full knowledge of the facts. *Id.*

Where a deed of trust was invalid for lack of written authority, of the attorney executing it, the grantor's answer in a suit to foreclose that the deed was in all things ratified constituted a valid ratification, not only as against her, but as against the holder of a subsequent deed of trust, with notice. *Id.*

A power authorizing an attorney to sell the grantor's realty did not confer on him authority to incur the same by a deed of trust. *Id.*

Rev. St. 1895, art. 624, does not prevent an agent from binding his principal by a parol sale of lands under any circumstances. *Houston Oil Co. of Texas v. Payne* (Civ. App.) 164 S. W. 886.

Written authority is not necessary to enable an agent to bind his principal by an executory contract for the sale of lands. *Id.*

Persons who conveyed land to B.'s wife for land as to which B. had a power of attorney held not relieved of liability to the owner of such land by their good faith or reliance on the advice of an attorney. *White v. Love* (Civ. App.) 174 S. W. 913.

That attorney in fact who conveyed land for his own benefit had sold land taken in exchange held not to affect liability of the purchaser from the attorney to the attorney's principal. *Id.*

A power of attorney to sell real estate does not authorize the grantee therein to maintain a suit on behalf of the grantors in trespass to try title and for damages. *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

Deed from holder of power of attorney held admissible in view of his authority under the power of attorney and agreement by his principal that the land should be sold to the grantee. *Zeigel v. Magee* (Civ. App.) 176 S. W. 631.

9. — **Termination of agency.**—A power of attorney, which merely empowered the agent to sell land and turn over the proceeds, the agent having no interest in the land, was not a power coupled with an interest, and hence was revocable. *Baker v. Heney* (Civ. App.) 166 S. W. 19.

Powers are irrevocable by the principal when they form part of an act deemed valuable in law, or which forms part of the contract and is a security for money or for the performance of any act deemed valuable. *Quanah, A. & P. Ry. Co. v. Dickey* (Civ. App.) 179 S. W. 69.

10. — **Execution of power.**—A conveyance by an attorney in fact for his principal conveys whatever right the attorney had in the property, whether he signed the conveyance as agent or as principal. *Ford v. Warner* (Civ. App.) 176 S. W. 885.

An attorney in fact induced by fraud to execute a deed for his principal to the fraudulent grantee may acquire title as against the grantee or those claiming under him. *Id.*

12. **Dedication, requisites of.**—“Dedication” is a setting apart of land for the public use, and may be either statutory or at common law, the distinction being that statutory dedication operates as a grant, while common-law dedication operates by way of estoppel in pais. Common-law dedications are either express or implied, it being necessary in each case that there be an appropriation of land by the owner to the public use, which may be express or may be shown by some act or course of conduct. *Poindexter v. Schaffner* (Civ. App.) 162 S. W. 22.

An owner held not to have dedicated his land for a public road. *Bryson v. Abney* (Civ. App.) 171 S. W. 508.

Common-law dedications are divided into express and implied dedications, and in both there must be an appropriation of land by the owner to public uses, in the one case by express manifestation of such purpose, and in the other by some act or course of conduct from which the law will imply such an intent. *City of Kaufman v. French* (Civ. App.) 171 S. W. 831.

To constitute dedication of land for highway so as to estop owner, there need be no formal grant or continued public use long enough to raise presumption of grant; any act or declaration by owner showing present, fixed purpose to dedicate, coupled with use by public in conformity with purpose of owner, being sufficient. *Santa Fé Town-Site Co. v. Parker* (Civ. App.) 194 S. W. 487.

15. — **Evidence, sufficiency of.**—In an action to enjoin a city from the use of land for a public street, evidence held insufficient to sustain a finding that plaintiff had informed grantees from his mother, by deeds referring to a map and plat for description, that the land in controversy was reserved. *City of Kaufman v. French* (Civ. App.) 171 S. W. 831.

In a suit to remove a cloud from title to a strip of land, evidence held to show that it was a public alley. *Perrow v. San Antonio & A. P. Ry. Co.* (Civ. App.) 178 S. W. 973, rehearing denied 181 S. W. 496.

Evidence, in an action of trespass to try title, held not to show such dedication to the public as to prevent the acquisition of the land by limitation. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

In an action to restrain county officers from expending money on a road alleged not to be a public highway, evidence held sufficient to show dedication of land for a public road making expenditure lawful. *Santa Fé Town-Site Co. v. Parker* (Civ. App.) 194 S. W. 487.

17. — **Designation in maps or plats.**—There is a valid dedication of land as streets if the owner of a tract which has been platted into blocks, lots, and streets as an addition by a recorded map, conveys the lots by deed referring to such map, but there is no valid statutory dedication of a street which was a part of a platted addition, where the street as laid off did not conform to the existing streets and lots abutting on the same, as required by Dallas charter, art. 1, § 3. To constitute a valid statutory dedication of land as a street, there must be a substantial compliance with the statute in the manner prescribed. *Poindexter v. Schaffner* (Civ. App.) 162 S. W. 22.

A dedication may be established against the owner of land by showing that he has platted it as an addition to a city by a map placed on the public records, and has sold lots by deeds referring to the map for the description, or that he has adopted a map or plat made by another person. An owner who, at the time of her deeds referring to a plat for description, did not intend to dedicate the land to a public use, as the grantors knew or might have known, held not to have dedicated it. *City of Kaufman v. French* (Civ. App.) 171 S. W. 831.

A plat of land which sets apart streets to the public is equivalent to a conveyance, and the easement granted is irrevocable. *Gibson v. Carroll* (Civ. App.) 180 S. W. 630.

The laying out of a town into blocks, lots, and streets, shown in a map acknowledged and recorded, and the sale of lots by reference to it, was a dedication of such streets to those purchasing the lots, and to the public. *Krueger v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 191 S. W. 151.

Where an owner of land plats it into lots, public streets and alleys and sells lots by reference to the plat, the purchaser of a lot acquires, as appurtenant thereto, the right to use the streets so dedicated. *Bowers v. Machir* (Civ. App.) 191 S. W. 758.

18. — **Acceptance.**—Mere nonuser or delay in the improvement of a street, so that parts of it became practically impassable and were not used by travelers, is insufficient to establish an abandonment by the city of that portion of the street, where it was a part of the general street system which was dedicated in laying out a subdivision. *City of La Grange v. Brown* (Civ. App.) 161 S. W. 8.

Where streets were dedicated to the public, the use of them by the public, and the removal of gravel therefrom by the city under the claim that they were a public street, is sufficient to show acceptance of the dedication, even though the streets were not always kept in condition fit for travel. *Id.*

A municipality is not bound by a common-law dedication of a street by the owner so as to impose the obligation of caring for it, unless it accepts the dedication. *Poindexter v. Schaffner* (Civ. App.) 162 S. W. 22.

Where plaintiff's predecessors in title and the adjoining owner gave strips of land for a road which was used by the public for more than 30 years, there was a valid dedication and acceptance. *Wheeler v. McVey* (Civ. App.) 164 S. W. 1100.

Proof of a city's acceptance of land dedicated by a map or plat and by reference thereto in deeds held not necessary. *City of Kaufman v. French* (Civ. App.) 171 S. W. 831.

Where recorded map showed a street extending across a railroad right of way, a use for more than 30 years amounted to an acceptance of the part of the street crossing the track. *Krueger v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 191 S. W. 151.

20. — **Estoppel.**—To constitute a dedication, it is essential that the donor intend to set apart and appropriate the land to a public use, and, where such intent is expressed by visible conduct and open acts inducing the belief of an intent to dedicate to a public use and action thereon by the public, the donor cannot assert that he had no intent to dedicate. *City of Kaufman v. French* (Civ. App.) 171 S. W. 831.

The doctrine of presumed dedication held to rest on the principle that a man is presumed to intend the usual and natural consequences of his own acts and declarations; but if the acts and declarations would not lead an ordinarily prudent man to infer an intent to dedicate, or if they forbade an inference of such intent, the donor might show his mistake and avoid the dedication. *Id.*

21. — **Operation and effect.**—When the owner plats property for the purpose of creating a new town, and dedicates the streets, they are as much a part of the public highways for all purposes as if condemned and paid for by the public. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

Purchasers of land abutting on a square dedicated for a specified public purpose may prevent the use of the square for another public purpose to their injury. *Clement v. City of Paris* (Sup.) 175 S. W. 672.

Land dedicated for county court house purposes cannot, as against owners of land abutting on the court house square, be used for a public comfort station. *Id.*

Dedication by riparian owner of street in land covered by water in which he had only a riparian right held to carry with it such rights, so that his grantee, whose deed described the parcel as bounded by the street, took no riparian rights. *Gibson v. Carroll* (Civ. App.) 180 S. W. 630.

Where a plat of land sets apart streets to the public the easement granted is irrevocable. *Id.*

29. **Trusts—express.**—The statute of frauds does not require that trusts shall be evidenced by writing. *Larrabee v. Porter* (Civ. App.) 166 S. W. 395.

An agreement whereby one of the parties constitutes himself a trustee for the specific purpose of carrying out an agreement for the sale and conveyance of an interest in land is not within the statute of frauds. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

Whether a conveyance was incumbered by a parol trust depends upon the intention of the grantor at the time of the conveyance. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

A court of equity will not permit a trust to lapse by nonacceptance by or nondelivery to a trustee named. *Texas Rice Land Co. v. Langham* (Civ. App.) 193 S. W. 473.

30. — **Resulting trust.**—Where two persons agreed to purchase land jointly, a trust in such land, when subsequently purchased by one of them, arose in favor of the other, although the purchaser had repudiated the agreement and purchased in open and positive defiance thereof. *Sachs v. Goldberg* (Civ. App.) 159 S. W. 92.

A showing of accident, fraud, or mistake is not necessary to ingraft a trust upon a deed conveying the legal title on its face. *Ratcliff v. Ratcliff* (Civ. App.) 161 S. W. 30.

Where plaintiff requested defendant to purchase a residence and sell it to him on installments, and defendant bought in the property for himself, no resulting trust arose. *Wade v. Cohen* (Civ. App.) 173 S. W. 1168.

In trespass to try title to land patented to plaintiff, where defendants claimed under one alleged to have paid purchase price, evidence as to whose money was used in purchase held not to show any resulting trust in defendants' grantor. *Houston Oil Co. of Texas v. Votaw* (Civ. App.) 184 S. W. 647.

Trust held not to have resulted in lots purchased by officers of traction company in favor of property owners advancing bonus pursuant to agreement whereby officers were to purchase the lots and erect thereon terminal buildings of traction company. *Eastern Texas Traction Co. v. Harrison* (Civ. App.) 189 S. W. 302.

Evidence held to show that execution defendant had no interest in lands, but purchased them merely as agent for plaintiff, who advanced entire purchase price; a resulting trust in his favor being created notwithstanding that record title was in his agent. *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.

Where plaintiff advanced money with which to purchase land, but his agent took title in his own name and gave notes for unpaid purchase money, which notes, however, plaintiff paid before defendant bank loaned money to such agent, a resulting trust in plaintiff was created. *Id.*

Where plaintiff furnished purchase money to agent who took title to lands in his own name and gave notes secured by vendor's lien, held that, when plaintiff paid notes and discharged vendor's lien, execution creditor of plaintiff's agent could not claim that trust was only for portion of property represented by cash consideration. *Id.*

31. — **Constructive trust.**—An employé of the trustee of realty who purchased the outstanding title to the injury of the beneficiary will be held to hold the title in trust for the beneficiary. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

Client having conveyed one-fourth of a cause of action to recover land to her attorney, and having obtained a secret conveyance, held one-fourth of the land as the attorney's trustee. *Porterfield v. Taylor* (Civ. App.) 171 S. W. 793.

A son in whose name, one, to defraud his wife, took title to land bought with community property, held a trustee in invitum. *Krenz v. Strohmeir* (Civ. App.) 177 S. W. 178.

Under agreement between plaintiff, defendant and other independent cotton buyers to join their dealings, defendant, who had received the proceeds of cotton put in by plaintiff and had not paid over the cost to plaintiff held to hold the proceeds as agent in trust for plaintiff. *Driskill v. Boyd* (Civ. App.) 181 S. W. 715.

32. — **Sufficiency of evidence.**—There is a presumption that an agent duly authorized to collect money for his principal has done his duty and delivered the money, and hence a judgment, charging the agent's estate with a constructive trust on the theory that he had converted the money, cannot be sustained, in the absence of evidence to that effect. *Swan v. Price* (Civ. App.) 162 S. W. 994.

Evidence held not to sufficiently show that land conveyed was taken under a parol trust. *Robson v. Moore* (Civ. App.) 166 S. W. 908.

Evidence held insufficient to establish a parol trust in favor of appellees upon land conveyed to another. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

Evidence held to show that, when a stockholder took title to land in himself, he did so as trustee for the corporation, which paid the consideration. *Texas Rice Land Co. v. Langham* (Civ. App.) 193 S. W. 473.

36. — **Title and rights of parties.**—A trustee becomes the special agent of both parties, and must act with absolute impartiality and fairness. *Zeiss v. First State Bank* (Civ. App.) 189 S. W. 524.

Where heirs of deceased stockholder who had taken title in his own name in trust for the corporation made their deed to individuals in trust for the corporation, and delivered it to one of the trustees, or to another for him, they divested themselves of title. *Texas Rice Land Co. v. Langham* (Civ. App.) 193 S. W. 473.

37. — **Power of sale and management.**—Where a father and children executed a deed and an agreement as to the distribution by the father of the proceeds, and the father, who acted for all, delivered the deed, the grantee was not bound to see that each child received his share under the agreement, and one of them could not object that the delivery was unauthorized because she did not receive her share. *Cooper v. Marek* (Civ. App.) 166 S. W. 58.

Where the owners of a town site conveyed it to trustees, to be represented by 1,000 shares to be sold by the trustees for the benefit of the owners and their associates, the purchasers to form a joint-stock company to continue the enterprise, the fact that the trustees conveyed the land to the directors of the joint-stock company did not preclude

them from continuing to sell unsold shares. *Yeaman v. Galveston City Co.*, 167 S. W. 710, 106 Tex. 389, answering certified questions (Civ. App.) 173 S. W. 489.

Where town-site owners conveyed to trustees certificates to be issued to represent the land, and sold for the owners, purchasers to form a joint-stock company, that the trustees conveyed to the directors of the company did not preclude their further sale of certificates. *Yeaman v. Galveston City Co.* (Civ. App.) 173 S. W. 489, certified questions answered by Supreme Court 167 S. W. 710, 106 Tex. 389.

A deed of trust held to give the trustees power to organize a corporation to develop and sell the land held in trust, and as incidental thereto agree that purchasers of preferred stock should have a right to demand redemption of same in land. *Rowan v. Texas Orchard Development Co.* (Civ. App.) 181 S. W. 871.

A power whose exercise involves discretion is not delegable. *Michael v. Crawford* (Sup.) 193 S. W. 1070.

Where grantor took under will authorizing her to convey fee-simple title, her deed, conveying whatever interest she had, conveyed the fee, although it did not refer to will. *Johnson v. Kirby* (Civ. App.) 193 S. W. 1074.

47. **Execution of conveyance—Burden of proof and evidence.**—The execution of a deed may be established by circumstantial evidence. *Pipkin v. Ware* (Civ. App.) 175 S. W. 808.

49. **Avoidance of deed.**—Evidence held not to show that a contract conveying land was so unjust and inequitable as to warrant setting it aside. *Versyp v. Versyp* (Civ. App.) 159 S. W. 165.

Where vendors took vendors' lien notes for the purchase money, and the purchaser, after living upon the land for two years, failed to pay anything therefore and surrendered the land to the vendors, delivering to them the deed, which had not been recorded, upon their cancellation of his notes, there was then no title in him. *Williams v. McComb* (Civ. App.) 163 S. W. 654.

Where a deed given by several grantors is rescinded for misrepresentation, the grantors are jointly and severally liable for any sums paid by the purchasers. *Hurst v. Knight* (Civ. App.) 164 S. W. 1072.

Where defendant, who traded real property as unincumbered for machinery, thereafter discharged the lien upon the realty, plaintiff is not subsequently entitled to rescind. *Hawkins v. Cook* (Civ. App.) 178 S. W. 624.

50. — **Conditions precedent.**—Plaintiff was not entitled to a return of the consideration as a condition to the canceling of certain deeds executed by an insane person in the absence of proof that he had the money at the time of his death or that it had been used to purchase necessities or been invested by or for him for the benefit of his estate and was still on hand. *Brown v. Brenner* (Civ. App.) 161 S. W. 14.

It is a condition precedent to the recovery of title that money paid by defendant as a consideration for a former void deed be returned. *Lafferty v. Wilson* (Civ. App.) 162 S. W. 379.

A grantor seeking to set aside his deed because induced by fraud need not make a formal demand for rescission, where, on discovering the fraud, he complained of it and asked to be protected by the grantee. *McIndoo v. Wood* (Civ. App.) 162 S. W. 488.

Where a grantor of real estate, in consideration of a stock of merchandise, sought to set aside the conveyance as fraudulent and showed that the money received in the sale of goods had been used to purchase other goods left in the store when returned to the grantee, the grantor did all that was required to obtain relief. *Id.*

Where a grantee obtaining a deed by fraud paid interest on an incumbrance long after the institution of the suit by the grantor to set aside the conveyance, the sum paid was not in equity connected with a rescission, and the grantor was entitled to relief without paying that sum. *Id.*

Where an owner of land contracted to sell the rock thereon with the right of the purchaser to erect a crusher and use the surface so long as the crusher was operated, and received the compensation agreed on, but executed a deed in fee by the fraud of the purchaser, the owner, seeking a cancellation, was not required to return the consideration, but the court could by its judgment protect the rights of the purchaser. *Cearley v. May*, 106 Tex. 389, 167 S. W. 725.

In an action to cancel a deed on the ground of defendant's fraudulent representations as to the indebtedness on the stock of goods given in exchange, held that, as it was impossible to place the parties in statu quo, judgment was properly rendered for defendant. *Paschal v. Hudson* (Civ. App.) 169 S. W. 911.

Where a wife sought to recover a homestead conveyed by her insane husband, held that, under the pleadings, she could recover without tendering a return of the consideration. *Rowan v. Hodges* (Civ. App.) 175 S. W. 847.

An infant who seeks recovery of land sold by one assuming to be her guardian cannot, as a condition precedent to recovery, be required to refund purchase money which her assumed guardian paid for her support. *Hamer v. Sanford* (Civ. App.) 189 S. W. 343.

In suit to cancel a deed of land given in exchange for land, plaintiff, who had nothing to do with trade between another party and defendant, and who had never been in possession of note given by such party to defendant, would not be denied a rescission because he did not offer to return such note to defendants. *Pitt v. Gilbert* (Civ. App.) 190 S. W. 1157.

52. — **Failure of consideration.**—Where one takes by a quitclaim deed, taking only the chance of title and not the land itself, he cannot on failure of title, recover money paid. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614.

In suit to quiet title, party to whom one-half interest in land was conveyed in consideration of his acting as agent and attorney for an owner to recover it, though he failed to perform the services, could recover against the grantees of the purchaser at judicial sale of the property under a judgment of which satisfactory proof was not made. *Brady v. Cope* (Civ. App.) 187 S. W. 678.

Where a party who undertook, in consideration of a conveyance of a half interest in land sold under judicial sale, to act as agent and attorney for an owner in recovering it failed to perform the agreed services, the owner or those in privity with her could rescind the conveyance of the half interest. *Id.*

53. — **Mistake.**—Where the mutual mistake of a vendor and purchaser did not constitute a material inducement to the purchase, the mistake did not justify the setting aside of the deed. *Camp v. Smith* (Civ. App.) 166 S. W. 22.

54. — **Duress.**—Deception by a husband in inducing his wife to sign a deed, by false statements as to threats made against him by his creditors, is not duress which he and she may set up to invalidate the deed as against such creditors. *Burnett v. Continental State Bank of Alto* (Civ. App.) 191 S. W. 172.

In action to obtain possession of property under a deed, the defense being duress in the execution of the deed, evidence held to support special finding of jury that there was no duress. *Id.*

55. — **Fraud.**—Evidence in a suit to rescind an exchange of property held sufficient to support a finding that defendant's representations that the title to the land to be conveyed to plaintiff was unincumbered, except for a \$500 mortgage, were fraudulently made. *Willingham v. Geitzenauer* (Civ. App.) 161 S. W. 376.

Evidence held sufficient to show that plaintiff did not undertake to determine for himself that the title offered him was clear, but relied on the false representations made to him by defendant. *Id.*

In an action to set aside a conveyance of property which was made on account of defendant's misrepresentations as to the contents of the contract and as to extraneous matters, it is no defense that plaintiff, by diligence, might have discovered the falsity of the representations. *Hammel v. Benton* (Civ. App.) 162 S. W. 34.

One exchanging his stock of merchandise for real estate, who, to induce the exchange, represented that there were no debts against the stock, saying nothing about numerous debts against it, was guilty of concealing facts constituting fraud, authorizing a rescission at the suit of the owner of the real estate. *McIndoo v. Wood* (Civ. App.) 162 S. W. 488.

One exchanging his real estate for a stock of merchandise, who seeks a cancellation of the transaction within two days of the discovery of the fraud of the adverse party, acted with sufficient promptness. *Id.*

The purchasers of land are entitled to a cancellation of the deed and rescission of the contract on account of misrepresentations as to the title of the vendor, even though they have received a warranty deed and there has been no eviction by paramount title. *Hurst v. Knight* (Civ. App.) 164 S. W. 1072.

Where the false representations of a vendor did not constitute a material inducement to the purchaser, nor influence him at the time of the purchase, the representations did not justify the setting aside of the deed. *Camp v. Smith* (Civ. App.) 166 S. W. 22.

One of several grantors was not entitled to object, as against the grantee, that she had been misinformed as to her liability on a mortgage on the land unless she was deceived and misled by the grantee. *Cooper v. Marek* (Civ. App.) 166 S. W. 58.

A conveyance in fee on the promise of the grantee that he would execute a written agreement to reconvey when his use of the premises had terminated, which he did not at the time intend to perform, was procured by fraud warranting the cancellation of the conveyance. *Cearley v. May*, 167 S. W. 725, 106 Tex. 442.

Defendant, in an action to cancel a deed on the ground of fraud, cannot plead plaintiff's fraud to defeat a recovery. *Paschal v. Hudson* (Civ. App.) 169 S. W. 911.

Where, on exchange of property, defendant neither made nor authorized false representations and the exchange resulted from negotiations between her and plaintiff, misrepresentations of her husband held not to justify rescission. *Kirkland v. Rutherford* (Civ. App.) 171 S. W. 1031.

In suit to rescind exchange for fraud, evidence that plaintiff was deceived held immaterial, where jury found that defendant neither made nor authorized any false representations. *Id.*

Under the evidence, in an action to cancel a deed for fraudulent representations, held, that the court did not err in failing to render judgment for defendant. *Orient Land Co. v. Reeder* (Civ. App.) 173 S. W. 939.

Plaintiff held entitled to have a conveyance of land canceled on the ground of fraud. *Cook v. Hardin* (Civ. App.) 174 S. W. 633.

A positive representation as to the condition of land exchanged, though expressly made as upon information, but affirmed as being true when in fact false, affords ground for rescission of the exchange made in reliance thereon. *Boles v. Aldridge* (Sup.) 175 S. W. 1052, reversing judgment (Civ. App.) 153 S. W. 373.

An untrue material representation of the condition and value of land exchanged, stated upon information, warrants rescission where the party making it affirms the truthfulness of the information. *Maddox v. Clark* (Sup.) 175 S. W. 1053, affirming judgment (Civ. App.) 163 S. W. 309.

A misrepresentation by grantee's attorney to the grantor as to the legal effect of a deed of trust held sufficient to avoid the deed for fraud. *Holt v. Gordon* (Civ. App.) 176 S. W. 902.

In a suit to cancel a deed, evidence held insufficient to show that defendants made the misrepresentations relied upon. *Cleveland v. Stanley* (Civ. App.) 177 S. W. 1181.

Vendor of land, taking in payment note executed to purchaser and indorsed without recourse, the mortgage security of which was worthless, as known to the purchaser, and was concealed from the vendor, held entitled to cancellation of the deed. *Bullock v. Crutcher* (Civ. App.) 180 S. W. 940.

Where defendant materially misrepresented the character of his land, and plaintiff believed and relied thereon, and would not have contracted for the exchange of lands but for them, the representations were ground for rescission in equity. *Kincaid v. Tant* (Civ. App.) 180 S. W. 1103.

The owner of lands in Texas, induced to exchange them for lands in Mexico by misrepresentations of the owner and his agent that such lands in Mexico were good and smooth, had a cause of action to rescind the contract for fraud. *Benham v. Tipton* (Civ. App.) 181 S. W. 510.

In a suit to rescind an exchange of lands as induced by defendant owner's false representations, evidence held sufficient to sustain a finding that defendant and his agent made positive misrepresentations of fact. *Id.*



Where the owner of Mexican lands, proposing to exchange them, recklessly stated to the owner of other lands, without knowledge of the truth or falsity of his statement, that his Mexican lands were good and valuable, which was not the case, the representation was such as to support a suit for rescission of the exchange for fraud. *Id.*

Misrepresentations by the owner of Mexican lands through one to whom he referred when asked as to their character by the owner of Texas lands proposing to exchange held such as to support a suit for rescission of the contract. *Id.*

Grantee's fraudulent promise to pay \$700, upon delivery of deed with intent not to make such payment, held such fraud as authorized cancellation of deed, though other promises constituting considerations were performed. *Wyatt v. Chambers* (Civ. App.) 182 S. W. 16.

Evidence held to sustain findings that defendant fraudulently induced plaintiff husband to surrender deed to property owned by wife in exchange for stock of goods. *King v. Diffey* (Civ. App.) 192 S. W. 262.

To pass title to lands the conveyance must be in writing and a delivery made with the grantor's consent, and a deed obtained by fraud is wholly insufficient to pass title. *Id.*

To pass title to lands the conveyance must be delivered with the grantor's consent, and a deed obtained by fraud does not pass title. *Id.*

A deed cannot be canceled for fraud where defendant paid more than the land would otherwise bring in bulk, irrespective of what representations regarding its value he made, and although he sold small tracts thereof for higher prices. *Barker v. Ash* (Civ. App.) 194 S. W. 465.

56. — **Undue influence.**—Evidence held to show that a deed was procured by undue influence. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

57. — **Mental incapacity.**—Evidence held to show that one making a deed did not possess sufficient mental capacity. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

The deed of an insane person is not void but only voidable, since it may have been executed during a lucid interval, or ratified on the incompetent's regaining sanity. *Porter v. Brooks* (Civ. App.) 159 S. W. 192.

One merely in privity of estate with an alleged insane grantor, who was the common source of title, could not attack such grantor's deed for alleged incapacity. *Id.*

Widow and sole heir of insane person held to have ratified his exchange of lands by dealing with the property received after his death, or changing its status with full knowledge of the material facts and circumstances. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

In an action to set aside a deed and a judgment confirming it, evidence held to warrant the jury in finding that the grantor was insane when he made the conveyance and at the time the judgment was rendered, and that the grantee had knowledge of such insanity. *Pyle v. Pyle* (Civ. App.) 159 S. W. 488.

Neither old age, sickness, nor distress in mind or body incapacitates a grantor, who has possession of his mental faculties and understands the transaction in which he is engaged, from disposing of his property. *Crow v. Childress* (Civ. App.) 169 S. W. 927.

In a suit to set aside a deed on the ground that the grantor had not sufficient mental capacity, a verdict for plaintiffs held contrary to the great weight and preponderance of the evidence. *Id.*

Evidence held insufficient to support a finding that a grantor was mentally incompetent when executing a deed. *Milner v. Sims* (Civ. App.) 171 S. W. 784.

A deed of an idiot is not binding on him. *Ramirez v. Lasater* (Civ. App.) 174 S. W. 706.

Each case pertaining to mental disability must be decided by its own circumstances. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

In order to avoid a deed executed by deceased to defendants, it would not be necessary to show that grantor was insane, or in such a state of imbecility as to render her entirely incapable of executing a valid deed. *Id.*

60. **Necessity and requisites of delivery and acceptance.**—The mere placing of a deed in which a corporation is named as grantee in the custody of one of its officers is not a delivery; the question of a delivery being one of intention. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

The recordation of a deed by the notary with whom it was left held not a delivery. *Cox v. Payne* (Sup.) 174 S. W. 817, affirming judgment (Civ. App.) *Payne v. Cox*, 143 S. W. 336.

"Delivery" ordinarily implies acceptance, but a mere transfer of manual possession of a deed for examination is no more than a tender. *Capps v. Edwards* (Civ. App.) 180 S. W. 137.

Acceptance of deed by purchaser of land at the time of execution and delivery of contract of sale held a delivery and acceptance, conditioned on the existence of a merchantable title to the land. *Id.*

Where the grantor executed a deed and filed it for record, and the following day mailed it to the grantee, with a letter clearly showing that he intended it as a gift to her, in contemplation of his death, there was sufficient delivery to make the deed effective. *Taylor v. Sanford* (Sup.) 193 S. W. 661.

A deed of gift to property which imposed on the grantee the assumption of the payment of notes against the property, and her conveyance of other property to the grantor, requires an acceptance by the grantee. *Id.*

Where the grantee of a deed of gift accepted the deed as soon as she learned of it, such acceptance was sufficient, though the grantor had died before the acceptance. *Id.*

Where a deed is disposed of by the grantor so as to clearly evince an intention that it shall have effect as a conveyance, there is a sufficient delivery. *Id.*

The fact that the grantor had power to recall a deed from the mail in which he had placed it, addressed to the grantee and thereby prevent its physical delivery to her, does not prevent mailing the deed with intention to give it immediate effect from being a delivery. *Id.*

Delivery of a deed is a symbolical delivery of possession of the property conveyed. *Hall v. Edwards* (Civ. App.) 194 S. W. 674.

65. — **Evidence of delivery.**—Evidence held not to show whether a provision of the instrument, "the delivery hereof not to occur until my death," referred to the property conveyed or to the deed. *Stevens v. Haile* (Civ. App.) 162 S. W. 1025.

Evidence in trespass to try title held to show a sufficient delivery of a deed under which one of the parties claimed. *Id.*

Delivery of a deed may be established by circumstantial evidence. *Pipkin v. Ware* (Civ. App.) 175 S. W. 808.

Evidence held to require a finding that a deed was not delivered to and accepted by the purchaser with intent to transfer title. *Capps v. Edwards* (Civ. App.) 180 S. W. 137.

In suit of trespass to try title and to recover rents, evidence held insufficient to raise issue of nondelivery of deed to land by deceased owner to plaintiff, his son. *Johnson v. Masterson* (Civ. App.) 193 S. W. 201.

In a suit to cancel deeds, evidence held to show that the plaintiff wife never consented to delivery of deeds by her husband under materially different terms than those he had previously assented to. *King v. Diffey* (Civ. App.) 192 S. W. 262. See, also, *Vann v. George* (Civ. App.) 191 S. W. 585.

67. — **Redelivery, effect of.**—Where a deed had become effective by delivery, regaining possession thereof by the grantor, before it reached the possession of the grantee, would not defeat it. *Taylor v. Sanford* (Sup.) 193 S. W. 661.

68. **Escrows, requisites of, in general.**—Before an instrument can become an escrow, the contracting parties must actually agree thereto, and an agreement between the grantors as to the distribution of the purchase price was not binding on the grantee, who was not a party thereto. *Cooper v. Marek* (Civ. App.) 166 S. W. 58.

A deed delivered by the grantor to his agent with specific instructions as to delivery to the grantee is not in escrow while in the hands of the agent. *Tyler Building & Loan Ass'n v. Biard & Scales*, 171 S. W. 1122, 106 Tex. 554, reversing judgment (Civ. App.) 165 S. W. 542. Rehearing denied 171 S. W. 1200, 106 Tex. 554.

72. — **Wrongful delivery by depositary.**—Where one, in whose possession plaintiff placed a deed for safe-keeping, and for delivery after plaintiff had inspected some goods for which it was to convey the land, fraudulently delivered the deed before the goods were inspected, plaintiff was not bound by the deed holder's acts and the delivery was not effectual to pass title. *Tyler Building & Loan Ass'n v. Baird & Scales* (Civ. App.) 165 S. W. 542.

Where a bankrupt delivered a deed in escrow to be delivered on condition he secured a discharge and had no further trouble with his creditors, the condition held to apply to creditors then existing. *Burnett v. Continental State Bank of Alto* (Civ. App.) 191 S. W. 172.

If husband and wife, delivering their deed in escrow on conditions, are notified by the depositary before delivery of the deed and make no objection, they thereby waive any nonperformance of the conditions. *Id.*

74. **Operation of conveyance in general.**—Conveyance of interest in land acquired under a contract for a contingent fee, made to defendant company in aid of litigation upon the express understanding that it should not affect his interest and that it would be reconveyed, held not to divest the attorney of his interest therein. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

A deed will not pass title to a grantee not in existence. *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

The court, if possible, must give effect to the intention of maker of a deed, if it appears that it was the grantor's intention that it should take effect on his death, provided that such intention must be gathered from the face of the instrument. *Emerson v. Pate* (Civ. App.) 165 S. W. 469; *Same v. Rice* (Civ. App.) *Id.* 471.

No interest in land could be predicated on forged deeds. *Green v. Eddins* (Civ. App.) 167 S. W. 196.

75. **Property or estate conveyed.**—Under a deed of certain timber by fee owner to T. with provision if not removed within six years to "revert to us," and a later deed to B. in fee, save and except timber sold to T., held, that on default of T. title to timber reverted to original owner, and at expiration of six years did not become part of B.'s fee. *Lewis v. Bennette* (Civ. App.) 193 S. W. 233.

### Art. 1105. [626] [550] Conveyance of the greater estate passes the less.

Cited, *Houston Oil Co. of Texas v. Ainsworth* (Civ. App.) 192 S. W. 614.

**Merger.**—"Merger" is where a greater or less estate coincide in the same person, in the same right, without any intermediate estate. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

### Art. 1106. [627] [551] An estate deemed a fee simple, when.

Cited, *Stevens v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 169 S. W. 644 (dissenting opinion); *Feegles v. Slaughter* (Civ. App.) 182 S. W. 10.

**Estates or interests created in general.**—Where a grantor conveying a permanent easement or a title had only an undivided interest, the grantee taking possession could assert only the rights of a tenant in common; but his right to retain possession could not be made dependent on payment of the entire value of the land. *Gulf, C. & S. F. Ry. Co. v. Brandenburg* (Civ. App.) 167 S. W. 170.

Where testator devised his community interest to his wife for life, with gift over to his children, a conveyance by the wife vested in the grantee an undivided interest and made him a tenant in common with the children. *Id.*

A vested estate is an interest clothed with a present, legal, and existing right of alienation. *Anderson v. Menefee* (Civ. App.) 174 S. W. 904.

A deed of a stated number of acres in a certain survey, in which the grantor has several tracts, embracing more acres, conveys an undivided interest. *Waterhouse v. Gallup* (Civ. App.) 178 S. W. 773.

A grantee can acquire no greater title to land than her grantor possessed. *Gibson v. Carroll* (Civ. App.) 180 S. W. 630.

A purchaser of land from one cotenant without consent of others obtains only the undivided interest of his grantor. *Broom v. Pearson* (Civ. App.) 180 S. W. 895.

Every part of a deed must be given effect, if possible, and, when all of the parts are harmonized, the largest estate that its terms will permit will be conferred upon the grantee. *Standefor v. Miller* (Civ. App.) 182 S. W. 1149.

A deed conveying "just such title as was received from the said trustees" by a certain deed held to bind the grantor to convey the same character of title as that possessed by the trustees. *Pridgen v. Cook* (Civ. App.) 184 S. W. 713.

A deed will be construed to give the largest estate under the terms of the grant. *Arden v. Boone* (Civ. App.) 187 S. W. 995.

Where intended grantee could be ascertained, a conveyance by him carried not only equitable, but legal title, though the deed to grantee contained extra initial. *Knox v. Gruhlkey* (Civ. App.) 192 S. W. 334.

A power of attorney authorizing grantee to litigate or compromise the grantor's title to certain land and conveying an undivided one-half interest therein, creates a tenancy in common. *Rogers v. White* (Civ. App.) 194 S. W. 1001.

**Fee simple.**—A provision in a deed to grantor's son, reserving to grantor the right to control the land as "guardian of said estate for the benefit" of his son, gave grantor no more rights over the property than he had as the natural guardian of his son, so that the fee-simple title passed to the son free from any trust. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

Where a right of way is conveyed by deed, the fee remains in the owner of the land. *St. Louis Southwestern Ry. Co. of Texas v. Temple Northwestern Ry. Co.* (Civ. App.) 170 S. W. 1073.

A conveyance of a fee-simple estate subject to an illegal condition subsequent conveys an absolute estate free of the condition. *O'Connor v. Theford* (Civ. App.) 174 S. W. 680, 682.

A fee may pass by deed upon a condition subsequent, subject to the contingency of being defeated according to the condition. *Texas Co. v. Daugherty* (Sup.) 176 S. W. 717, affirming judgment (Civ. App.) 160 S. W. 129.

**Life estates.**—A written agreement made as part of the same transaction and involving the execution and delivery of a deed, will be construed with the deed, and may be sufficient to show a life estate. *Cleveland v. Stanley* (Civ. App.) 177 S. W. 1181.

**Vested remainder.**—A remainder is vested, if, at every moment during its continuance, it is ready to come into possession whenever and however the preceding estates determine. *Anderson v. Menefee* (Civ. App.) 174 S. W. 904.

A remainder is contingent if, in order for it to come into possession, the fulfillment of some condition precedent other than the determination of the preceding estates is necessary. *Id.*

**Limitation to heirs, issue, etc.**—In construing deeds, the intention of the grantor as to whether the grantee took the fee or merely a life estate, with remainder to her heirs, will prevail, if such intention is manifest from the language of the deed, though there may be words which, if used unrestrictedly, would bring the conveyance within the rule in *Shelley's Case*. *Hughes v. Titterington* (Civ. App.) 168 S. W. 45.

Where the Legislature, prior to the execution of a deed, had abolished the statute providing for forced heirs, a recital in the deed of a grant to one and her forced heirs must be treated as a grant to one and her heirs; the word "forced" being disregarded as surplusage. *Id.*

A deed held to carry to the grantee a fee; the rule in *Shelley's Case* being operative. *Id.*

**Conditional limitations.**—Where B. conveyed land to a county for school purposes, subject to a conditional limitation for reversion, the deed of an adverse claimant to B. ratifying and confirming the deed of B. to the county held not to destroy the conditional limitation. *Stewart v. Blain* (Civ. App.) 159 S. W. 928.

Provision, in a deed conveying property to a county judge for the erection of a schoolhouse for colored children, that in the event of the removal of the schoolhouse the land should revert to the grantor, or his heirs or assigns, held a conditional limitation and not a condition subsequent, so that on the county ceasing to use the property for colored school purposes the land reverted to the grantor or his heirs. *Id.*

A conditional limitation differs from a condition subsequent, in that the former terminates the estate on the happening of the event, while the latter designates a happening which gives the grantor or his heirs, if mentioned, a right to terminate the estate. *Daggett v. City of Ft. Worth* (Civ. App.) 177 S. W. 222.

**Exceptions and reservations.**—Where land was conveyed to a county for colored school purposes, subject to a provision for reversion in case the schoolhouse was removed, and the county subsequently abandoned the land for school purposes and sold it to another, such acts amounted to a removal of the schoolhouse within the terms of the limitation, though the building in fact remained on the land. *Stewart v. Blain* (Civ. App.) 159 S. W. 928.

Under this article, where grantors executed a deed to their daughter containing a clause that they should hold possession until their death, such clause did not constitute a reservation of any estate in the grantors but a mere homestead right of occupancy. *Emerson v. Pate* (Civ. App.) 165 S. W. 469; *Same v. Rice* (Civ. App.) *Id.* 471.

The way of necessity reserved to a vendor who sells land surrounding other land which he retains, and to which he can have access only through the granted premises, cannot be asserted by the vendor for the benefit of subsequent grantees to whom he sold the inaccessible tract. *Bowington v. Williams* (Civ. App.) 166 S. W. 719.

Where a certain acreage is conveyed with stipulation that grantees should keep open a permanent roadway, on the tract conveyed, the roadway being necessary to make the full acreage conveyed, stipulation should be construed as reservation of an easement, and not as an exception of an open lane. *Arden v. Boone* (Civ. App.) 187 S. W. 995.

In suit to enjoin interference with use of road by plaintiff, who had sold defendant the land, reserving right to cross it to have access to "public roads," evidence held insufficient to show that stipulation was placed in deed to insure plaintiff right to use

private road running west across defendant's ranch, formerly used as convenient route to town. *Day v. Williams* (Civ. App.) 193 S. W. 239.

**Conditions and restrictions.**—A grantor may incorporate such restrictions in his deed to the land as are not against public policy. *Co-operative Vineyards Co. v. Ft. Stockton Irrigated Lands Co.* (Civ. App.) 158 S. W. 1191.

A contract whereby a grantee assumes the debts of the grantor is a divisible contract, and the grantor may only recover damages from the payment by him of any debt the grantee fails to pay. *Closner v. Chapin* (Civ. App.) 168 S. W. 370.

A deed whereby the grantor for a nominal sum and the grantee's assumption of the grantor's debts conveys land and a contemporaneous contract by which the grantees bind themselves to pay the debts, when construed together, vest in the grantees the property, and the agreement to pay debts is a covenant and not a condition. *Id.*

Where a deed conveys only an easement and not the fee, the right to maintain an action of forfeiture for breach of a condition subsequent is not limited to the grantor or his heirs, but may extend to the assignee of the grantor. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 169 S. W. 644.

In a condition subsequent, providing for forfeiture in case the land should cease wholly to be used for railroad purposes, the condition, construed against the forfeiture, is not violated by the leasing of a part of the premises to be occupied by a rock crusher. *Id.*

Where property is conveyed upon condition subsequent, the title remains unimpaired even after breach, unless forfeited by the grantor or his heirs; the right to forfeit not being one which the grantor can convey. *Id.*

Where the grantor, who had conveyed land upon a condition subsequent, requiring continuous performance, thereafter quitclaimed all his interest in such land to another, the land is freed from the condition. *Id.*

Condition in restraint of alienation of a fee-simple estate for the grantee's lifetime held void. *O'Connor v. Thetford* (Civ. App.) 174 S. W. 680, 682.

The contract in a deed to reconvey for the money consideration paid on failure of the grantee to drill a well, stipulated as part consideration, is not wanting in mutuality. *Citizens' Water Co. v. McGinley* (Civ. App.) 175 S. W. 457.

The law implies a reasonable time for drilling a well, by a deed agreed to be done as part of the consideration. *Id.*

An estate held on condition subsequent is defeated when the condition is broken and the grantor makes entry with intent to forfeit the grant; the estate thereby being reinstated in him, so that thereafter he may convey to another. *Id.*

Under a provision of a deed, the grantee failing in a reasonable time to drill the well stipulated as part of the consideration, held, that the grantor was entitled to a reconveyance on tender of the money paid. *Id.*

To create a condition subsequent the language of a deed must be clear, and the condition must be created by express terms or clear implication; and, where the language is ambiguous, it will be construed to create a covenant, rather than a condition. *Daggett v. City of Ft. Worth* (Civ. App.) 177 S. W. 222.

A deed held to convey the property on condition subsequent that a school building be erected thereon and the premises be used for school purposes. *Id.*

A condition subsequent for particular use in order to enhance the value of grantor's adjoining property will not be construed to continue after the use ceases to be of benefit to the adjoining property, where the duration is not specified. *Id.*

A condition subsequent requiring the use of the premises for free school purposes held not shown to have been breached by a discontinuance of the school. *Id.*

Where a deed retained a lien and declared it did not become absolute until full performance by vendee, the vendor held entitled to possession under unimpaired title, where the vendees repudiated the conditions. *Imperial Sugar Co. v. Cabell* (Civ. App.) 179 S. W. 83.

An agreement in a deed whereby vendees were to raise sugar cane and sell it to the vendor held a condition, and not a covenant. *Id.*

A deed providing that title should pass to the vendee only upon condition of full performance of the contract is not ineffectual because partly based upon a sale of personal property. *Id.*

Deed conveying land to town trustees for purpose of building academy held not to make application of proceeds of sale to such purpose, a condition precedent to the vesting of title in the trustees. *Joyce v. City of Mt. Vernon* (Civ. App.) 184 S. W. 626.

#### Art. 1107. [628] [552] Form of conveyance.

4. **Deed or executory contract.**—Instrument construed and held a present conveyance and not an executory contract to convey. *Porterfield v. Taylor* (Civ. App.) 171 S. W. 793.

5. **Deed, mortgage, or conditional sale.**—That an instrument is an absolute deed in form would not prevent a showing that it was intended as a mortgage; the test being whether the relation of debtor and creditor existed between the parties after the execution of the instrument. *Mitchell v. Morgan* (Civ. App.) 165 S. W. 883.

Where the intent of parties to a transfer purporting on its face to be a deed, was that title should pass, with the privilege of repurchase instead of providing security for his debt, the transfer was not a mortgage. *Flynn v. J. M. Radford Grocery Co.* (Civ. App.) 174 S. W. 902.

A judgment creditor's attorney purchased land on an execution sale which he conveyed to a grantee, who paid the judgment debts with the understanding that such grantee would convey to the judgment debtor when reimbursed for his outlay. Held, the attorney's deed was in effect a mortgage. *Alexander v. Conley* (Civ. App.) 187 S. W. 254.

6. — **Evidence.**—Where the parties to an instrument purporting to be a deed agree that the land was grantor's homestead, and that the transaction was really intended as a mortgage, evidence that others understood that the instrument was an absolute conveyance will not overcome the admission of the grantee. *Kellner v. Randle* (Civ. App.) 165 S. W. 509.

In an action to cancel a deed on the ground that it was intended as a mortgage and conveyed the homestead property, evidence held to sustain a finding that the conveyance

was intended as a mortgage, and not as a conditional sale. *Mitchell v. Morgan* (Civ. App.) 165 S. W. 883.

In trespass to try title to land conveyed by defendant to plaintiffs' father by a deed which defendant claimed was given to secure a debt, evidence held insufficient to support a verdict for plaintiffs. *Yates v. Caswell* (Civ. App.) 169 S. W. 1104.

Where a notary public's testimony that when deed was drawn it was agreed that it was to secure a debt was uncontradicted, and he was not impeached, the jury could not disregard such evidence. *Id.*

Evidence held to sustain a finding that a deed by a husband and wife, though absolute in form, was intended as a mortgage. *Cox v. Kearby* (Civ. App.) 175 S. W. 731.

In widow's action to cancel warranty deed conveying land out of homestead tract and the grantee's deed thereof to defendant, evidence held to show that the first deed was given for the security of a debt. *Bailey v. Bailey* (Civ. App.) 188 S. W. 264.

Inadequacy of consideration for an absolute deed, taken alone, is insufficient to show that it was intended as a mortgage. *De Shazo v. Eubank* (Civ. App.) 191 S. W. 369.

Evidence held to show that a deed absolute in form was, in fact, a mortgage. *Kidd v. Sparks* (Civ. App.) 167 S. W. 799. See, also, *Norton v. Lea* (Civ. App.) 170 S. W. 267.

7. — **Estates and interests of parties.**—An "equity of redemption" is an interest in the land mortgaged which will descend to the heir of the mortgagor, who in legal contemplation continued to be the owner of the land. It is considered to be the real and beneficial estate, tantamount to the fee at law. *Hawkins v. Stiles* (Civ. App.) 158 S. W. 1011.

Where an absolute deed was given to secure a debt, the beneficial interest remained in the grantor until her equity of redemption was conveyed in writing for a valid consideration. *Yates v. Caswell* (Civ. App.) 169 S. W. 1104.

The measure of damages recoverable by the grantor in a security deed where the land was sold by the grantee, without fraud, for an amount in excess of the debt secured, held to be the consideration received, less the debt secured, with legal interest on the excess. *Norton v. Lea* (Civ. App.) 170 S. W. 267.

A mortgagee, in a mortgage evidenced by a deed absolute on its face, holds only a right to have recourse to the property for satisfaction of his debt in case of default, and the grantee acquires no title unless he is a purchaser for value and without notice that the deed was a mortgage. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536.

9. **Quitclaim.**—A deed held a conveyance of land to the full extent of the grantor's interest and not a quitclaim. *Nichols v. Schmittou* (Sup.) 174 S. W. 283, reversing judgment (Civ. App.) *Schmittou v. Dunham*, 142 S. W. 941.

Whether a deed is a warranty or quitclaim deed must be determined according to whether it assumes to convey the property itself, or merely the grantor's title. To determine this the deed must be considered in its entirety. A deed, reciting that grantor bargained, sold, and quitclaimed described property, to have and to hold the premises, and that it was his intent to convey all his real estate, is a warranty deed. *Cook v. Smith* (Sup.) 174 S. W. 1094, reversing judgment (Civ. App.) *Smith v. Cook*, 142 S. W. 26.

A deed conveying only the right, title, and interest of the grantor in land, and not the land itself, is a quitclaim deed. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614.

A deed held not a quitclaim deed, where it purported to convey the land itself, as distinguished from a transfer of the grantor's title merely. *Id.*

Whether a deed is a quitclaim or not depends upon the intent of the parties appearing from the face of the instrument, the use of the word "quitclaim" not being absolutely decisive. If it appears from the language of a deed that it was intended to convey the land itself, rather than such title as the grantor had, it is not a quitclaim deed. *Pridgen v. Cook* (Civ. App.) 184 S. W. 713.

A deed undertaking to "warrant or defend from all persons claiming under" the grantor was a quitclaim deed. *Niles v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 748.

A deed to land held a quitclaim instead of a warranty deed. *Barksdale v. Benskin* (Civ. App.) 194 S. W. 402.

13. **Recital as to parties.**—Deed held to convey the property in controversy to H. & Bro. as a firm. *Hollingsworth v. Wm. Cameron & Co.* (Civ. App.) 160 S. W. 644.

A deed is not binding upon one who signs it but who is not named in the body of the deed as one of the grantors. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

The grantees in a deed must be in existence when it is executed, but a deed to the heirs of a dead person is valid if the grantees can be identified, though a deed to the heirs of a living person, without specifying their names is invalid, especially where the heirs are yet unborn. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

Since the grantees must be in existence, under a deed to grantor's son and to the heirs of grantor and his wife, the son would take all of the land conveyed, if grantor then had no other children. *Id.*

A deed, reciting that it was a conveyance by B., which was not signed by B., but was signed, after her death, by her heirs, does not convey the interest of the heirs in the premises. *Jackson v. Craigen* (Civ. App.) 167 S. W. 1101.

Unless the heir of the grantor is named in a deed conveying on condition subsequent, he cannot re-enter, though the condition is breached. *Daggett v. City of Ft. Worth* (Civ. App.) 177 S. W. 222.

Where a deed with the grantee's name left blank was given to the purchaser of land with authority to fill in the name of his grantee, and several like sales were made title passed to the ultimate purchaser. *Fennimore v. Ingham* (Civ. App.) 181 S. W. 513.

14. **Construction.**—In construing a deed, the intention of the parties governs, and that may be ascertained from the terms of the deed, adequacy of price, and other pertinent circumstances surrounding its execution. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614; *Hooper v. Lottman* (Civ. App.) 171 S. W. 270; *Diffie v. White* (Civ. App.) 184 S. W. 1065.

Where the language of a deed cannot be harmonized, from which an ambiguity arises, so that the instrument is susceptible of two constructions, the interpretation most favorable to the grantee will be adopted. *Standefer v. Miller* (Civ. App.) 182 S. W. 1149;

*Stevens v. Haile* (Civ. App.) 162 S. W. 1025; *Beaton v. Fussell* (Civ. App.) 166 S. W. 458; *Crawford v. Spruill* (Civ. App.) 187 S. W. 361; *Arden v. Boone* (Civ. App.) 187 S. W. 995.

The habendum clause of a purported deed, "to have and to hold the said hereby granted and described premises \* \* \* forever from and after my death the delivery hereof not to occur until my death," was ambiguous as to the time of the delivery of the deed, since the phrase "the delivery hereof," etc., might have referred either to the property or the instrument. *Stevens v. Haile* (Civ. App.) 162 S. W. 1025.

The law of the state where land conveyed by deed is situated governs the obligation assumed by the grantor. *Newsom v. Langford* (Civ. App.) 174 S. W. 1036.

**15. Property conveyed.**—Where by the rejection of a false and impossible part of a description which is repugnant to the general intention of a deed a perfect description will remain, the false part should be rejected and effect given to the deed. *Griswold v. Comer* (Civ. App.) 161 S. W. 423.

The description in a deed need not state in what survey the land is situated, if it otherwise identifies it. *Hinkle v. Hays* (Civ. App.) 162 S. W. 435.

Though the first call of a deed was imperfect, held that by starting at the second call, which agreed with the subsequent calls, the description was sufficiently certain to prevent the deed from being void for uncertainty. *Id.*

Where a deed of trust described the property as 160 acres known as the J. H. B. homestead survey, that description was not so vague as to render the deed of trust invalid as against one not a bona fide purchaser. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

That a description in a deed does not entirely inclose the land will not invalidate the deed, where it otherwise sufficiently identifies the land. *Randolph v. Lewis* (Civ. App.) 163 S. W. 647.

A description in a deed held to be sufficiently certain under the maxim that "that is certain which can be made certain" to make the deed admissible in evidence. *Roberts v. Hart* (Civ. App.) 165 S. W. 473.

Where plaintiff, in addition to the ordinary count of trespass to try title, prayed reformation of her deed, which, while reciting a conveyance of 160 acres, described only 80, it was improper for the court to direct a verdict in her favor on the ground that the deed on its face showed a conveyance of 160 acres, for a particular description will govern a general one. *Johnson v. Conger* (Civ. App.) 166 S. W. 405.

The deed of a grantee of 100 acres of land to be selected out of a larger tract undertaking to convey a particular part of a 100 acre tract established that the selection had been previously made. *Hermann v. Thomas* (Civ. App.) 168 S. W. 1037.

If the land intended to be conveyed be so inaccurately described that it appears by the deed that the identity of the land is altogether uncertain, the court should pronounce the deed void. In this case evidence to identify the land described held sufficient to support a finding identifying the tract as the land in controversy. *Young v. Gharis* (Civ. App.) 170 S. W. 796.

Where a deed specially excepted "D's 1½-acre tract," by reference and by description, the grantee and his successor in interest acquired no interest in the excepted tract, though the deed to D. described it as "1.35 acres." *Gilmore v. O'Neil* (Sup.) 173 S. W. 203, reversing judgment (Civ. App.) 139 S. W. 1162.

Where a conveyance of lots is made with reference to a map, it is immaterial who made the map or whether it is recorded or whether a copy can be produced, if the location can be proven with reference to streets, etc., by any method recognized by law. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

A deed held to convey all the grantor's interest as heir in lands in S. county, as well as in H. county. *Holman v. Houston Oil Co.* (Civ. App.) 174 S. W. 886.

A deed of "810 acres, \* \* \* part of the H. league, \* \* \* the same to be an undivided interest in said league," conveys the grantor's undivided interest of that number of acres in the east half of the league; he owning nothing in the west half. *Id.*

A deed, whether the sale be judicial or voluntary, is not void for uncertainty, unless on its face the description cannot, by extrinsic evidence, be made to apply to any definite land. The only uncertainty in the description in a deed being in an attempted exception, the exception fails, and not the grant. *Waterhouse v. Gallup* (Civ. App.) 178 S. W. 773.

Deed conveying only the unsold part of a survey, less 80 acres mentioned therein, without evidence as to what, if any, part of the survey had been previously sold, held not to identify the land thereof involved in the grantee's action of trespass to try title. *Brown v. Foster Lumber Co.* (Civ. App.) 178 S. W. 787.

Where 200 acres of land were conveyed without a definite description, the mere plating of the land and setting aside of a certain block as containing such 200 acres held not to give title thereto, where it contains more than the quantity sold. *Ware v. Perkins* (Civ. App.) 173 S. W. 846.

Where a conveyance referred to a recorded map for description, such map and metes and bounds of the lot as delineated thereon are a part of the instrument. *Gibson v. Carroll* (Civ. App.) 180 S. W. 630.

A deed to a tract of land comprising 400 acres more or less, but reciting that it covered the unsold portion of a 3,000-acre tract, and a deed to 1,000 acres, alleged to cover the land previously conveyed to the grantee by the equitable owner, held not to cover a 320-acre tract which the owner had previously attempted to convey by an invalid deed, where it clearly appeared that there was no attempt to include such tract in these deeds. *Ayers v. Snowball* (Civ. App.) 181 S. W. 827.

Where the ambiguity in a deed as to the land conveyed is patent, and so inconsistent and contradictory that the deed is inoperative, no land passes by it, unless the deed is corrected to conform to the actual agreement of the parties. Where a general description of the acreage intended to be conveyed is inconsistent with the particular locative calls identifying the land, such deed should be construed most favorably to the grantee. *Standefer v. Miller* (Civ. App.) 182 S. W. 1149.

Where the description of the property in a deed contains false matter, without which the description would be sufficient to identify the property conveyed, such false matter will be rejected and effect given to what remains. *Id.*

Where a deed, following the field notes, calling for the length of the lines east and west and for the north and south lines of the section, recited that the intention of the parties was "to convey said amount of land," such recital did not refer alone to the quantity of the land conveyed, first mentioned in the deed. *Id.*

A deed of land would not be treated as void for want of a sufficient description, unless so defective that the land could not be located by inspecting the deed and resorting to the muniments or evidences to which it expressly or impliedly refers. The office of the description in a deed is not to identify the land, but to furnish means of identification. Description in deed, conveying 420 acres out of northeast portion or part of survey, containing 836 acres after northwest and southwest corners, amounting to 433 acres, had been conveyed, held to convey a square conforming to the north and east boundary lines of the survey, and, in connection with the field notes, its form and area, to be sufficient as to description. *Diffie v. White* (Civ. App.) 184 S. W. 1065.

Deeds through which plaintiff in a suit to recover land deraigned title, held not void on their face for want of a description. *North Texas Lumber Co. v. First Nat. Bank of Atlanta* (Civ. App.) 186 S. W. 258.

Though map of "addition" was not in deed records of county at time of a conveyance of a block therein title vested in grantee where grantor, in describing property in deed, referred to map which designated land after having been actually located and surveyed on the ground. *King v. Lane* (Civ. App.) 186 S. W. 392.

Where a deed fails to properly describe the land conveyed, it may be corrected by the grantor giving a correction deed properly describing the property. *Hodges v. Moore* (Civ. App.) 186 S. W. 415.

The exception of land required to make the full acreage conveyed under general warranty deed will be rejected as repugnant to the grant. *Arden v. Boone* (Civ. App.) 187 S. W. 995.

Where there is no suggestion that calls for courses and distances given in a deed are not correct, the deed conveys all the land embraced within its lines, though it is more than the amount stated in the deed and intended to be conveyed. *Seureau v. Frazer* (Civ. App.) 189 S. W. 1003.

A deed, to a place "known as the place built on by Thos. Davis and lastly occupied by G. N. Breckenridge" was not void for uncertainty as the land might be identified by extrinsic evidence. *Petty v. Wilkins* (Civ. App.) 190 S. W. 531.

Error in description of land in deed held not to prevent a good marketable title; the deed referring to the recorded deed to the grantor for full description. *Nelson v. Butler* (Civ. App.) 190 S. W. 811.

Deed conveying certain number of acres from larger survey, though grant restricts interest of grantee to certain part, makes grantee tenant in common with owner of larger tract; his interest being represented by fraction whose denominator is number of acres in larger tract, and numerator is number of acres conveyed. *Whitfield v. La Grone* (Civ. App.) 191 S. W. 1169.

16. — **Appurtenances and easements.**—An easement over the land of another may be acquired when it is necessary for an outlet to the county road.

Where an owner of land verbally reserved a way over the land conveyed so as to have access to a parcel retained, the right is personal to him, and cannot inure to the benefit of subsequent grantees to whom he conveyed his remaining parcel. *Bowington v. Williams* (Civ. App.) 166 S. W. 719.

A conveyance of a city lot with reference to a map of the city addition was a conveyance of all the appurtenances ascertainable by the map. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

Where a vendor of land agrees with the purchaser that it is bounded by a street or alley and so describes it in the deed, such purchaser, as against the vendor and those taking with notice, has an easement in the property represented as a street or alley. *Perrow v. San Antonio & A. P. Ry. Co.* (Civ. App.) 181 S. W. 496.

Laws 1884 (Gammel's Laws Tex., vol. 9, pp. 600-602), providing for a right of way across land surrounding the land of another, held not to apply to plaintiff's tract bounded on three sides by a river and on a fourth by land of defendant. *Anderson v. Engler* (Civ. App.) 184 S. W. 309.

An easement by way of necessity arises where owner of land sells part thereof, and it is necessary to pass over land sold to reach that which he has retained. Use of stairway in new adjoining building for access to existing building in place of former outside stairway held not necessary to use of upper story of original building, so that grantee took no right of use. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

Easement in favor of grantee held to have arisen by implication of law where part of a tract was conveyed and there was an apparently permanent and obvious alleyway reasonably necessary thereto. *Miles v. Bodenheim* (Civ. App.) 193 S. W. 693.

Where company operating cotton seed oil plant executed deed of trust on property situated in town, seedhouse located in country a number of miles away on land of party who contracted to buy cotton seed from company did not pass as appurtenant to company's property in town. *Balcar v. Lee County Cotton Oil Co.* (Civ. App.) 193 S. W. 1094.

17. — **Crops and timber.**—Whether nursery stock, prima facie a part of the realty, is subject to the lien of a mortgagee of the land depends upon the intention of the parties at the time the mortgage was executed. *Colonial Land & Loan Co. v. Joplin* (Civ. App.) 184 S. W. 537.

Crops grown on mortgaged land are personalty of the mortgagor, and not subject to the mortgage. *Id.*

Where the parties to a mortgage of lands of a nursery company contemplated that the company might sell the nursery stock without accounting for proceeds, which was done, it was the intention that the stock be regarded as personalty, not subject to the mortgage. *Id.*

18. — **Fixtures.**—Contract between mortgagor and mortgagee of personal property that same shall not become fixture upon attachment to realty held valid between parties. *Phillips v. Newsome* (Civ. App.) 179 S. W. 1123.

Stationary engine, bolted to concrete bed prepared therefor and attached by its shaft to the building, held a fixture, title to which passed to the purchaser. *Id.*

**Art. 1108. [629] [553] Other forms and clauses valid.**

**Covenants in general.**—The usual covenants of warranty appearing in a deed apply only to the title conveyed, and do not guarantee the quantity of land. *Holland v. Ashley* (Civ. App.) 153 S. W. 1033.

A general covenant of warranty does not include a warranty of the quantity of land conveyed, unless the property is sold by the acre and the quantity warranted. *Brown v. Yoakum* (Civ. App.) 170 S. W. 803.

The sale of lots by a townsite company, with statement that railway would build its depot opposite the lots, held not a contractual obligation in the nature of a covenant to erect the depot. *Ore City Co. v. Rogers* (Civ. App.) 190 S. W. 226.

Where a deed contains full covenants of warranty, exceptions, conditions, or reservations inconsistent therewith are of no effect. *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

**Covenants running with the land.**—A covenant by a purchaser in a contract for the sale of land to operate a street railroad around a certain part of the land for the life of the purchaser's franchise was a covenant running with the land. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

**Persons liable.**—One furnishing money to a vendee to purchase land on notes executed by the vendee directly to such person is not a warrantor of the title nor of the quantity of the land conveyed. *Roberts v. Prather* (Civ. App.) 153 S. W. 789.

A covenant restricting the use of lots which were part of a tract divided and sold for residence purposes may be enforced against a grantee of an original purchaser, where he bought with actual or constructive knowledge of the purpose of the covenant to benefit all of the lots. *Hooper v. Lottman* (Civ. App.) 171 S. W. 270.

**Persons entitled to enforce covenants.**—Where the county opened up a road on land purchased by plaintiff, after he had sold it, any right of action existing on warranties in plaintiff's deed and violated by the opening up of the road was not held by plaintiff. *Bonzer v. Garrett* (Civ. App.) 162 S. W. 934.

That a purchaser could have ascertained the defects in a title, or even that he had knowledge thereof, is no defense to an action by him upon the covenant of warranty after eviction by a superior title. *Coleman v. Luetcke* (Civ. App.) 164 S. W. 1117.

Where the owner of land, intended to be sold for residence purposes, imposed restrictive covenants, calculated to preserve the residential character of the property, in the deeds to the several grantees, the restriction is for the benefit of all of the lots, and individual lot owners may enforce the covenant. That a covenant restricting the building of stables upon lots in a residence subdivision varied does not show that the covenants were not imposed pursuant to a general scheme to make the locality more attractive, and will not prevent an individual purchaser from enforcing the same. *Hooper v. Lottman* (Civ. App.) 171 S. W. 270.

That a covenant, restricting the use of lots in a residence subdivision, was omitted in conveyances of land to a water company will not prevent other grantees from enforcing the covenant; the furnishing of water to persons living in the district being a necessity, and the necessary use of land by a water company being inconsistent with covenants applicable to residence property. *Id.*

Whether a person not a party to a restrictive covenant may enforce it depends upon the intention of the parties making the covenant. *Id.*

**Performance or breach.**—Where a vendor of land, subject to certain vendor's lien notes which the purchaser agreed to assume, falsely represented that the interest on such notes was paid to a certain date, the purchaser could sue for damages for the fraud and deceit and was not limited to an action for breach of warranty. *Jones v. Montague* (Civ. App.) 153 S. W. 1053.

The bringing of a suit by the grantee under a warranty deed to quiet title against one claiming a superior title is not an invitation to assert the superior title which will bar any right to recover upon the warranty. *Coleman v. Luetcke* (Civ. App.) 164 S. W. 1117.

While the mere existence of a superior title will not support a recovery upon a warranty of title, where there is an assertion of a superior title, the grantee is not required to make a useless resistance thereto, but may resort to his warranty. *Id.*

Where there was a breach of warranty in a contract of sale before the delivery of the deed, the purchaser accepting the deed containing the warranty, with knowledge of the breach, could merely recover damages for the breach. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

An assumption by a grantee of the debts of the grantor does not give the grantor a right of action unless the grantee has refused to pay debts and the grantor has paid them or some of them. *Closner v. Chapin* (Civ. App.) 168 S. W. 370.

Where value of land, title to which failed, or value of rest of the land sold for gross sum, or that it was of uniform value, was not shown, purchaser held not entitled to recover on warranty. *Northcutt v. Hume* (Civ. App.) 174 S. W. 974.

**Damages for breach.**—In an action upon a warranty of title, the measure of damages is the price paid for the land, and plaintiff need not prove that the land was of the value he paid for it. *Coleman v. Luetcke* (Civ. App.) 164 S. W. 1117.

The rule that the measure of damages which a purchaser may recover is the difference between the consideration given for the land and the value thereof does not apply in cases of breach by the vendor of a warranty. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

Where title to part of land fails, damages bearing same proportion to the whole purchase money as the value of the part to the whole premises, estimated at the price paid, held recoverable. *Northcutt v. Hume* (Civ. App.) 174 S. W. 974.

In case of exchange of lands, measure of damages for breach of covenant of general warranty of title is market value of land conveyed to purchase that of warrantor. *Wiggins v. Stephens* (Civ. App.) 191 S. W. 777.

Where there is only partial failure of title in violation of general warranty thereof, value of land lost to warrantee must be ascertained as the measure of damages in absence of agreed value. *Id.*



Between immediate parties, proper measure of damages for breach of covenant of general warranty of title in executed contract for sale of realty is purchase money paid, with interest, where there has been total failure of title, and purchaser has lost land. *Id.*

**Art. 1110. [631] [555] Conveyance by sheriff or other officer will pass title, when.**

**Description of land.**—A sheriff's deed description of property as one-half of survey 671, being 338½ acres in a certain county, while not void, is insufficient unless aided by extrinsic evidence, where there might be other surveys of the same number in the same county, and the evidence indicates the acreage number was wrong. *Leal v. Moglia* (Civ. App.) 192 S. W. 1121.

**Art. 1111. [632] [556] Estates in futuro.**

**Deed or will.**—An instrument whereby a husband conveyed all his property to his wife and children with the right to control the property for his life held a deed, within this article, and not a will. The court, in determining whether an instrument disposing of property is a deed or will, will give effect to the intention of the maker. *Low v. Low* (Civ. App.) 172 S. W. 590.

**Art. 1112. [633] [557] Implied covenants.**

**Implied covenants in general.**—Where the words "grant" and "convey" were used as a part of the granting clause of a deed, they implied a covenant on the part of the grantor that the land was free from incumbrances as provided by this article. *Alston v. Pierson* (Civ. App.) 158 S. W. 1165.

Arts. 1112 and 1113 do not raise an implied warranty by the use of the words "grant and convey" in a quitclaim deed. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614.

In view of this article, held, a provision in a deed was not to be construed as extending time for payment of a mortgage to a third person, against which the grantors specially covenanted. *Chapin v. Ford* (Civ. App.) 194 S. W. 494.

**Art. 1113. [634] [558] Incumbrances include what.**

Cited, *Chapin v. Ford* (Civ. App.) 194 S. W. 494.

**Implied covenants.**—Arts. 1112 and 1113 do not raise an implied warranty by the use of the words "grant and convey" in a quitclaim deed. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614.

**Breach of warranty against incumbrances.**—Failure of grantor to pay notes, secured by a lien on land, not assumed by grantee, is a breach of warranty against incumbrances. *Neeley v. Lane* (Civ. App.) 193 S. W. 390.

**Art. 1114. [635] [559] Conveyance of separate lands of the wife, how made.**

**Conveyance and contract to convey in general.**—That a married woman did not know a devise embraced a particular tract, and that she treated her sisters as owners thereof, held not to transfer title to them in view of this article. *Morton v. Calvin* (Civ. App.) 164 S. W. 420.

Under Paschal's Dig. art. 1003, authorizing a married woman to convey her separate property by joint deed of herself and husband, privily acknowledged by her, she could not execute an executory contract therefor. *Blakely v. Kanaman* (Civ. App.) 168 S. W. 447, judgment affirmed (Sup.) 175 S. W. 674.

Under this article married woman held to have no authority to contract to convey her separate real estate, so that her contract would not be specifically enforced. *Blakely v. Kanaman* (Sup.) 175 S. W. 674. Affirming judgment (Civ. App.) 168 S. W. 447.

Under this article married woman's bond for title to her separate realty, mortgage thereon, or conveyance by power of attorney joined by her husband upheld, because operating as "conveyances" of her title or interest therein. *Id.* See, also, notes under art. 4621.

**Separation.**—Where a husband and wife have already separated, a conveyance intended as a provision for the wife's support will be upheld, though the property conveyed was the separate property of the husband. *Versyp v. Versyp* (Civ. App.) 159 S. W. 165.

**Wife's acknowledgment.**—A deed conveying a wife's separate real estate must be duly acknowledged to be valid, under this article. *King v. Driver* (Civ. App.) 160 S. W. 415.

A joint and mutual will executed by husband and wife pursuant to a contract between them, which gives to the survivor a life estate in their property with remainder to their daughters, need not be separately acknowledged by the wife, but declares a trust in favor of the children to become effective after the death of the survivor. *Larabee v. Porter* (Civ. App.) 166 S. W. 395.

Only an innocent purchaser, who actually paid a valuable consideration, and received or was entitled to receive a conveyance, having no notice of any fraud, can defend a wife's suit for cancellation of her deed to the purchaser's grantor, based upon fraud practiced in securing her acknowledgment. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

**Art. 1115. [636] [560] Conveyance of homestead, how made.**

See notes under arts. 3786 and 4621.

**Conveyance and contract to convey in general.**—Under this article a contract for the conveyance of a homestead cannot be specifically enforced unless the wife joined. *Burnett v. Mitchell* (Civ. App.) 158 S. W. 800.

Where the owners of a homestead executed a deed thereto and delivered it to another in exchange for a vendor's lien note, which was indorsed to a third person, the whole transaction being for the purpose of evading the homestead laws, the lien was invalid, and no foreclosure thereof could be had at the suit of the holder of the note except upon the principle of estoppel. *Henderson v. Wilkinson* (Civ. App.) 159 S. W. 1045.

A contract by a wife to convey the homestead is not enforceable against her, since the only manner in which she may convey is by deed acknowledged as provided by law. *Hudgins v. Thompson* (Civ. App.) 163 S. W. 659.

In view of Const. art. 16, § 50, providing that a married man shall not sell the homestead without his wife's consent, given in the manner prescribed by law, title to the homestead could only pass by deed acknowledged by the wife apart from her husband, this article so requiring. *Harle v. Harle* (Civ. App.) 166 S. W. 674.

A wife's right in the homestead is a vested right in the land, of which she cannot be deprived, except as provided by the Constitution and statutes. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

Under this article title to lots, occupied by incorporator as a business homestead, agreed by him to be transferred to the company in return for stock, which was issued, neither the application for the charter nor the affidavit being executed by such incorporator's wife, did not pass. *McGough v. Finley* (Civ. App.) 179 S. W. 918.

A married woman's deed of the homestead, delivered in escrow, is valid where she does not retract before the deed is delivered by the depository. *Burnett v. Continental State Bank of Alto* (Civ. App.) 191 S. W. 172.

**Land not part of homestead.**—See art. 3786 and notes.

Where a contract for the sale of land included the vendor's homestead, though his wife was not a party, specific performance will not be granted as to the land not a part of the homestead where the plaintiff did not offer to accept a conveyance of it in compliance with the contract, for to grant specific performance of part of the land, leaving plaintiff a right of action for damages, would be making a new contract for the parties. *Burnett v. Mitchell* (Civ. App.) 158 S. W. 800.

The homestead exemption being limited to 200 acres, the owner of 320 acres cannot claim the whole tract, hence his conveyance of 160 acres passes good title though his wife did not join, where his homestead was upon the other half of the tract, and he had not claimed as part of his homestead any particular 40 acres out of the quarter section conveyed. *Johnson v. Conger* (Civ. App.) 166 S. W. 405.

Where a husband has designated a homestead of 200 acres out of a larger tract, he may mortgage or convey the excess, and such conveyance passes the title, though the wife does not join therein. *Hughes v. Hughes* (Civ. App.) 170 S. W. 847.

**Disposition of proceeds.**—A husband has the right to control the proceeds of the sale of a homestead and may apply them to the payment of debts. *Russell v. Hamilton*, 174 S. W. 705 (following) *Alvord Nat. Bank v. Ferguson* (Civ. App.) 126 S. W. 622.

**Abandonment of homestead.**—A contract for the sale of a homestead belonging to husband and wife, in which the wife did not join, was void and did not thereafter become valid by their ceasing to occupy the land as a home; no other homestead having been acquired. *Ward v. Walker* (Civ. App.) 159 S. W. 320.

While specific performance of husband's contract to convey homestead will be granted after abandonment of homestead, held, that there was no such abandonment as would justify a decree for specific performance where the wife did not know of the husband's contract, though they had moved from the homestead. *Hudgins v. Thompson* (Civ. App.) 163 S. W. 659.

There can be in law no abandonment of a homestead in which the wife does not join. *Id.*

Where, during a temporary removal from the homestead, a husband secretly renounces the same in a deed of trust thereon, the renunciation is not binding on the wife. A recital in the mortgage that the property mortgaged is not homestead is a declaration by him against interest on the issue of homestead. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

A husband, though entitled to select the home, may not defeat a home established and vested until, in good faith, he selects another, or in good faith abandons the old one. *Id.*

**Insanity of wife.**—Under art. 3594 and Const. art. 16, § 50, a deed of the husband during wife's insanity granting the homestead, though in consideration of debts of the community, without a showing of necessity thereof, is invalid. *Priddy v. Tabor* (Civ. App.) 189 S. W. 111.

**Separation.**—A husband's sole deed to land not used as a homestead, after his wife had left him and taken up her residence on other land, held valid, though she did not join therein. *Hughes v. Hughes* (Civ. App.) 170 S. W. 847.

**Estoppel.**—Where a deed given in exchange for a vendor's lien note, for the purpose of evading the homestead laws, was never recorded, and the grantor and his wife remained in possession of the property, there could be no estoppel which would authorize the foreclosure of the lien at the suit of the holder of the note. *Henderson v. Wilkinson* (Civ. App.) 159 S. W. 1045.

A homestead must be conveyed in the manner prescribed by this article, and hence the failure of the head of the family to protest against the sale of his business homestead by his general assignee will not warrant an estoppel vesting title to the property in the purchaser. *McDowell v. Northcross* (Civ. App.) 162 S. W. 13.

Where husband and wife executed their warranty deed to secure a loan conveying part of homestead tract, and the grantee executed a deed thereof to defendant with the knowledge of the husband and wife, the surviving wife was not thereby estopped from suing to cancel both deeds and to remove the cloud from the title. *Bailey v. Bailey* (Civ. App.) 188 S. W. 264.

**Fraud and coercion.**—A grantor suing to set aside a conveyance procured by the fraud of the grantee may show that the property conveyed was his homestead and so describe it when testifying. *McIndoo v. Wood* (Civ. App.) 162 S. W. 488.

Title to a homestead could not pass without the wife's joinder in the conveyance, untainted by fraud of any kind upon her rights, and, if the deed was delivered by her husband in fraud of her rights, she would not be precluded from asserting them against the purchaser. And where a wife signed a deed of her homestead, reciting a consideration of \$2,200, understanding that it was to be cash, and her husband, without her knowledge or consent, delivered it for a consideration partly in notes, there was a

fraud upon her rights, entitling her to rescind as against a purchaser with notice of the recital, who had made no inquiry as to the husband's authority to deliver on other terms of payment. *Miller v. Flattery* (Civ. App.) 171 S. W. 253.

In a suit to set aside a conveyance of a homestead, evidence held to show that the plaintiff wife's signature was obtained by fraud. *Gill v. Flynn* (Civ. App.) 175 S. W. 853.

Where a husband and a third party fraudulently induced the wife to deed to the third party her homestead, the wife believing that the transaction constituted a mortgage, she could have, against a purchaser of her vendor's lien note from the third party with knowledge of the facts, cancellation of the note and deed, irrespective of her return of the consideration paid her. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

A deed to her homestead, signed by a wife under the coercion of her husband, is voidable so far as the avoidance touches the rights of a third person not an innocent purchaser for value. *Id.*

**Easements and incumbrances.**—A covenant in a mortgage executed by a husband alone that the premises are not the homestead is not binding on the wife. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

In action to cancel vendors' lien notes with intervention by defendant's wife seeking cancellation of her deed, etc., evidence held to justify finding of a pretended sale within Const. art. 16, § 50, declaring such sales of homestead involving conditions of defeasance, void. *Bludworth v. Dudley* (Civ. App.) 173 S. W. 561.

A conveyance of a homestead intended as a mortgage is void as to any one not an innocent purchaser. *Gill v. Flynn* (Civ. App.) 175 S. W. 853.

Under express provision of Const. art. 16, § 50, a warranty deed to secure a loan executed by husband and wife conveying part of their homestead was absolutely void, and the grantee took no title thereto, and hence could convey none by his deed thereof. *Bailey v. Bailey* (Civ. App.) 188 S. W. 264.

If vendees conveyed land to satisfy purchase-money debt, leaving deficit, and a parcel was reconveyed to them under agreement that the lien reserved was for the original purchase price, and such transaction was simulated to avoid the constitutional prohibition against mortgaging the homestead, no lien would attach. *Jenkins v. Guaranty State Bank of Palestine* (Civ. App.) 189 S. W. 314.

Though an easement of an alleyway appurtenant to a homestead is within this article, the deed of a homestead duly signed and acknowledged by the grantor and wife will pass an easement appurtenant, though the easement is not described in the deed. *Miles v. Bodenheimer* (Civ. App.) 193 S. W. 693.

**Rights of purchasers and mortgagees.**—A contract executed by a husband alone to convey the homestead is not unlawful, and an action lies against the husband for the breach of the contract, where he assured the purchaser that the wife would join in the deed, and she refused so to do. *Fonda v. Colquitt* (Civ. App.) 165 S. W. 1195.

Where a wife executed a deed of her homestead, either under her husband's coercion or the inducement of the misrepresentations of the grantee, who gave a check for the conveyance which the wife never cashed, and which she tendered in court in her suit for cancellation, the third person was not an innocent purchaser for value without notice. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

In action to cancel deed of land out of homestead tract and grantee's deed thereof to defendant, evidence held to show that defendant knew first deed was to secure a debt. *Bailey v. Bailey* (Civ. App.) 188 S. W. 264.

## TITLE 25

## CORPORATIONS—PRIVATE

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| <p>Chap.<br/>2. Creation of corporations.<br/>3. Powers and duties of private corporations, and duties of stockholders in reference thereto, etc.<br/>4. Land, acquisition, etc., of—Restricted.<br/>8. Liabilities of stockholders and directors.<br/>9. Insolvent corporations.<br/>10. Dissolution of private corporations.<br/>11. Religious, charitable and other corporations.<br/>13. Telegraph corporations.<br/>14. Telephone and telegraph companies.</p> | <p>Chap.<br/>16. Channel and dock corporations.<br/>21. Gas and water corporations.<br/>21a. Gas, electric current and power corporations.<br/>22. Sewerage companies.<br/>23. Cemetery corporations.<br/>24. Oil, gas, salt, etc., companies.<br/>25. Bond investment companies.<br/>25a. Building and loan associations.<br/>25b. Co-operative savings and contract loan companies.<br/>25c. Loan and investment companies.<br/>26. Foreign corporations.</p> |
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## CHAPTER TWO

## CREATION OF CORPORATIONS

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| <p>Art.<br/>1120. Private corporations may be created.<br/>1121. For what purposes corporations may be created.<br/>1122. Charter and what it must set forth.<br/>1123. Charter must be subscribed and acknowledged.<br/>1125. Private corporations for profit must subscribe, etc.<br/>1126. Secretary of state to receive, file and record charter, on satisfactory evidence, and payment of fees and franchise tax.<br/>1127. Satisfactory evidence defined.</p> | <p>Art.<br/>1128. Secretary of state may require other evidence.<br/>1129. Certain corporations exempt from provisions.<br/>1130. Subscriptions and payment of stock required of excepted corporations.<br/>1131. Must be filed with secretary of state, etc.<br/>1137. Renewal and consolidation of two or more such corporations, etc., how.<br/>1138. Existence of corporation shall not be disputed collaterally.</p> |
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**Article 1120. [641] [565] Private corporations may be created.**

Cited, *City Com'rs of Port Arthur v. Fant* (Civ. App.) 193 S. W. 334.

**Art. 1121. [642] [566] For what purposes corporations may be created.**

11a. Private corporations may be created, under the general corporation laws of this State, by the voluntary association of three or more persons, for the purpose of building, constructing and repairing boats, ships and vessels for use in and for the navigation of rivers, lakes, streams and seas, with power to build, construct, maintain and operate such docks, dry docks, marine railways, wharves and other appurtenances as may be necessary for the accomplishment of such purpose. [Act March 20, 1917, ch. 90, § 1.]

**Explanatory.**—Took effect 90 days after March 21, 1917, date of adjournment.

16. For the establishment and maintenance of oil companies with the authority to contract for the lease and purchase of the right to prospect for, develop and use coal and other minerals, petroleum and gas; also the right to erect, build and own all necessary oil tanks, cars and pipes necessary for the operation of the business of same. [Act March 31, 1915, ch. 144, § 1.]

All private corporations heretofore created under the provisions of Subdivision 16, Article 1121, Chapter 2, Title 25, Revised Statutes of Texas of 1911, shall, in addition to the powers therein enumerated, have the power to contract for the lease and purchase of the right to prospect for, develop and use gas; also erect, build and own all necessary oil tanks, cars and pipes necessary for the operation of the business of same. [Act March 31, 1915, ch. 144, § 2.]

**Explanatory.**—Act took effect 90 days after March 20, 1915, date of adjournment.

53. The construction, operation and maintenance of terminal railways; and any such terminal railway company, in addition to the rights conferred by law upon corporations generally, shall have and exercise all rights and powers conferred upon railroad companies by Chapters 8 and 9, Title 115 of the Revised Statutes of Texas, relating to railroads. And when any such terminal railway company is adjacent to any inland navigable stream or water body, it shall have the right and power to construct, erect, operate and maintain all necessary and convenient facilities of every kind and character to accommodate and expeditiously handle the exchange of freight and passenger traffic with any and all steamships, and all other vessels and water craft using such waterways. Such terminal railway company shall also have the right to issue bonds in excess of its authorized capital stock; provided, that its stock and bonds shall be issued under the direction of the Railroad Commission of this State, in accordance with the stock and bond law regulating the issuance of stocks and bonds by railroads; and the commission shall fix the values of the property, rights and franchises of such terminal railway company; and its stock and bonds shall not exceed the amount authorized by the Railroad Commission of Texas; and jurisdiction over the issuance of the bonds herein authorized is hereby expressly vested in the Railroad Commission; provided, that no such terminal company shall have the right to charge any railroad company, steamship, vessel or water craft for terminal facilities a greater amount than may be, from time to time, designated and established by the Railroad Commission, which shall have authority to establish and prescribe such rates and rules for the operation of all such terminal companies as will prevent discrimination by them against any common carrier with respect to either charges or service; provided, further that the provisions of Articles 6656, 6657 and 6658 of the Revised Statutes of Texas shall apply to any and all orders, rulings, judgments and decrees of the Railroad Commission made, entered or held under the provisions of this subdivision in regard to such terminal railway companies. [Act March 10, 1917, ch. 72, § 1.]

**Explanatory.**—Took effect 90 days after March 21, 1917, date of adjournment. The act amends section 53, article 1121, Title 25, ch. 2, Rev. Civ. St. 1911, being Acts 30th Legislature, ch. 157.

60. The construction, acquiring, maintaining and operating lines of electric, gas or gasoline, denatured alcohol, or naphtha motor railways within and between any cities or towns, and interurban railways within and between cities and towns, in this State, for the transportation of freight, or passengers, or both, with power, also to construct, own and operate union depots and office buildings, and such interurban railways shall have the same rights of eminent domain as are now given by law to steam railroads; and any such company shall have the right and authority to acquire, hold and operate other public utilities in and adjacent to the cities or towns within or through which said company operates. But no electric, gas or gasoline, denatured alcohol, or naphtha motor railways, incorporated under this subdivision, shall ever be exempt from the payment of assessments that may be legally levied, or assessed against it for street improvements. Corporations created under this subdivision shall be, and are authorized to exercise the right of eminent domain for the purpose of acquiring right-of-way upon which to construct their railway lines, and sites for depots and power plants, upon the same conditions, and in the same manner as railroad corporations are now required to do under the laws of this State, and shall have the same rights, powers and privileges as are now granted to interurban electric railway companies, by Chapter 17, of Title 115, of the Thirty-second Legislature, and all the powers of whatsoever kind, or character, conferred by said chapter; provided no property upon which is located a cemetery shall ever be condemned, unless it shall affirmatively be shown, and so found by the court trying such condemnation suits, that it is necessary to take such

property and no other route is possible or practicable; and provided that the electric, gas or gasoline, denatured alcohol or naphtha motor railways incorporated under this subdivision, which shall engage in transporting freight shall be subject to the control of the Railroad Commission.

That any corporation heretofore organized under any law of this State, and which now or may hereafter own or operate a line of electric, gas or gasoline, denatured alcohol, or naphtha motor railway, within and between any cities or towns in this State, shall be and the same is hereby authorized to own and operate office buildings, and to acquire, hold and operate electric light and power plants in and adjacent to the cities or towns within or through which said company operates, and may, by proceeding in the manner provided by existing laws, amend its articles of incorporation so as to expressly include any or all powers herein authorized.

Any corporation heretofore organized under this subdivision may, by proceeding in the manner provided by existing laws, amend its charter so as to expressly include all powers given under this section as now amended. [Act April 2, 1917, ch. 178, § 1.]

**Explanatory.**—The act amends subd. 60 of art. 1121, Rev. Civ. St. 1911. No reference is made in the act to the fact that since the adoption of the Revised Statutes this subdivision has been twice amended, first, by Acts 1913, p. 67, and later by Acts 1913, p. 349. Took effect 90 days after March 21, 1917, date of adjournment.

76. A private corporation may be formed and chartered for the design, purchase and sale of steel and iron and other metal products and the manufacture of any or all of such products, and for the design, sale, construction and erection of engineering and architectural structures, and for contracting for the construction and erection of such structures. [Act March 22, 1915, ch. 109, § 1.]

**Explanatory.**—The act amends art. 1121 by adding thereto section 76 to read as above. The act took effect 90 days after March 20, 1915, date of adjournment.

Article 1121 cited, Commonwealth Bonding & Casualty Ins. Co. v. Meeks (Civ. App.) 187 S. W. 681. 9 Gammel's Laws, p. 679, and Laws 1871, 2d Sess. ch. 80, § 5, subd. 27, cited, Staacke v. Routledge (Civ. App.) 175 S. W. 444.

**Partial invalidity of charter.**—A corporate charter is not necessarily void as a whole because it contains a provision authorizing the corporation to engage in a business not authorized by law. Staacke v. Routledge (Civ. App.) 175 S. W. 444.

**Subdivision 2.**—Cited, Richardson v. General Assembly of the Church of the Living God (Civ. App.) 191 S. W. 148.

**Subdivision 10.**—Neither subd. 10 nor subd. 18 authorize the formation of a corporation to engage in the business of renting by the hour automobiles with their drivers. Staacke v. Routledge (Civ. App.) 175 S. W. 444.

**Subdivision 16.**—This subdivision, as amended by Acts 34th Leg. c. 144, held not to authorize a producing oil company organized in a foreign state to own and operate a railroad. Continental Trust Co. v. Brown (Civ. App.) 179 S. W. 939.

**Subdivision 18.**—Neither subd. 10 nor subd. 18 authorize the formation of a corporation to engage in the business of renting by the hour automobiles with their drivers. Staacke v. Routledge (Civ. App.) 175 S. W. 444.

**Subdivision 23.**—An irrigation company has the power of eminent domain and may exercise the privileges of public service corporations with respect to irrigation projects, whether incorporated under Rev. St. 1895, art. 704, subd. 6, or under this subdivision. Co-operative Vineyards Co. v. Ft. Stockton Irrigated Lands Co. (Civ. App.) 158 S. W. 1191.

An irrigation company which has not taken water from streams in which the public has any interest, but only distributes water arising from lands owned exclusively by it which do not touch the lands of others except persons holding under it cannot exercise the privileges of public service corporations with respect to irrigation projects including the power of eminent domain. *Id.*

**Subdivision 24.**—A corporation formed under this subdivision cannot by its charter be given the power to engage in the business of renting by the hour its automobiles. Staacke v. Routledge (Civ. App.) 175 S. W. 444.

**Subdivision 29.**—Under arts. 1164, 1165, a corporation formed under subd. 29 may not bind itself as accommodation indorser. McCaleb v. Boerne Electric Power & Mfg. Co. (Civ. App.) 173 S. W. 1191.

**Subdivision 30.**—In an action against a stockyards company for injuries to live stock, held, that the measure of damages was the difference between the value of the stock when received by the company and the value when delivered to the plaintiff. Hovencamp v. Union Stockyards Co. (Sup.) 180 S. W. 225.

**Subdivision 31.**—Under a charter authorizing construction and maintenance of establishment for slaughtering, refrigerating, canning, curing, and packing meats, held, that a meat packing company had authority to enter into a contract to provide refrigerating

rooms for preservation of turkeys. *Cuero Packing Co. v. Alamo Mfg. Co.* (Civ. App.) 194 S. W. 492.

**Subdivision 37.**—Cited, *McCaleb v. Boerne Electric Power & Mfg. Co.* (Civ. App.) 173 S. W. 1191; *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

**Subdivision 39.**—See *Co-operative Vineyards Co. v. Ft. Stockton Irrigated Lands Co.* (Civ. App.) 158 S. W. 1191; note under subd. 23, ante.

**Subdivision 40.**—Abstract company, acting for sellers of land, incurred no liability to buyer because of negligence in drawing up abstract of title. To render title abstract company liable for damages occasioned buyer of land by negligence in failing to search for matters of record touching the title, company's negligence need not have been sole cause of loss; it being sufficient that its negligence concurred with seller's fraud. Title abstract company held liable to buyer of land for damages suffered because of its failure to make diligent search for matters of record relating to title to land, where company undertook, at buyer's instance, to correct and complete its abstract made for sellers. *Decatur Land, Loan & Abstract Co. v. Rutland* (Civ. App.) 185 S. W. 1064.

**Subdivision 46.**—Cited, *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050.

**Subdivision 48.**—Duly elected executive officers of district union which had purchased land and erected warehouse and which thereafter changed its organization and private charter from a national to a state subsidiary, held entitled to the charge and control of its warehouse property and its books, constitution, and by-laws. Acts of officers of a farmers' district union not violating its by-laws in respect to possession and control of its property held binding upon other members of the union or organization. A farmers' district union, chartered under a national organization by subsequent application for a charter from the state organization and the acceptance thereof, ipso facto repudiated and surrendered its charter from the national organization. *Ryan v. Witt* (Civ. App.) 173 S. W. 952.

**Subdivision 73.**—See *Co-operative Vineyards Co. v. Ft. Stockton Irrigated Lands Co.* (Civ. App.) 158 S. W. 1191; note under subd. 23, ante.

Under subd. 73, determination by electric light and ice company that condemnation of land of railroad was necessary could not be reviewed by courts, in absence of abuse, or showing that use of right of way is impaired. *Pecos & N. T. Ry. Co. v. Malone* (Civ. App.) 190 S. W. 809.

While a corporation formed to supply light, ice, water, and power to the people of a town is within the class denominated private corporations by the statute, its objects are such as clothe it with a quasi public character and subject it to certain rules governing public corporations. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 783.

**Subdivision 75.**—Cited, *Staacke v. Routledge* (Civ. App.) 175 S. W. 444.

### Art. 1122. [643] [567] Charter and what it must set forth.

**Contracting in other than corporate name.**—In the absence of statutory prohibition, a corporation may recover on a contract executed by it in a name other than its corporate name. *W. B. Clarkson & Co. v. Gans S. S. Line* (Civ. App.) 187 S. W. 1106.

**Use of similar name.**—Under the evidence in an action by the "Howe Grain and Mercantile Company" to enjoin defendants from doing business under the name of "Howe Grain Company," held, that plaintiff was entitled to the relief sought. *Hughes v. Howe Grain and Mercantile Co.* (Civ. App.) 162 S. W. 1187.

**Residence.**—A corporation is a resident of the state creating it. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 395.

**Enforcement of contract to form corporation.**—A contract to form a corporation cannot be specifically enforced, where there is no showing of an agreement upon the preliminary steps necessary to its formation, under this article. *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

### Art. 1123. [644] [568] Charter must be subscribed and acknowledged.

Cited, *Panhandle Packing Co. v. Stringfellow* (Civ. App.) 180 S. W. 145.

### Art. 1125. Private corporations for profit must subscribe, etc.

Cited, *Witt v. Nelson* (Civ. App.) 169 S. W. 381.

### Art. 1126. Secretary of state to receive, file and record charter, on satisfactory evidence of compliance, and payment of fees and franchise tax.

Cited, *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

**Mandamus to compel issuance of charter.**—In view of Const. art. 12, § 6, and arts. 1126-1128, held that, act of secretary of state in issuing a corporate charter being discretionary, and not purely ministerial or imperatively required by law, he cannot be required by mandamus to issue charter where he has not received satisfactory evidence that provisions of article 1126 have been complied with. *Beach v. McKay* (Sup.) 191 S. W. 557.

Whether corporate stock had been subscribed in good faith, and 50 per cent. thereof had been paid in cash or equivalent as required by this article, held questions of fact to be determined by secretary of state in exercise of his discretion under article 1128, and not coercible by mandamus. *Id.*

In view of *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 1126, 1128, secretary of state held within rights in refusing to issue charter to company where it involved acceptance of patent at value of \$64,050, and evidence was not satisfactory to him that the patent had such value. *Id.*

**Application to foreign corporation.**—Under Code W. Va. 1913, c. 53, § 24 (sec. 2857), to invalidate issue of stock by West Virginia manufacturing corporation for property taken at overvaluation, it must be shown that overvaluation was intentional and fraud-

ulent, and fraud will not be implied from mere finding property was worth less than par value of stock; Rev. St. Tex. 1911, arts. 1126, 1127, 1145, having no application. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

**Art. 1127. Satisfactory evidence defined.**

Cited, *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

Application to foreign corporation.—See *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115; note under art. 1126.

**Art. 1128. Secretary of state may require other evidence.**

Mandamus to compel issuance of charter.—See *Beach v. McKay* (Sup.) 191 S. W. 557; note under art. 1126.

**Art. 1129. Certain corporations exempt from provisions.**

Cited, *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

**Art. 1130. Subscriptions and payment of stock required of excepted corporations.**

Cited, *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

**Art. 1131. [645] [569] Must be filed with secretary of state, etc.**

Other form of notice.—The name of an association on the office door with names of individuals with whom the representative of plaintiff dealt did not necessarily give notice to plaintiff of a corporation; articles of incorporation not being on file with the Secretary of State. *Luck v. Alamo Printing Co.* (Civ. App.) 190 S. W. 204.

**Art. 1137. Renewal and consolidation of two or more such corporations, etc., how.**

Assent of stockholders.—A stockholder who is present by proxy, but who declines to vote for a merger of corporations, does not assent thereto, and is not bound by the action of the majority stockholders favoring a merger. *Cattlemen's Trust Co. v. Beck* (Civ. App.) 167 S. W. 753.

Liabilities of new corporation.—Where a contract for the consolidation of banks bound defendant to pay the M. bank's liabilities as appeared on its books, such contract required defendant bank to pay the value of the M. bank's stock to the lawful holders. And where the agreement obligated defendant to pay all liabilities on the books at the close of business April 11, 1910, it was liable for the book value as distinguished from the market value of the M. bank's stock on that date. Where defendant was to pay all the liabilities of the M. bank, including its stock, part of which had been pledged to plaintiff, plaintiff could assume that such payments would not be made without a surrender of the stock, and its failure to notify defendant of the pledge did not estop it to claim payment, notwithstanding defendant's payment to the pledgor. *Guaranty State Bank of Carthage v. Continental Bank & Trust Co. of Shreveport, La.* (Civ. App.) 164 S. W. 411.

In the absence of an agreement to that effect, a new corporation, organized to succeed an old one, is not liable for the debts of the old one, unless the new corporation is merely a continuation of the old one, or unless the new corporation assumes the debts of the old corporation. But where the new corporation assumes the debts and takes possession of the assets of the old one, it is liable for a debt of the old one not in excess of the assets. *Cattlemen's Trust Co. v. Beck* (Civ. App.) 167 S. W. 753.

Under this article, where two corporations formed a new corporation which took the name of one and assets of both, they did not defeat obligations of old companies, and where new corporation, although nothing was said at time of consolidation, paid all but contested debts of old corporation, there was an implied promise to pay its obligations: *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (Civ. App.) 187 S. W. 747.

Actions against new corporation.—In an action on a contract for onions to be grown, brought against a corporation formed by consolidation of corporation with which the contract was made with another, evidence held sufficient to justify a finding that new corporation agreed to assume indebtedness of constituent companies. *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (Civ. App.) 187 S. W. 747.

**Art. 1138. [675] [599] Existence of corporation shall not be disputed collaterally.**

Who may question corporate existence.—Subscriber to corporate stock who took active part in the incorporation, being elected director and vice president, could not defend the company's action on his subscription because it was not legally incorporated, in that half its capital stock had not been paid in when the charter was issued. *Panhandle Packing Co. v. Stringfellow* (Civ. App.) 180 S. W. 145.

A corporation cannot be attacked collaterally by a stockholder upon call for payment of stock subscription. *Medlin v. Commonwealth Bonding & Casualty Ins. Co.* (Civ. App.) 180 S. W. 899.

Illegal corporation.—Rev. St. 1911, art. 1138, relating to obligations to ostensible corporations, does not apply to pretended corporations expressly forbidden by law. Where Special Act May 23, 1871 (Sp. Acts 12th Leg. c. 264), for incorporation of banking corporation was repealed by Const. 1876, art. 16, § 16, the incorporation of pretended banking corporation thereunder, contracts for subscription, and notes given therefor held that stockholders were not estopped to question existence collaterally. *Davis v. Allison* (Civ. App.) 189 S. W. 968.

DECISIONS IN GENERAL

De facto corporations.—The requisites of a "de facto corporation" are the existence of a law under which a corporation with the powers assumed might lawfully be created,



a bona fide effort to incorporate thereunder, and an actual user of the rights claimed to be conferred by such law. As against all persons except the state, a de facto corporation has the same powers, and is subject to the same obligations, as a corporation de jure. In a suit to enjoin a telephone company from using the streets for its line, it will be presumed that it had attempted in good faith to incorporate under the law, and actually exercised its franchise thereunder; these elements of a de facto corporation being presumed. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

### CHAPTER THREE

## POWERS AND DUTIES OF PRIVATE CORPORATIONS, AND DUTIES OF STOCKHOLDERS IN REFERENCE THERE TO, ETC.

Art.	Art.
1140. General powers of corporations.	1161. Shall report to stockholders and make dividends.
1141. Unpaid stock payable when; proof of payment.	1162. May borrow money.
1145. May increase its capital stock, how.	1164. Corporation restricted to objects of its creation; may contribute to certain enterprises not political; pending suits.
1146. Watering stock prohibited, forfeiture for violation.	1165. Restrictions upon creation of debts.
1147. Watered stock and bonds not for money, etc., quo warranto suit to cancel.	1167. Penalty of forfeiture for violation of provisions of either of last three preceding articles.
1148. Suit may be dismissed or not brought under what conditions.	1168. Stock of corporation is personal estate.
1149. Remedies cumulative.	1169. Directors may require payment of stock.
1150. Increase in certain cases validated.	1170. Stock forfeited, when and how.
1153. Quorum of directors, and annual elections.	1173. Corporation may convey lands, how.
1159. Directors shall have general management, etc.	
1160. Directors shall cause record to be kept, etc.	

### Article 1140. [651] [575] General powers of corporations.

See notes under art. 1164.

2. **Corporate powers and liabilities—In general.**—A doubt as to the implied powers of a corporation must be resolved against the corporation. *State v. Country Club* (Civ. App.) 173 S. W. 570.

An incorporated golf club held not to possess an implied power to dispense intoxicating liquors to its members. *Id.*

Corporations exist by law for the purposes defined in their charters, and he who deals with them is charged with notice of those purposes. *El Fresno Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

3. — **Incidental.**—Under arts. 1140, 1164, 1167, a corporation can exercise only powers expressly granted or those necessary or reasonably appropriate to the exercise of such powers. *State v. Country Club* (Civ. App.) 173 S. W. 570.

The powers of a corporation are not restricted to those expressly conferred by its charter, but include as necessary all those powers which are appropriate. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Civ. App.) 181 S. W. 534.

A corporation is not restricted to the actual wording of its charter, but has implied powers reasonably necessary or usually incident to its business. *Coppard v. Farmers' & Merchants' State Bank* (Civ. App.) 184 S. W. 551.

5. — **Purchase own stock.**—A corporation, when not forbidden by statute and when acting in good faith and without objection from its stockholders or prejudice to creditors, may purchase shares of its own stock, regardless of the purpose for which it is bought. *W. R. Case & Sons Cutlery Co. v. Folsom* (Civ. App.) 170 S. W. 1066.

A corporation, organized to sell land which represents its capital and for which corporate stock was issued, may provide in its charter that the holders of the stock may surrender it and accept land in lieu thereof on such terms as may be determined by the corporation. *Rowan v. Texas Orchard Development Co.* (Civ. App.) 181 S. W. 871.

Where a corporation was insolvent and it became necessary, in winding up its affairs, to order sale of land to satisfy claims, held that purchasers of preferred stock, under agreement entitling them to demand redemption of same in land on a certain date, were entitled to make such demand, though that date had not arrived. *Id.*

A corporation's agreement to buy its stock from a stockholder will be enforced when the purchase can be made and the stock paid for without prejudice to the rights of creditors and other stockholders. *Id.*

An agreement by persons selling land to a corporation and adopted by the corporation, giving purchasers of preferred stock a right to demand redemption of same in land, held enforceable, where it appeared that the land was never in fact part of the capital of the corporation. *Id.*

An agreement to redeem preferred stock out of the capital if there are no profits will not be enforced. *Id.*

Where the organizer of a bank induced defendant to subscribe for stock, and gave a note, agreeing to purchase defendant's stock and to pay the note, which was in the

hands of a bank, such agreement was not unenforceable as violative of the laws of the state governing the incorporation of state banks. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

7. — **To sue and be sued.**—A private corporation has the right to maintain an action in its own name. *Rockdale Mercantile Co. v. Brown Shoe Co.* (Civ. App.) 184 S. W. 281.

9. — **To enter into partnership.**—Without express charter power to enter a private partnership, a corporation would be unauthorized to do so. *Southern Oil & Gas Co. v. Mexia Oil & Gas Co.* (Civ. App.) 186 S. W. 446.

10. — **Indemnity, guaranty, and suretyship.**—A corporation authorized by law to enter into contracts of guaranty cannot justify the making of indemnity contracts on the theory that they fall within its implied powers, and such a contract is ultra vires. *Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.* (Civ. App.) 184 S. W. 238.

12. — **Taking notes, etc.**—The mere fact that the buyer of notes was a mercantile corporation would not make ultra vires its act in buying such notes from which it might largely profit. *Coppard v. Farmers' & Merchants' State Bank* (Civ. App.) 184 S. W. 551.

14½. **Corporate seal.**—The seal of a corporation is not necessary to a valid transfer of a note payable to it. *Forster v. Enid, O. & W. R. Co.* (Civ. App.) 176 S. W. 788.

15. **Capacity to contract in general.**—The contract of a hardware company for an advertising scheme to extend its sales is in furtherance of its usual business and within its powers to make. *American Mfg. Co. v. O. C. Frey Hardware Co.* (Civ. App.) 180 S. W. 956.

Under arts. 1140 and 1162, the execution and issuance of notes by corporation cannot be held to be ultra vires in absence of evidence that they were not issued in transaction of corporation's authorized business. *Galveston-Houston Interurban Land Co. v. Dow* (Civ. App.) 193 S. W. 353.

16. **Contracts before incorporation or organization.**—The promoters of a corporation cannot procure the payment of a bonus to themselves as commissions and charge it to the corporation when formed. *Commonwealth Bonding & Casualty Ins. Co. v. Thurman* (Civ. App.) 176 S. W. 762.

In an action against defendant and others, promoters, to recover for surveying a proposed railroad and for other services and advances prior to defendant's participation in the enterprise, evidence held to show agreement by defendant, who had received the benefits, to become liable therefor. *Vaughn v. Morris* (Civ. App.) 180 S. W. 954.

The expenses incurred by the promoters of a railroad enterprise in their preliminary work rendered them jointly and severally liable therefor. *Id.*

In action against promoters for services in surveying a proposed railroad, evidence held sufficient to show that a defendant had made another defendant agent for him, so as to be bound by his actions. *Id.*

17. — **Liability for contracts of promoters.**—A debt incurred by a promoter of a corporation on its behalf, prior to the filing of its charter, is not an original liability of the corporation. *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060.

A contract by a promoter of a proposed corporation cannot be ratified by the corporation, but liability may arise by adoption of the contract by acceptance of benefits. *Id.*

Notwithstanding Rev. St. 1895, art. 3096h, a corporation held not liable for material ordered by the promoter and delivered to an officer, where the acts of the corporators and of the directors and officers were void. *Id.*

A corporation held not liable to a subscriber for money paid to promoters in consideration of their agreement to organize the corporation free of expense to stockholders. *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

Where, before incorporation, company's promoter without authority contracted on its behalf to guarantee plaintiff against liability on paper of a corporation in which he held stock, in return for plaintiff's release of an option on land, so that the owner could convey to the lumber company, such company was liable on the contract after accepting and retaining the land. *Weathersby v. Texas & Ohio Lumber Co.* (Sup.) 180 S. W. 735.

In an action against a lumber company on an unauthorized contract made by its promoter before incorporation, evidence held to show that the company, when buying land, had notice of the term of the promoter's contract that the company should guarantee plaintiff against liability on another company's paper in return for his release of an option on the land. *Id.*

Where defendant corporation with notice of a promoter's contracts, and that a note given for stock in another corporation organized by the same promoter was to constitute part of its surplus, received the note without consideration, held, that the promoter's agreement was binding on defendant. *Commonwealth Bonding & Casualty Ins. Co. v. Curry* (Civ. App.) 183 S. W. 1.

18. — **Rights on contracts of incorporators.**—The subscribers for the stock of a corporation constituted a voluntary association prior to the issuance of its charter, and a deed to the corporation vested title in them individually, though they held in trust for the corporation, and might be compelled to convey the land to it, or be estopped to deny its title by permitting it to deal with the land as its own. *William Cameron & Co. v. Trueheart* (Civ. App.) 165 S. W. 58.

21. **Ultra vires contracts.**—One injured by the negligence of a servant of a corporation, who is at the time engaged in a business authorized by its charter, but not allowed by statute, can question the power of the corporation to do the acts. *Staacke v. Routledge* (Civ. App.) 175 S. W. 444.

Capacity of a corporation to hold land can be questioned by the state only, and so not by an individual defendant in the corporation's action to compel conveyance to it. *Wooten v. Dermott Town-Site Co.* (Civ. App.) 178 S. W. 598.

The courts will not aid in performing an ultra vires act by enforcing an executory contract. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

It is not every ultra vires act of a corporation that is void. *Coppard v. Farmers' & Merchants' State Bank* (Civ. App.) 184 S. W. 551.

A bond given by a corporation to construct a building is binding on the surety, though the contract is ultra vires as to the corporation. *Kaufman v. Christian-Wathen Lumber Co.* (Civ. App.) 184 S. W. 1045.

**22. Property and conveyances—Power to convey.**—Intoxicating liquors purchased by a corporation and held for sale to its members are the sole property of the corporation as an entity. *State v. Country Club* (Civ. App.) 173 S. W. 570.

In absence of constitutional prohibition the Legislature can empower quasi public corporations to transfer their franchises and all their property, either by absolute sale or by lease or mortgage, though the transfer may disable them from performing their duties to the public. Subd. 4 of this article authorizes quasi public corporations, to sell their property for corporation purposes, and no one but the state can question the propriety of the directors' determination of what is required by the purposes of the corporation. It authorizes a sale by the corporation to its principal stockholder to discharge its obligation to him by reason of his payment of all its debts, where the purchaser continued to perform the public service. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

**31. Estoppel to deny corporate powers of corporation.**—The doctrine of estoppel of a corporation to plead its ultra vires act as a defense in an action on an obligation incurred thereby does not apply to public corporations, but it applies to a private corporation in whose acts the public is not interested to the same degree as if it were an individual, except where the act done is one which it could not do for lack of capacity. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Civ. App.) 181 S. W. 534.

Where all the stockholders in a corporation assent to the borrowing of money for a wrongful purpose and to the execution of a mortgage to secure it, it is liable. Evidence held to show assent of stockholders, so that the doctrine of liability of a corporation on a debt because of assent of all stockholders was applicable. *Id.*

**32. — By receiving and retaining benefits.**—A corporation holding the legal title to land for the benefit of the real parties in interest, promising one of such parties who conveyed his interest to it to aid in litigation that it would reconvey, and which received the full benefit of the performance of such contract, could not defeat the right of such party to a reconveyance on the ground that the contract was ultra vires. *Phenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

A corporation whose declared purpose was to buy, feed, and sell cattle, which borrowed money and executed a mortgage to secure it and used the money for another purpose, acted within its power, though it acted wrongfully, so that it was estopped thereafter to deny liability. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Civ. App.) 181 S. W. 534.

Where a corporation borrows money and gives its mortgage therefor, it cannot, in order to defeat the mortgage, thereafter allege that the mortgagee was in pari delicto with it, knowing that it acted wrongfully and without its express powers, where the contract was fully executed by the mortgagee. *Id.*

A corporation which receives the consideration for a mortgage and retains it without offer to return it receives a consideration for the mortgage, so that it is thereafter estopped to plead ultra vires. *Id.*

Defendant, a Texas corporation empowered to do a guaranty business, held not estopped from urging the ultra vires character of an indemnity contract entered into with plaintiff, another Texas guaranty company, through receiving compensation under the contract. *Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.* (Civ. App.) 184 S. W. 238.

### Art. 1141. Unpaid stock payable when; proof of payment.

**Trust fund.**—Unpaid stock subscriptions constitute a trust fund for creditors. *Davis v. Burns* (Civ. App.) 173 S. W. 476; *Witt v. Nelson* (Civ. App.) 169 S. W. 381. Such subscriptions may be sued on and collected by receiver for such purpose, even though such creditors did not know of such unpaid subscriptions at time debts were incurred. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

### Art. 1145. [652] [576] May increase its capital stock, how.

**Application to foreign corporations.**—See *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115; note under art. 1126.

**Right to increase capital.**—Under this article a banking association chartered by special act of May 23, 1871 (Sp. Acts 12th Leg. c. 264), held to have the right to increase its capital stock under a provision in its charter, so that subscription to its additional stock might be enforced for the benefit of its creditors. *Davis v. Burns* (Civ. App.) 173 S. W. 476.

**Subscription to increased stock.**—A subscription contract for the purchase price of a portion of the capital stock of a corporation created by an increase in the amount of its authorized capital stock is, when not in violation of law, a valid and enforceable obligation. *Cope v. Pitzer* (Civ. App.) 166 S. W. 447.

### Art. 1146. Watering stock prohibited; forfeiture for violation.

See *Cole v. Adams*, 92 Tex. 171, 46 S. W. 790, s. c. 19 Civ. App. 507, 49 S. W. 1052; *Mathis v. Pridham*, 1 Civ. App. 53, 20 S. W. 1015; *San Antonio St. Ry. Co. v. Adams* (Civ. App.) 25 S. W. 639; *Bank of De Soto v. Reed*, 50 Civ. App. 102, 109 S. W. 256; *O'Bear-Nestor Glass Co. v. Anti-Explo. Co.*, 101 Tex. 431, 108 S. W. 967, 16 L. R. A. (N. S.) 520 (rehearing denied 101 Tex. 431, 109 S. W. 931), reversing judgment (Civ. App.) 106 S. W. 180; *Houston Fire & Marine Ins. Co. v. Swain* (Civ. App.) 114 S. W. 149; *San Antonio Irr. Co. v. Deutschmann*, 102 Tex. 201, 114 S. W. 1174; *McCarthy*

v. Texas Loan & Guaranty Co. (Civ. App.) 142 S. W. 96; Mason v. First Nat. Bank (Civ. App.) 156 S. W. 366.

**In general.**—Under Const. art. 12, § 6, issuance by a corporation of stock on a subscription contract before payment for the stock is ultra vires. General Bonding & Casualty Ins. Co. v. Mosely (Civ. App.) 174 S. W. 1031.

Under Const. art. 12, § 6, subscribers to the stock of a corporation who had not fully paid for stock received are guarantors of the balance due regardless of transfer. Rich v. Park (Civ. App.) 177 S. W. 184.

The purpose of Const. art. 12, § 6, and this article, is to insure an equivalent in corporate property for such stocks or bonds as are in circulation and subject to purchase by the public. Cattlemen's Trust Co. of Ft. Worth v. Turner (Civ. App.) 182 S. W. 438.

**Giving note or other obligation for subscription price in general.**—Where a corporation sold all its stock to S. & Co., who employed R. to resell, and R. sold stock to defendant, receiving a note to S. & Co. for a part of the price, and another note for the balance, representing commissions, the latter note was not invalid as violating the statute. Scheffel v. Smith (Civ. App.) 169 S. W. 1131.

In an action on a note given in payment for corporate stock, held, that the balance of the stock subscribed for by the payee of the note which was not legally issued under Const. art. 11, § 6, had never been placed as required by a collateral agreement before defendant's obligation became binding. Sanger v. First Nat. Bank of Amarillo (Civ. App.) 170 S. W. 1087.

A transaction held not an issue of stock, for the purchaser's note, in contravention of this article, but nothing more than a subscription for stock. Farmers' & Merchants' State Bank v. Falvey (Civ. App.) 175 S. W. 833.

Where plaintiffs executed note for stock subscription to one corporation, and the promoter delivered it to defendant, a different corporation, without consideration, defendant's issuance of stock to plaintiffs did not make them stockholders. Commonwealth Bonding & Casualty Ins. Co. v. Curry (Civ. App.) 183 S. W. 1.

False representations of an agent, taking subscriptions to the stock of a corporation to be organized, that plaintiff could give his note for the stock, and that it would be indefinitely extended, relating to a matter as to which agent had no authority, and which the corporation could not validly carry out, held to warrant rescission of the subscription. General Bonding & Casualty Ins. Co. v. Mount (Civ. App.) 183 S. W. 783.

Notes given as part of the subscription to stock of a corporation are not void, and may be enforced and collected as valid obligations. Commonwealth Bonding & Casualty Ins. Co. v. Hill (Civ. App.) 184 S. W. 247.

On the corporation's acceptance of a subscription to its stock with the indorsement of secured notes to it the subscriber became liable thereon. *Id.*

Under Const. art. 12, § 6, and this article, subscriber to capital stock of corporation on credit, accompanied by issuance and delivery of stock, held not liable on his notes given in payment therefor. Republic Trust Co. v. Taylor (Civ. App.) 184 S. W. 772.

In a suit on note where defendants' contention that the balance due represented a note given for shares of stock sold by a private corporation contrary to law was denied by plaintiff, testimony was admissible that the shares were purchased from an individual to whom they had in good faith been sold by the corporation. Witt v. Young (Civ. App.) 194 S. W. 1019.

**Issuance of stock in payment for property.**—A dissatisfied stockholder cannot require directors to account for stock received by them for the transfer to the corporation of a franchise which they paid nothing for; there being no showing as to the value of the franchise. Thomas v. Barthold (Civ. App.) 171 S. W. 1071.

Corporation may lawfully issue stock in payment for property, and when corporation's representatives fairly and honestly issue stock in payment for property, and par value of stock is equal to valuation placed by them on property, transaction cannot be set aside because of mere overvaluation of property. Southwestern Portland Cement Co. v. Latta & Happer (Civ. App.) 193 S. W. 1115.

**Delivery of stock to purchaser.**—Where, though subscribers for stock gave their note therefor, there was no agreement to issue the stock on their promise to pay, and the stock was not delivered, held that Const. art. 12, § 6, was not violated. Horn Bros. v. Baker (Civ. App.) 173 S. W. 474.

Subscribers to stock, who gave their note therefor, held not entitled to the stock until paid for, and the refusal to deliver it was not a failure of consideration for the note. *Id.*

A subscription for stock under an arrangement whereby the stock was held until payment the price held not an "issuance" of stock within Const. art. 12, § 6, and this article. Cattlemen's Trust Co. of Ft. Worth v. Turner (Civ. App.) 182 S. W. 438.

A corporation is not bound under a subscription to its stock to issue a certificate of stock until the subscription is fully paid. Commonwealth Bonding & Casualty Ins. Co. v. Hill (Civ. App.) 184 S. W. 247.

Under Const. art. 12, § 6, and in view of Rev. St. 1911, art. 1170, subscription to stock of corporation to be organized, accompanied by subscription notes secured by deed of trust on land, without delivery of the stock, held not an issue of stock, and hence not illegal or void. *Id.*

Making of certificate of stock by banking corporation in name of subscriber who gave only a note, and its retention until the note should be paid, meanwhile apportioning dividends to the subscriber, etc., held not violative of Const. art. 12, § 6, or this article. Cattlemen's Trust Co. of Ft. Worth v. Pruett (Civ. App.) 184 S. W. 716.

**Note secured by mortgage.**—Giving of notes secured by a deed of trust for stock in an insurance company subsequently issued is not payment for the stock. General Bonding & Casualty Ins. Co. v. Mosely (Civ. App.) 174 S. W. 1031.

A note and deed of trust, given as part of a subscription to stock of a corporation to be organized and to secure its payment on call, were not void on the ground that

they were given in payment of stock. *Medlin v. Commonwealth Bonding & Casualty Ins. Co.* (Civ. App.) 180 S. W. 899.

A note secured by trust deed is neither money paid nor property actually received. *Prudential Life Ins. Co. of Texas v. Pearson* (Civ. App.) 188 S. W. 513.

**Pledge of stock as security for note.**—Stock subscribed for with a future promise to pay and held pending payment vests the subscriber with but a qualified right therein, not capable of being pledged. *Cattlemen's Trust Co. of Ft. Worth v. Turner* (Civ. App.) 182 S. W. 438.

Transaction wherein subscriber to corporate stock, not to be delivered until paid for, gave his note to the agent of the promoters of the company, the stock being attached as collateral security, held a sale of stock on credit, prohibited by Const. art. 12, § 6. *Kanaman v. Gahagan* (Civ. App.) 185 S. W. 619.

**Violation by foreign corporation.**—This article held to prohibit a foreign corporation doing business in the state, without permission, from issuing stock, except in consideration for money, labor, or property. *Farmers' & Merchants' State Bank v. Falvey* (Civ. App.) 175 S. W. 833.

Under Const. art. 12, § 6, and this article, the issuance and delivery of the stock of a foreign corporation in consideration of a note was an illegal transaction. *Sturdevant v. Falvey* (Civ. App.) 176 S. W. 908.

If issuance by West Virginia manufacturing company to president of shares of stock in payment for property in California was violation of this article, fact merely authorizes forfeiture of company's permit to do business in Texas. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

Under Const. art. 12, § 6, and this article, note given for capital stock in a foreign corporation and subscription contract held void. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

**Stock in banking corporation.**—Subscription contract to stock of a banking corporation held not to violate Const. art. 12, § 6, providing that no corporation shall issue stock except for money paid or property actually received. *Davis v. Burns* (Civ. App.) 173 S. W. 476.

Under Const. art. 12, § 6, prohibiting issuance of stock in corporation except for money paid, labor done, or property actually received, banking corporation has no right to issue or tender its stock until the subscriber's note was paid. *Thompson v. First State Bank of Amarillo* (Civ. App.) 189 S. W. 116.

Where Special Act May 23, 1871 (Sp. Acts 12th Leg. c. 264), for incorporation of banking corporation was repealed by Const. 1876, art. 16, § 16, the incorporation of pretended banking corporation thereunder, contracts for subscription, and notes given therefor held void ab initio. *Davis v. Allison* (Civ. App.) 189 S. W. 968.

**Stock in insurance company.**—Const. art. 12, § 6, and Rev. St. 1911, arts. 4725, subd. "e," 4733, and 1146, held not to prevent a life insurance company from contracting to sell an increase of its capital stock and from taking notes of the subscribers in payment therefor, where the stock was not issued until the notes were fully paid. *Cope v. Pitzer* (Civ. App.) 166 S. W. 447.

This article is superseded by Acts 31st Leg. c. 108, post, art. 4726, authorizing the incorporation of insurance companies. *General Bonding & Casualty Ins. Co. v. Mosely* (Civ. App.) 174 S. W. 1031.

**Rights of purchasers of note or obligation.**—Where consideration of note of buyer of capital stock of a corporation was illegal under the constitutional and statutory provisions as to the sale of capital stock on credit, the note was void, and its payment could not be enforced by innocent purchaser for value. *Republic Trust Co. v. Taylor* (Civ. App.) 184 S. W. 772; *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825; *Prudential Life Ins. Co. of Texas v. Pearson* (Civ. App.) 188 S. W. 513; *Ater v. Rotan Grocery Co.* (Civ. App.) 189 S. W. 1106.

A transaction held not an issue of stock, for the purchaser's note, in contravention of this article, but nothing more than a subscription for stock, so that the note was good in the hands of a purchaser without notice of a secret agreement making the contract to take the stock optional. *Farmers' & Merchants' State Bank v. Falvey* (Civ. App.) 175 S. W. 833.

An insurance company, which issued its stock, contravening Constitution and statute, for a note, and indorsed before maturity to a third person as part consideration for property transferred, was liable to the third person on its indorsement. *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825.

A note given for capital stock of a trust company through the medium of an investment company was void in the hands of a purchaser, even if he paid value and had no notice of the status of the negotiation. *Crawford v. Davis* (Civ. App.) 188 S. W. 436.

While consideration for a note issued for corporate stock is void or illegal, note is not void in the hands of a bona fide purchaser for value. *Lockney State Bank v. Martin* (Civ. App.) 191 S. W. 796.

**Rights and remedies of parties to contract or obligation.**—The court will cancel notes secured by mortgage given for stock subsequently issued by a corporation in violation of law. *General Bonding & Casualty Ins. Co. v. Mosely* (Civ. App.) 174 S. W. 1031.

If the promise of defendant's agents to loan plaintiff money was part of the agreement when plaintiff signed a stock subscription contract, he should have sought reformation, and cannot maintain suit to cancel the contract. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936.

Where notes for corporate stock were received and then renewed, held that, the stock issued being invalid, the notes should be canceled. *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Civ. App.) 184 S. W. 776.

Corporation having illegally accepted note and trust deed for stock, cannot defeat the maker's suit for cancellation on the ground that the transaction was a loan. *Prudential Life Ins. Co. of Texas v. Pearson* (Civ. App.) 188 S. W. 513.

**Estoppel to assert invalidity of purchase.**—One who for years has gone along as a stockholder, being sued after the corporation is insolvent, is estopped to assert he is not

a stockholder because stock was issued for his note. *McWhirter v. First State Bank of Amarillo* (Civ. App.) 182 S. W. 682.

Though estopped from asserting fraud, plaintiffs held entitled to cancellation of note for stock in B. company, secured by defendant, another corporation, which issued its stock therefor, and to recover stock in B. company, also secured by defendant, or amount of note given therefor. *Commonwealth Bonding & Casualty Ins. Co. v. Curry* (Civ. App.) 183 S. W. 1.

A transaction whereby corporate stock is issued in consideration of a note cannot be ratified, and furnishes no basis for estoppel. *Id.*

A corporation is particularly charged with knowledge of its powers, in view of arts. 1146 and 1147, as to forfeiture of charter for illegal issuance of stock, and cannot defeat a subscriber's action to cancel a note and trust deed given for stock, which it was illegal for the corporation to accept, on the ground that the plaintiff was in pari delicto with it. *Prudential Life Ins. Co. of Texas v. Pearson* (Civ. App.) 188 S. W. 513.

In action by state officers in name of banking corporation to recover upon subscription note, evidence held to show that liability of parties on ground that note was given in violation of Constitution, was not raised until bank had failed and suit was brought. *Thompson v. First State Bank of Amarillo* (Civ. App.) 189 S. W. 116.

**Validation of illegal transaction.**—That defendant, who had given his nonnegotiable note in a transaction whereby stock was illegally delivered therefor, afterwards substituted his negotiable note, did not validate the illegal transaction. *Sturdevant v. Falvey* (Civ. App.) 176 S. W. 908.

**Rights of creditors of corporation.**—Where defendants did not deny obligation of stock subscription or note for the amount until after rights of creditors had intervened, creditor holding deed of trust on the corporation's property held entitled to sell the note and purchaser entitled to enforce collection by suit. *Horn Bros. v. Baker* (Civ. App.) 173 S. W. 474.

Stockholders who paid nothing for common stock issued to them were liable for an amount sufficient to pay unsecured creditors of the insolvent corporation. *Rowan v. Texas Orchard Development Co.* (Civ. App.) 181 S. W. 871.

Subscriber to corporate stock of banking corporation payable by note, in contravention of Const. art. 12, § 6, after bank's insolvency, and in view of trust fund doctrine, held not entitled, as against its creditors, to assert invalidity of note. *Thompson v. First State Bank of Amarillo* (Civ. App.) 189 S. W. 116.

#### **Art. 1147. Watered stock and bonds not for money, etc., quo warranto suit to cancel.**

See *Prudential Life Ins. Co. of Texas v. Pearson* (Civ. App.) 188 S. W. 513, note under art. 1146.

Cited, *Cope v. Pitzer* (Civ. App.) 166 S. W. 447; *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Civ. App.) 184 S. W. 776 (dissenting opinion); *Lockney State Bank v. Martin* (Civ. App.) 191 S. W. 796.

#### **Art. 1148. Suit may be dismissed or not brought under what conditions.**

Cited in dissenting opinion, *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Civ. App.) 184 S. W. 776.

#### **Art. 1149. Remedies cumulative.**

Cited, *Boyd v. State* (Cr. App.) 180 S. W. 230.

#### **Art. 1150. [652a] Increase in certain cases validated.**

Cited, *El Fresnal Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

#### **Art. 1153. [665] [579] Quorum of directors and annual elections.**

**Contract entered into by quorum of directors.**—Where the three directors of a corporation owned all shares, a contract executed by two of them is, in view of this article, binding on the corporation, particularly where the third director had stated that whatever the other two did would be satisfactory to him. *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897.

**De facto officers.**—Officers of a corporation, not selected in the statutory manner, are not even "de facto officers," and their acts are not binding. *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060.

#### **Art. 1159. [661] [585] Directors shall have general management, etc.**

See notes under art. 1164.

1½. **Meetings.**—Unless the by-laws otherwise prescribe, the directors of a corporation may select the place of meeting, and they are not bound to meet at the principal place of business of the corporation. *Hackler v. International Travelers' Ass'n* (Civ. App.) 165 S. W. 44.

2. **Compensation.**—Salary of a corporation president cannot be held excessive, where there is nothing to show the duties exacted from him. *Bounds v. Stephenson* (Civ. App.) 187 S. W. 1031.

Where officers of corporation had rendered services ever since organization of company, and no salary had ever been paid them, and it was evident that parties did not intend or understand they were to be paid for their services, payment of back salaries to them by corporation for a year was without consideration, and judgment for amounts was properly rendered against officers in suit by minority stockholders. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

3. — **By-laws providing therefor.**—President of corporation, who rendered services formerly rendered by its manager, worked as a salesman and even helped with the sweep-

ing of the store, held entitled to compensation, though no salary for the president had been fixed by the directors pursuant to the by-laws. *Georgetown Mercantile Co. v. First Nat. Bank* (Civ. App.) 165 S. W. 73.

**4. Management of corporate affairs.**—While, as to the stockholders of a corporation, directors are trustees, as to corporate creditors or third persons they are agents of the corporation. *Dollar v. Lockney Supply Co.* (Civ. App.) 164 S. W. 1076.

Where stockholders of a corporation consisted of the holders of certain trust certificates, representing rights to participate in a town site, their rights could not be terminated by a resolution that they could not vote or draw dividends until they surrendered their certificates for stock certificates, of which they were not notified, except by publication of the resolution in three newspapers in states other than that in which the corporation was organized. *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710, answering certified questions (Civ. App.) 173 S. W. 489.

Notice by publication that holders of irregularly issued shares must exchange them in order to be entitled to dividends held not a repudiation by the corporation of its liability to holders of such shares. *Yeaman v. Galveston City Co.* (Civ. App.) 173 S. W. 489, certified questions answered by Supreme Court, 106 Tex. 389, 167 S. W. 710.

The rights of the corporation are not affected by the dealings of the stockholders among themselves. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991.

That shareholders defeated a motion to reimburse those who financed an investigation of corporate affairs, the expenses of which amounted to \$800 or \$900, does not preclude the board of directors from subsequently paying any legitimate item of such amount. *Rio Grande Fire Ins. Co. v. Herder* (Civ. App.) 180 S. W. 1150.

The mere fact that, where by-laws required 10 days' notice of meeting to stockholders, officers sent with the notice two proxy slips, one of which ran to the officers, and sent also a stamped envelope for return of the proxy, is insufficient to show mismanagement; the additional expense being slight. *Bounds v. Stephenson* (Civ. App.) 187 S. W. 1031.

Evidence held insufficient to show mismanagement of a surety corporation sufficient to warrant, on a stockholder's petition, removal of the president as trustee for stock sales. *Id.*

The borrowing of money in conducting corporation's business, and methods of obtaining loans, were "affairs of the corporation" of which directors had control within Rev. St. 1911, art. 1159. *Cameron v. First Nat. Bank* (Civ. App.) 194 S. W. 469.

**4½. Liability of stockholder.**—See arts. 1146, 1198.

In view of this article, a purchaser, who acquires treasury stock of a corporation after it has been organized, is not liable for the par value of the stock, where it was sold in good faith for an amount less than par. *Witt v. Nelson* (Civ. App.) 169 S. W. 381.

**5. Rights as creditors.**—The law should properly hold the creditor who was president and general manager of a corporation to the utmost good faith in attempted collection of his claim, in order to obtain a preference over other creditors. *McCormick v. Cornell & Wardlaw* (Civ. App.) 193 S. W. 1083.

Until a corporation ceases to be a going concern, it may prefer its creditors, and diligent creditor of such corporation, although a director, can in good faith secure such preference by attachment or garnishment. *Id.*

**7. Corporate property, funds, etc.—Purchase and sale of.**—Directors of a corporation stand in a fiduciary relation to it, and their purchase of corporate property may be set aside at the option of the corporation. *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

Directors and stockholders of a corporation acquiring real estate of the corporation held not entitled to recover for temporary improvements as against dissenting stockholders. *Id.*

**8. Individual profits, etc., from corporate business.**—That attorney is officer or stockholder of corporation does not preclude him from recovering value of professional services rendered corporation outside scope of his duty as such officer or stockholder. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

A director of a corporation cannot contract with it, or have any interest in a contract between it and a third person, and such contract is fraudulent and unenforceable. *Peerless Fire Ins. Co. v. Reveire* (Civ. App.) 188 S. W. 254.

The president of a corporation occupies a fiduciary capacity, and where he personally acquires property with view to disposing of it to company, and does so, he becomes liable to company for any profit he may make, unless he makes full disclosure, and entire contract is open, fair, and honest. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

**9. Dealings with corporation or shareholders.**—Where a corporation was authorized to act as surety, and its officers in its name signed an undertaking for the brother of the president, and on default suffered judgment against it, but took judgment over against the brother and secured a lien on land to secure it, but did not release the judgment, such facts were insufficient to show mismanagement. *Bounds v. Stephenson* (Civ. App.) 187 S. W. 1031.

Officers of corporation, who executed undertaking as surety for president's brother in name of corporation, and on recovery of judgment obtained judgment against the brother and secured a lien on land, held not guilty of fraud. *Id.*

A guaranty by stockholders of the directors, naming them, against personal liability on account of borrowing money to operate the company, does not extend to transactions after a change in the personnel of the directory. *Paddleford v. Wilkinson* (Civ. App.) 194 S. W. 467.

If any recovery can be had on a guaranty of directors against personal liability, where a change was made in directors before debts were paid, it being limited to amount of old debts thereafter paid by hold over directors, such amount must be shown. *Id.*

**10½. Actions—By stockholders.**—Stockholders may sue on behalf of the corporation without first demanding action by officers, where request would be useless. *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

Stockholders held authorized to sue for property of the corporation, claimed adverse-

ly by a majority of the directors and some stockholders, without first requesting the officers to sue. *Id.*

Stockholders, suing to protect corporate rights in land claimed by a majority of its officers and some stockholders, held not required to tender payment of a lien on the land. *Id.*

Minority stockholders held not estopped from suing for the corporation for real estate in possession of a majority of the officers and some stockholders. *Id.*

Label affecting corporation, see *Cummer Mfg. Co. of Texas v. Butcher* (Civ. App.) 176 S. W. 82.

Circumstances justifying suit by stockholder for corporation, must be clear and definite, and it must appear that the object of the suit is to recover debts for the corporation. *Toomey v. First Mortgage Trust Co.* (Civ. App.) 177 S. W. 539.

The rule that a shareholder suing for the corporation is entitled to expenses only if successful does not apply where it is sought to charge a director who disbursed funds to such shareholders under authority of the board. *Rio Grande Fire Ins. Co. v. Herder* (Civ. App.) 180 S. W. 1150.

The fraudulent breach by defendant of a contract to organize a corporation and convey a patent to it does not authorize the subscribers to the stock to recover on preliminary and tentative agreements for the transfer of an interest in the patent to them. *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

Minority stockholders, objecting to establishment of additional plant in another state, and desiring to sue corporation in good faith to protect their own interests, and those of other stockholders, had right to avail themselves of selfish interest of competitor corporation to procure funds to prosecute litigation. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

In suit against corporation by minority stockholder to enjoin act in fraud of his rights, it is not necessary to join as parties defendant majority stockholders at whose instance proposed action is about to be taken. *Id.*

If corporate stock was about to be issued for unauthorized purpose, proper remedy for minority stockholders was to enjoin issuance, and it would not be proper for court to undertake to cancel the authorized capital stock of the corporation or any part simply because it was proposing to issue the same for an unauthorized purpose. *Id.*

12. — **Between shareholders and officers.**—Evidence, in an action against directors of a corporation, held to show that they knowingly permitted funds collected for, and belonging to, another to be appropriated to the corporation's use, rendering them personally liable. *McCullom v. Dollar* (Civ. App.) 176 S. W. 876.

13. **Representation by officers and agents.**—Unless authorized by the charter or directors, the president of a corporation has no greater control over its property than any director. *El Fresno Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

Corporations can be bound by their agents only within the scope of their authority. *Id.*

Acts of the president of a corporation beyond the objects of the corporation and without the scope of his authority cannot bind the corporation. *Morringsport Oil Co. v. Aldridge* (Civ. App.) 193 S. W. 400.

15. — **Actual or apparent authority.**—The apparent authority of the president and manager of a corporation does not include the execution of notes. *El Fresno Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

16. — **Restriction of authority.**—The rule that an agent, though violating his instructions, can bind his principal to the extent of the apparent scope of his authority applies to corporations. *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897.

Where no restriction was known to other contracting party, a contract entered into by general agent of corporation within charter powers is binding on corporation. *Cuero Packing Co. v. Alamo Mfg. Co.* (Civ. App.) 194 S. W. 492.

17. — **Control and conduct of corporate business.**—The president of a manufacturing company had authority to bind the company by a contract for repairs on a building if entered into by him for the benefit of the company. *Texas Mfg. Co. v. Fitzgerald* (Civ. App.) 176 S. W. 891.

18. — **Contracts.**—Where defendant's agent received money for it on a stock subscription, defendant was liable for the money in its agent's hands, and hence was liable for its return if the contract under which the money was paid required its return in certain contingencies, which happened. *Amicable Life Ins. Co. v. Kenner* (Civ. App.) 166 S. W. 462.

For improvement of the property of a corporation, under contract with one of the two stockholders, authorized to do so by the other, the corporation is primarily liable, and the two stockholders are sureties as to each other, though they be principals as to the holder of the debt. *Zachry & Gearhart v. Peterson & Avant* (Civ. App.) 171 S. W. 494.

Where a note was executed by the president of the defendant corporation within the apparent scope of his authority, it was immaterial on the liability of the corporation how the money was to be used. *Coppard v. Farmers' & Merchants' State Bank* (Civ. App.) 184 S. W. 551.

Where defendant wrote to the president of a corporation guaranteeing a third party's debt he knew was due the corporation, the guaranty was available to the corporation. *Martin v. Blair & Hughes Co.* (Civ. App.) 187 S. W. 505.

19. — **Contracts of employment.**—A buyer and inspector of a lumber company has not incidental authority to contract to pay commissions to one indicating where lumber may be secured. *Cummer Mfg. Co. of Texas v. First Nat. Bank of Center* (Civ. App.) 173 S. W. 536.

Evidence held insufficient to show that defendant corporation president hired attorneys without proper authority, or without necessity for their employment, so that he could not be held liable to stockholders for the fees paid them. *Bounds v. Stephenson* (Civ. App.) 187 S. W. 1031.

20. — **Purchases, sales, and warranties.**—The act of the president of a corporation holding the legal title to land for the benefit of the real parties in interest in tak-



ing a conveyance from one of such parties and promising to reconvey held to be the act of the corporation and binding thereon. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

A corporate contract for the purchase of property held properly admitted in evidence in an action on a note, where it was the obvious intention of the parties that it, when taken in connection with the note which was given for the price of the property, should be considered the act of the defendant corporation, and not that of the president, who merely guaranteed the payment of the note. *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897.

Where the president of a corporation purchased property in its name from plaintiff, and gave a note in payment thereof, which he also personally guaranteed, an instruction in a suit on the note to find for defendant, if it was found that plaintiff had stated that he was not looking to the corporation for payment, but to the president, was properly refused, as there could be no finding for defendant, unless it was found as a fact that plaintiff intended to hold the president alone, and the corporation had been in some way released. *Id.*

Under the by-laws of a corporation, providing that the president shall sign all contracts, deeds, etc., executed by it, and that no sale of realty shall be consummated without the consent of the board of directors, the secretary did not have authority to bind the corporation by a contract to sell realty. *Vacarezza v. Realty Inv. Co.* (Civ. App.) 165 S. W. 516.

If the secretary of a corporation had no power to sign a contract for it to convey land, it is immaterial what he thought when he signed the contract in the name of the corporation, or as to whether he signed by mistake, etc. *Id.*

Where a corporation advertised that a certain person was its general manager, his purchase of machinery for the corporation, which it received and installed, bound the corporation for the price. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 167 S. W. 256.

President of lumber corporation held to have held out assistant superintendent as authorized to purchase a steam log loader by referring the seller to such assistant superintendent. *Benford Lumber Mfg. Co. v. Knox* (Civ. App.) 168 S. W. 32.

Officers of corporation, who are not even de facto officers, may not make a purchase for the corporation or bind it by adopting an unauthorized contract of the promoter. *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060.

Action of a majority of the stockholders of a corporation in transferring real estate of the corporation subject to a vendor's lien held not to pass title. *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

Under the law of Louisiana, as well as this state, the president of a corporation has no authority to contract for the sale of corporation lands, in the absence of authority conferred on him by the directors. *Morgan v. Washburn Lumber Co.* (Civ. App.) 180 S. W. 911.

Purchase, by president and general manager of wholesale grocery company, of retail stock of goods at wholesale prices to collect debt, held within his authority, though he also intended to use stock to open retail business by the company. *Crews v. Gulf Grocery Co.* (Sup.) 182 S. W. 1096.

An open crossing over a railroad right of way is so intimately connected therewith that an agent, to obtain the same, should be presumed to have authority to agree to leave such open crossing as a part of the consideration for such right of way. *Malmstrom v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 188 S. W. 453.

Where the officers of a traction company personally contracted with property owners, for a bonus, to purchase lots and have terminals of the company erected thereon, but failed, they were liable to parties who paid bonus. *Eastern Texas Traction Co. v. Harrison* (Civ. App.) 189 S. W. 302.

Where officers of traction company contracted with property owners, in return for bonus, to buy lots and construct thereon terminal buildings without designating themselves as officers, it was their personal engagement. *Id.*

Where officers of traction company agreed to purchase lots and erect thereon terminal buildings, and a bond contained ratification of company to maintain offices in the city, such bond did not necessarily include agreement to construct buildings in accordance with undertaking of officers. *Id.*

Where officers of traction company, for bonus, contracted with property owners to buy lots and erect company's terminal buildings thereon, a bond executed by company and officers engaging to guarantee that officers, should they fail to perform, would return money received, was not ultra vires as to the corporation. *Id.*

A traction company might itself, in return for bonus, contract with property owners in a city to buy lots and erect and maintain its terminal buildings thereon, and could have bound itself to return bonus if it failed to perform. *Id.*

21. — **Collections and payments.**—The president of a corporation had no implied authority, even though he had the management and general control of the corporation, to bind the corporation by an agreement, without consideration, to notify and send a note, payable to the corporation, to a third party in another county, who had assumed the payment. *Ward v. San Antonio Life Ins. Co.* (Civ. App.) 164 S. W. 1043.

22. — **Bonds and mortgages.**—An authorization to the president of a corporation to execute notes does not imply authority to execute liens to secure them. *El Fresnal Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

Where a corporation did not ordinarily give liens to secure loans, its president could not mortgage corporate land without authority from the directors. *Id.*

24. — **Representations and financial statements.**—A corporation is bound by and charged with the fraud of its agents. *Peerless Fire Ins. Co. v. Reveire* (Civ. App.) 188 S. W. 254.

Secretary of investment company held without authority to make statements respecting the record title to lots which had been owned by the company which would estop subsequent purchaser from company from claiming that the record title thereto was then in it. *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

Whether it authorized them or not the principal is liable for and bound by any fraud-

ulent representations made by its agent in securing indorsements on a note in which it was the payee. *Hackney Mfg. Co. v. Celum* (Civ. App.) 189 S. W. 988.

Where all definite assets of bankrupt corporation had been sold, in action against directors for making false financial statements, plaintiffs were not required to accept speculative value of claims in trustee's pending suits, or to await final result thereof. *Cameron v. First Nat. Bank* (Civ. App.) 194 S. W. 469.

Directors are responsible for the truth of corporation's financial statements sanctioned by them during long-continued method of borrowing money on faith of such statements. *Id.*

The general rule that negligent mismanagement of a corporate business will not render directors liable to creditors will not relieve directors from liability for false financial statements sanctioned by them. *Id.*

The fact that a director resided out of the state did not make creditors negligent in relying on assumption that he sanctioned issue of corporation's financial statement, made under his name. *Id.*

That a corporation's financial statement was prepared by employes, under directors' control, cannot relieve directors of responsibility for misrepresentations therein, in view of R. S. 1911, art. 1159. *Id.*

25. — **Wrongful acts.**—Corporate directors, who knowingly appropriated to the use of the corporation the proceeds of cotton held by the corporation for another or knowingly permitted the corporation to do so, are jointly and severally liable with the corporation therefor. *Dollar v. Lockney Supply Co.* (Civ. App.) 164 S. W. 1076.

Manager of corporation, the stock of which had been given as collateral for the note of a third person, and which with the creditor's consent removed its stock of goods from its place of business, after a stockholder's original undertaking to pay the note, held not liable to the creditor for conversion. *Enterprise Trading Co. v. Bank of Crowell* (Civ. App.) 167 S. W. 296.

A corporation is liable for the fraud of its agents, committed within the scope of their real or apparent authority. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

A corporation is liable for the torts of its servants or agents, precisely as a natural person. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 178 S. W. 574.

A corporation is liable for slander uttered by an employe within the scope of his employment. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

A slander, uttered by manager of corporation in giving employe reason for her discharge, was within the scope of his employment. *Id.*

Where a corporation and plaintiff jointly owned secured note payable to plaintiff's order, if president of corporation in its behalf assumed authority to dispose of plaintiff's interest, corporation would be liable in damages to plaintiff for any loss sustained. *Beall v. Clack* (Civ. App.) 190 S. W. 774.

27. — **Estoppel to deny authority or acts.**—Where plaintiff relied solely on the statement of a bookkeeper of an ice company without knowledge that he had a limited power to make purchases, and the company refused to accept or use the goods purchased, it cannot be held liable on the theory that it misled the public by holding out the bookkeeper as manager. *Silsbee Ice & Mfg. Co. v. Tippet-Stanley-Garner Co.* (Civ. App.) 158 S. W. 787.

Legally constituted officers of a corporation are not estopped from denying unlawful acts done by officers not even de facto officers. *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060.

When officers of a corporation make a contract for it, which inures to its benefit, and the results are enjoyed by it, it is estopped to deny the officers' authority to make the contract. *Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin* (Civ. App.) 179 S. W. 541.

One cannot by relying upon its agent's assumption of authority charge a corporation for an unauthorized act of its agent. *El Fresno Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

Where a loan from plaintiff bank was credited to defendant corporation and used to purchase collateral notes for its benefit, it could not escape liability on the ground that it was the independent act of an officer. *Coppard v. Farmers' & Merchants' State Bank* (Civ. App.) 184 S. W. 551.

Express assent by corporation shareholders to unauthorized acts of its president is not necessary to bind corporation which may be estopped to deny unauthorized acts by failure to promptly condemn them and seek judicial redress. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

Corporation which accepts benefits of unauthorized employment of counsel by its president is estopped to deny authority of president to make such contract. *Id.*

A general manager, by authorizing an agent to borrow for purpose outside charter powers, does not estop the corporation to deny liability; the authority to manage the corporation under Rev. Civ. St. art. 1159, being fixed in, and nondelegable by, the directors. *Planters' Oil Co. v. Guaranty State Bank of Mertens* (Civ. App.) 188 S. W. 38.

The doctrine that a corporation, having accepted benefits of an unauthorized act of its agent, is estopped to deny consequent obligations, has no application where no benefits, but only liabilities, resulted. *Id.*

28. — **Ratification and repudiation.**—When an unauthorized act of a corporate agent or officer is beneficial to the corporation, and it acquiesces by an acceptance of the benefits, very slight evidence of a ratification is necessary to charge the corporation with liability for the agent's acts. *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897.

In an action against a corporation on a note executed by the president in pursuance of a contract which he was not authorized to make by a formal vote of board of directors, evidence held to show a ratification. *Id.*

Where the officers and directors of defendant corporation paid \$75 a month for five months under an employment contract for a year, made by its president without author-

ity, such acts constituted a ratification of the contract for the entire term. *Miller v. Sealy Oil Mill & Mfg. Co.* (Civ. App.) 166 S. W. 1182.

Purchase of steam log loader by assistant superintendent of corporation in charge of sawmill plant if unauthorized held ratified by the failure to repudiate the purchase, though the president and general superintendent knew of its purchase and use. *Benford Lumber Mfg. Co. v. Knox* (Civ. App.) 168 S. W. 32.

Where officers of a corporation repudiated a promise to pay a debt made by one who was not even a de facto officer, there was no acquiescence in the unauthorized act. *Exline-Reimers Co. v. Lone Star Life Ins. Co.* (Civ. App.) 171 S. W. 1060.

After rights of attorneys to compensation for services performed for a corporation have accrued, it cannot avoid liability by placing the matter of disbursing funds and employing attorneys in the hands of a finance committee. *Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin* (Civ. App.) 179 S. W. 541.

Authority of a corporation's president to employ an attorney can be presumed where its directors thereafter meet and confer with the attorney on legal matters. *Id.*

Where the directors ratify an unauthorized contract made by the manager of a corporation, such ratification relates back and validates the contract from the beginning. *West Texas Supply Co. v. Duniyan* (Civ. App.) 182 S. W. 425.

An act, ultra vires, though not void, may be ratified either by acquiescence of those charged with management of the corporation or by affirmative ratification. *Coppard v. Farmers' & Merchants' State Bank* (Civ. App.) 184 S. W. 551.

Where the contract has been partly performed, or ratified by a corporation for whom in fact it was made, suit may be brought by such corporation thereon, though the contract was made in a name other than the true name of the corporation. *W. B. Clarkson & Co. v. Gans S. S. Line* (Civ. App.) 187 S. W. 1106.

To be relieved of obligations arising from unauthorized acts of its agent, the corporation must return what it has received therefrom. *Planters' Oil Co. v. Guaranty State Bank of Mertens* (Civ. App.) 188 S. W. 38.

Where notes were executed by corporation as maker and two of its directors owning 93 per cent. of its stock, as indorsers, such notes were binding on the corporation, even if not expressly authorized, since indorsement of a majority of directors and stockholders was equivalent to ratification. *Galveston-Houston Interurban Land Co. v. Dow* (Civ. App.) 193 S. W. 353.

29. — **Notice to officers and agents as affecting corporation.**—Where officers of defendant bank knew the purpose of plaintiffs' draft for \$5,000 to be the purchase of the bank's stock and indorsed it, collected it, and let it remain on deposit in the name of its president as trustee, the knowledge of such officer was the knowledge of the bank; and the fact that the president afterwards misappropriated it did not relieve it from liability to plaintiff. *First State Bank of Seminole v. Shannon* (Civ. App.) 159 S. W. 398.

The fact that one partner was president of the bank in which the firm deposits were kept does not impart to the bank knowledge of an agreement between the partners as to the manner in which the funds were to be deposited and checked out, where the agreement was not communicated to any other officer of the bank. *Amarillo Nat. Bank v. Harrell* (Civ. App.) 159 S. W. 858.

A requested instruction, in an action against a corporation for negligent death in a collision between vehicles, caused by the viciousness of a team of mules belonging to the corporation, which makes the liability of the corporation depend on the knowledge of the character of the mules by an officer or officers, is properly refused. *American Express Co. v. Parcarello* (Civ. App.) 162 S. W. 926.

In an action on accepted drafts, that two persons were interested in both the drawer corporation and the plaintiff corporation, one as an incorporator in both and the other as an incorporator in one and a director in the other, held not to charge plaintiff with knowledge of defendant's equitable defense. *Interstate Finance Co. v. Hosch* (Civ. App.) 163 S. W. 600.

Knowledge of president of lumber company of terms of promoter's unauthorized contract made before incorporation secured while engaged in the company's business was imputable to the company, though it would not have been had he acquired it while engaged in his private business. *Weathersby v. Texas & Ohio Lumber Co.* (Sup.) 180 S. W. 735.

30. — **Notice of authority of agents, etc.**—The validity of a corporate contract of purchase cannot be affected by the seller's want of knowledge that the corporation had by-laws, or that the executing officer lacked authority to bind it. *Canadian Long Distance Telephone Co. v. Selber* (Civ. App.) 159 S. W. 897.

Where a corporation employed a manager of its property, and he employed plaintiff to work for the corporation, which thereafter permitted the former manager to remain in charge of the property as lessee, it was bound to notify plaintiff of the change in the manager's capacity in order to avoid liability on a further contract of employment between them. *Red Mineral Springs Development Co. v. Davis* (Civ. App.) 164 S. W. 427.

Where corporate by-laws provided that the corporation could only convey realty with the consent of its board of directors, persons purchasing realty from it were charged with knowledge that the only power of the acting agent of the corporation was derived from the board of directors. *Vacarezza v. Realty Inv. Co.* (Civ. App.) 165 S. W. 516.

31. — **Evidence as to authority—Sufficiency.**—In an action for land, evidence held to show that an agent of a corporation had authority to bind the company by a verbal sale of land. *Houston Oil Co. of Texas v. Payne* (Civ. App.) 164 S. W. 886.

Authority of an agent to act for a corporation may be shown by a course of dealing in which the acts of the alleged agent were known and recognized by the corporation. *Id.*

It is not necessary that the authority of an agent of a corporation be shown by a record or recital of corporate action, but it may be conferred by a vote of the directors not entered of record, or by a course of dealing. *Id.*

Evidence held to support jury finding that corporation's assistant superintendent in charge of its sawmill plant had authority to purchase a steam log loader. *Benford Lumber Mfg. Co. v. Knox* (Civ. App.) 168 S. W. 32.

Evidence held insufficient to show that defendant lumber company had authorized its

agent to contract on its behalf to pay commissions on lumber purchases for it. *Cummer Mfg. Co. of Texas v. First Nat. Bank of Center* (Civ. App.) 173 S. W. 536.

Evidence held insufficient to show that defendant corporation held out its president as its agent having authority to contract for the sale of its lands. *Morgan v. Washburn Lumber Co.* (Civ. App.) 180 S. W. 911.

The evidence did not show ratification by a corporation of a contract by its president to sell its lands, where it did not show knowledge, through some other officer or agent beside the president, of the facts relating to the transaction. *Id.*

In an action for conversion of cotton mortgaged to plaintiff, and received from mortgagor's wife by defendant's manager, evidence held to warrant a finding of purchase by manager for defendant, and not for himself. *First State Bank of Avinger v. J. J. Segal Co.* (Civ. App.) 181 S. W. 789.

Evidence held to warrant a finding that the agent, with whom plaintiff made the contract, had authority to bind the corporation. *Eastern Texas Traction Co. v. Birdsong* (Civ. App.) 185 S. W. 1031.

A corporation president, who signed a written contract of employment of plaintiff, is sufficiently shown to be the agent of the corporation. *Channell Chemical Co. v. Hall* (Civ. App.) 187 S. W. 704.

Evidence held to sustain a finding that defendant corporation's manager acted within his authority in giving plaintiff a firm check to apply on an indebtedness due plaintiff from a third firm, which was a creditor of defendant's and in which defendant's manager was financially interested. *Munday Trading Co. v. J. M. Radford Grocery Co.* (Civ. App.) 190 S. W. 520.

Evidence held sufficient to sustain finding that corporation authorized execution of notes indorsed by its officers. *Galveston-Houston Interurban Land Co. v. Dow* (Civ. App.) 193 S. W. 353.

In action against directors to recover amount of loan made to the corporation upon misrepresentations in annual statements as to its financial condition, evidence held to sustain special findings for plaintiffs. *Cameron v. First Nat. Bank* (Civ. App.) 194 S. W. 469.

Evidence held to show that directors, in authorizing corporation's financial statement, used to obtain credit, failed to exercise ordinary care. *Id.*

Evidence that directors knew of methods of bookkeeping held sufficient to charge them with notice of falsity of financial statements, used to obtain credit. *Id.*

#### Art. 1160. [662] [586] Directors shall cause record to be kept, etc.

Cited, *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

**Right of inspection.**—Notwithstanding statute, one seeking to examine corporate books to obtain information to be used in furtherance of a scheme to defraud stockholders and wreck corporation is not entitled to aid of courts by mandamus to secure his right to examine corporate books. *Roberts v. Munroe* (Civ. App.) 193 S. W. 734.

**Transfer on books.**—Under arts. 1160 and 1163, a petition to compel transfer of stock on the books by mandamus is insufficient if it fails to show what the by-laws provide as to transfers. *Milner v. Brewer-Monaghan Mercantile Co.* (Civ. App.) 188 S. W. 49.

**Record of corporate proceedings.**—The minute book of a corporation is merely a record of the corporate acts, and a recordation of acts of the corporation is not necessary to their validity. *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897.

#### Art. 1161. [663] [587] Shall report to stockholders and make dividends.

**Dividends.**—A dividend declared by a corporation is in the nature of a debt payable to the stockholder on demand. *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710, answering certified questions (Civ. App.) 173 S. W. 489.

Where board of directors of corporation did not act in bad faith in refusing to disburse surplus in dividends, court would not interfere and require them to declare dividends. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

**Art. 1162. [653] [577] May borrow money.**—Corporations shall have power to borrow money on the credit of the corporation and may execute bonds or promissory notes therefor and may pledge the property and income of the corporation. [P. D. 5944; Acts 1883, p. 98, § 13; Act Feb. 23, 1917, ch. 39, § 1.]

**Explanatory.**—The act amends art. 1162, ch. 3, title 25, Rev. Civ. St., so as to read as above. Took effect 90 days after March 21, 1917, date of adjournment.

**Notes—Ultra vires.**—Under arts. 1140 and 1162, the execution and issuance of notes by corporation cannot be held to be ultra vires in absence of evidence that they were not issued in transaction of corporation's authorized business. *Galveston-Houston Interurban Land Co. v. Dow* (Civ. App.) 193 S. W. 353.

**Implied power.**—The implied powers of a private trading corporation include that of borrowing money and giving security therefor. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Civ. App.) 181 S. W. 534.

**Art. 1164. [665] [589] Corporation restricted to objects of its creation; may contribute to certain enterprises not political; pending suits.**—No corporation, domestic or foreign, doing business in this State shall employ or use its stock, means, assets or other property, directly or indirectly for any purpose whatever other than to accomplish the legitimate business of its creation, or those purposes otherwise permitted by law:

provided that nothing in this section shall be held to inhibit corporations from contributing to any bona fide association, incorporated or unincorporated, organized for and actively engaged for one year prior to such contribution in purely religious, charitable or eleemosynary activities, nor to local, district, or statewide commercial or industrial clubs, or associations, or other civic enterprises or organizations not in any manner nor to any extent directly or indirectly engaged in furthering the cause of any political party, or aiding in the election or defeat of any candidate for office, or aiding in defraying the expenses of any candidate for office, or defraying or aiding in defraying the expenses of any political campaign, or political headquarters, or aiding or assisting the success or defeat of any question to be voted upon by the qualified voters of this State or any subdivision thereof. Provided, that the provisions of this Act shall not in any wise affect any suit now pending in this State on the behalf of the State of Texas for any violation of unlawful contributions by any corporation. [Acts 1907, p. 312, § 5; Act March 22, 1915, ch. 102, § 1; Act Feb. 13, 1917, ch. 15, § 1.]

**Explanatory.**—The title of the act purports to amend art. 1164, Rev. Civ. St., "as amended by chapter 102 of the Acts of the Regular Session of the Thirty-fourth Legislature." The enacting part omits reference to the amendatory act above referred to. Sec. 2 of the act makes it a felony for any officer or agent of a corporation to contribute money for political purposes, and is set forth as art. 1487b, post, of the Penal Code. Took effect 90 days after March 21, 1917, date of adjournment.

See notes under arts. 1140, 1159.

**In general.**—Under this article a land and irrigation company was without authority to contract to guarantee and secure a debt of a third person. *Carla Land & Irrigation Co. v. Asherton State Bank* (Civ. App.) 164 S. W. 1066.

Under arts. 1140, 1164, 1167, a corporation can exercise only powers expressly granted or those necessary or reasonably appropriate to the exercise of such powers. *State v. Country Club* (Civ. App.) 173 S. W. 570.

Under arts. 1164 and 1165, a corporation formed under art. 1121, subd. 29, may not bind itself as accommodation indorser. *McCaleb v. Boerne Electric Power & Mfg. Co.* (Civ. App.) 173 S. W. 1191.

Implied or incidental powers of a private corporation include those usually and customarily attending the business for which it is organized, and those necessary to enable it to fully perform the undertaking designated in the charter. A corporation for "manufacture of cotton seed oil and cotton seed products and the ginning of cotton, with power to purchase, or construct and maintain mills and gins for such purpose, and with power to purchase such goods, wares, and merchandise used for such business," cannot buy and sell baled cotton for speculation. *Planters' Cotton Oil Co. v. Guaranty State Bank of Mertens* (Civ. App.) 188 S. W. 38.

Although by buying and selling baled seeded cotton, a corporation might benefit by enlarging the local cotton market, such is not an implied power of a corporation organized to manufacture cotton seed products. *Id.*

If a corporation agent duly authorized to borrow money on its credit does so and uses it for a purpose outside the charter powers, the corporation cannot avoid liability on the ground of its own wrongful misappropriation of the money. Without actual authority, the general agent of a corporation cannot by contract bind it for money borrowed and used for a purpose outside the charter powers; one who deals with a corporation being charged with notice of limitations of powers by charter. *Id.*

Under this article a corporation for manufacture of cotton seed products cannot speculate in cotton. *Id.*

Transportation corporation cannot contract as insurance company to indemnify employé for the amount spent by him for hospital accommodations, medical treatment, etc., because the statute expressly authorizes insurance corporations to so contract. *Gulf, C. & S. F. Ry. Co. v. Goodman* (Civ. App.) 189 S. W. 326.

**Diversion of funds.**—Assistant general manager of railroad, granted a leave of absence by general manager, duly authorized thereto, on pay and subject to orders, held entitled to recover fixed salary during absence, the company's payment thereof not being prohibited by this article. *Missouri, K. & T. Ry. Co. of Texas v. Bryant* (Civ. App.) 178 S. W. 685.

Where corporation pays a debt believing that it was contracted in due course of business by its agent, when in fact it was for money borrowed for a purpose beyond the charter powers, it can recover the amount so paid. And where a corporation agent is authorized to draw checks and create an overdraft in due course of business, but, without notice to the bank, he draws such a check for a purpose outside the charter powers, the bank can recover the amount from the corporation. *Planters' Oil Co. v. Guaranty State Bank of Mertens* (Civ. App.) 188 S. W. 38.

A general manager, by authorizing an agent to borrow for purpose outside charter powers, does not estop the corporation to deny liability; the authority to manage the corporation under art. 1159, being fixed in, and nondelegable by, the directors. *Id.*

**Liability as partners for acts outside scope of corporate business.**—The managing stockholders of a corporation are liable as partners for the acts of corporate employés while engaged in business for the corporation which it could not be authorized to conduct. *Staaacke v. Routledge* (Civ. App.) 175 S. W. 444.

**Forfeiture.**—A county attorney may not bring suit to forfeit charter of a private corporation, exclusive authority in that respect being conferred by Const. art. 4, § 22, on

the Attorney General. *Union Men's Fraternal & Beneficiary Ass'n v. State* (Civ. App.) 190 S. W. 242.

**Art. 1165. [665] [580] Restrictions upon creation of debts.**

**Accommodation paper.**—Under arts. 1164 and 1165, a corporation formed under art. 1121, subd. 29, may not bind itself as accommodation indorser. *McCaleb v. Boerne Electric Power & Mfg. Co.* (Civ. App.) 173 S. W. 1191.

**Art. 1167. Penalty for violation of either of the last three preceding articles.**

See *State v. Country Club* (Civ. App.) 173 S. W. 570; note under art. 1164.

**Art. 1168. [666] [590] Stock of corporation is personal estate.**

**Nature of property.**—Stock in a corporation is property. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

**Certificate of stock.**—A certificate of stock in a corporation is but a muniment of title, and is not necessary to a subscriber's complete ownership of the stock. *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710, answering certified questions (Civ. App.) 173 S. W. 489.

Irregularities in the issue of stock of a corporation held not to affect the rights of its purchaser as a stockholder. *Id.*

Plaintiffs, by the purchase of trust certificates under a trust agreement providing for the formation of a corporation, held to have become stockholders in the corporation when formed. *Yeaman v. Galveston City Co.* (Civ. App.) 173 S. W. 489, certified questions answered by Supreme Court, 106 Tex. 389, 167 S. W. 710.

Construction placed by the corporation upon a trust instrument constituting its charter and regulating rights of stockholders held proper to be considered in determining the status as a shareholder of the owner of lost trustees' certificates issued under the agreement. *Id.*

Where a corporation was organized to further a business previously in the hands of a joint-stock company formed by the holders of trust certificates evidencing their right to participate, the holders of such certificates held ipso facto stockholders in the corporation, and entitled to all the rights of stockholders, regardless of whether they ever surrendered their trust certificates in exchange for stock certificates. *Id.*

A certificate of stock is not the stock itself, but evidence of its ownership. *Cattleman's Trust Co. of Ft. Worth v. Turner* (Civ. App.) 182 S. W. 438.

Evidence held to show that former petition by plaintiff's predecessors to have certificate issued to them related to same numbered certificate; that a resolution on the minutes of corporation denying the petition was a response to the petition; and that parties to petition by plaintiff's predecessors, or their attorney, had knowledge or notice of resolution denying petition at or about the date of its adoption. *Converse v. Galveston City Co.* (Civ. App.) 189 S. W. 539.

No right exists against a corporation because of lost certificates of stock, where the owner has duplicates issued, sells them, and they are redeemed, though some of the duplicates are erroneously numbered. *Yeaman v. Galveston City Co.* (Civ. App.) 190 S. W. 212.

**Transfer of shares.**—The remedy of a stockholder induced to exchange his stock for stock in another corporation is to rescind and recover back the stock given by him or its value, but he may not do so without returning the stock received or accounting for its value. *Continental Trust Co. v. Cowart* (Civ. App.) 173 S. W. 588.

Want of knowledge of defendants that their agent in selling stock to plaintiff had made false representations held no defense to plaintiff's suit to recover money paid and to enjoin enforcement of purchase-money notes, unless they were purchasers for value without notice. *Cunningham v. Gaines* (Civ. App.) 176 S. W. 148.

In an action to cancel a contract for the purchase of corporate stock and a note given for the price, evidence held sufficient to show that defendant, in procuring the note and contract, made false representations as to the amount of the corporation's capital stock and his right to sell it, and that the note and contract were unsupported by consideration. *Le Master v. Hailey* (Civ. App.) 176 S. W. 818.

The transfer of the capital stock of a railroad does not operate ipso facto as a transfer of the physical properties thereof. *Continental Trust Co. v. Brown* (Civ. App.) 179 S. W. 939.

Where party, to whom share of joint-stock company, which later became corporation, was issued, sold to another person so that either legal or equitable title passed, heirs of seller thereafter had no such title to stock of corporation thereafter chartered as authorized them to maintain suit for recognition as stockholders, etc. *Condit v. Galveston City Co.* (Civ. App.) 186 S. W. 395.

Shares may be sold by parol or pass by delivery of certificate. *Id.*

— **Acquisition by one person of entire stock.**—Purchasers of the entire stock of a corporation held not entitled to recover for misrepresentations by defendants that it was fully paid in. *Vick v. Park* (Civ. App.) 171 S. W. 1639.

Where plaintiffs acquired the entire stock of a corporation, all of the physical properties of the corporation were conveyed to them. *Id.*

Where the entire capital stock of a corporation is sold, its physical properties pass, for that must be the intention of the parties. *Vick v. Park* (Civ. App.) 173 S. W. 989.

Where improvements made by the sellers and purchasers of a corporation's entire capital stock exceeded the amount unpaid on the stock, purchasers cannot recover damages for misrepresentations that it was fully paid in, the value of the improvements having been credited. *Id.*

— **Pledges.**—A pledgee of corporate stock has such an interest in the assets of the corporation as entitles him to invoke equitable relief to prevent the removal of its assets from the place of its domicile and its exchange for stock of another corporation. *Enterprise Trading Co. v. Bank of Crowell* (Civ. App.) 167 S. W. 296.

In a suit to recover stock pledged to secure a debt, and transferred by the pledgee,

the admission in evidence of a letter written defendant by plaintiff, informing him of plaintiff's rights, held not error. *Featherston v. Greer* (Civ. App.) 169 S. W. 912.

Transfer of pledged stock, after indorsement that it was deposited as security had been erased and pledgor's signature had been forged to power of attorney thereon, held to pass no title. *Id.*

A contract, executed contemporaneously with pledge of stock to secure a debt, giving pledgee option to purchase a similar amount of the stock of the same company, held not to show that pledgee had authority to sell pledged stock or estop plaintiff to show lack of authority. *Id.*

— **Evidence.**—In action by heirs for recognition as stockholders, evidence held to authorize finding that plaintiff's ancestor had disposed of his share of stock. *Condit v. Galveston City Co.* (Civ. App.) 186 S. W. 395.

Evidence may be sufficient to show that plaintiff's ancestor had sold corporate stock originally issued to him, though there is no evidence as to the identity of the buyer and no claim to such stock had ever been made. *Green v. Galveston City Co.* (Civ. App.) 191 S. W. 182.

Evidence that one share less of the stock had been issued than plaintiffs admitted in their petition had been taken up by the corporation is sufficient to warrant the jury in finding that the share issued to plaintiffs' ancestor had been taken up by the corporation. *Id.*

In a suit by heirs and legatees to establish the ownership of a share of stock in defendant corporation, evidence held to sustain jury findings that the certificate in question was surrendered or disposed of by plaintiffs' ancestors and canceled by the defendant company. *League v. Galveston City Co.* (Civ. App.) 192 S. W. 350.

The mere fact that certificate of stock was signed by president did not prove that it was then owned by company instead of by president individually. *Mooringsport Oil Co. v. Aldridge* (Civ. App.) 193 S. W. 400.

**Registration of transfer.**—In the absence of statute or corporation by-law, assignee of stock is entitled to have it transferred on the books, although the corporation has a lien for debt, such transfer subject, however, to the lien. *Milner v. Brewer-Monaghan Mercantile Co.* (Civ. App.) 188 S. W. 49.

— **Compelling by mandamus.**—Under arts. 1160, 1168, providing for transfer of stock according to the by-laws, a petition to compel transfer of stock on the books by mandamus is insufficient if it fails to show what the by-laws provide as to transfers. *Milner v. Brewer-Monaghan Mercantile Co.* (Civ. App.) 188 S. W. 49.

— **Effect.**—A corporation stands in the relation of trustee to its stockholders, but this relation applies to the true owners of the stock, and not merely to those who from the records of the corporation appear to be owners. And a corporation, when sued by the heir of one shown by its books to have been the holder of stock, transferable by indorsement of the certificate, can defend the action in the interest of the real owner, though his identity may be unknown to it, if it has evidence that the stock has been sold. *Green v. Galveston City Co.* (Civ. App.) 191 S. W. 182.

**Action to establish right to stock.**—Where defendant corporation, prior to July, 1909, had taken no affirmative steps to repudiate certain rights of plaintiff's ancestor under trust certificates which had been long lost, and plaintiffs had no knowledge of their ownership as heirs of the original owner until August, 1909, and brought suit to establish their rights in November following the action was not barred by laches. *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710, answering certified questions (Civ. App.) 173 S. W. 489.

Evidence held insufficient to show repudiation by defendant corporation of plaintiffs' ancestor's rights as a stockholder. *Id.*

### Art. 1169. [667] [591] Directors may require payment of stock.

3. **Contract of subscription—Construction.**—Subscription contract to stock of a corporation to be organized under laws of Texas, with powers limited by *Vernon's Sayles'* Ann. Civ. St. 1914, art. 1121, held not a contract for stock of corporation organized under laws of another state. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

Where meaning of the term "securities," as used in a stock subscription contract, was doubtful, practical construction given it by both parties should control its interpretation. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

4. — **Liability of subscriber.**—Under a contract to take stock in plaintiff corporation, then "in process of formation" and to be chartered under the laws of the state, the law supplied the condition that the concern should in fact be incorporated, and on performance of such condition the subscriber's liability became absolute and enforceable by action of assumpsit; an action for breach of contract not being the only remedy. *McCord v. Southwestern Sundries Co.* (Civ. App.) 158 S. W. 226.

A corporation's issuance, delivery, or tender of a certificate is not a condition precedent to an action against a subscriber for the balance due upon his subscription. *Id.*

Where notes given for corporate stock were attached to and made a part of the subscription contract, the rejection of the notes, together with the failure to deliver the shares to the person contracting for them, justified him in concluding that the subscription contract had been rejected. *Amicable Life Ins. Co. v. Kenner* (Civ. App.) 166 S. W. 462.

A call for a subscription to stock in a corporation is not necessary when the contract of subscription contains the promise to pay the amount subscribed at a specified date. *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

Conditions prescribed by Legislature, under which charters of corporations may be granted, must be noticed by subscribers, and they are conclusively presumed to contract with reference thereto. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

5. — **Through promoters or agents.**—The provisions of a stock subscription contract for payment for the stock and for expenses of organization held severable, so that

the corporation was not liable for the money paid to the organizers upon rejecting the subscription. *Commonwealth Bonding & Casualty Ins. Co. v. Thurman* (Civ. App.) 176 S. W. 762.

**7. Subscriptions obtained by fraud.**—A prospectus of a corporation, which gives information as to the property, machinery, and appliances of the corporation and its financial condition, contains representations of fact, and, if false and inducing one to purchase stock, the corporation is liable for the damages sustained. *Foix v. Moeller* (Civ. App.) 159 S. W. 1048.

Statements by an agent in taking subscriptions for the increased capital stock of a life insurance company held mere puffing inducements or promises for future performance, and not fraudulent misrepresentations. *Cope v. Pitzer* (Civ. App.) 166 S. W. 447.

False representations by the promoter held such fraud on subscribers as authorized a rescission of the subscription contract. *Bohn v. Burton-Lingo Co.* (Civ. App.) 175 S. W. 173.

Evidence of misrepresentations by the promoters' agent held admissible to show fraud in the inception of the subscription contract sought to be canceled. *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

Evidence held to show that a subscription to corporate stock was not procured by representations that the proposed corporation would loan the subscriber \$50,000, or that the purpose of its organization was to make such loans. *Medlin v. Commonwealth Bonding & Casualty Ins. Co.* (Civ. App.) 180 S. W. 899.

False representations of an agent, taking subscriptions to the stock of a corporation to be organized, that plaintiff could give his note for the stock, and that it would be indefinitely extended, relating to a matter as to which agent had no authority, and which the corporation could not validly carry out, held to warrant rescission of the subscription. *General Bonding & Casualty Ins. Co. v. Mount* (Civ. App.) 183 S. W. 783.

**8. — Reliance on representations.**—Where an agent, authorized to sell stock of a mining corporation, made false representations to induce one to purchase stock, and thereby misled him and prevented him from discovering the truth by inquiry, the agent could not escape liability on the ground of the negligence of the purchaser. *Foix v. Moeller* (Civ. App.) 159 S. W. 1048.

Representations in the sale of corporate stock as to facts concerning which accurate knowledge could be had held fraud, without showing that defendant knew of their falsity. *Harris v. Shear* (Civ. App.) 177 S. W. 136.

**10. — Estoppel.**—Where a subscriber, with knowledge of a misrepresentation, transferred the stock to another, he waived his right to cancel the subscription contract. *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

Fact that corporation to which plaintiff had subscribed was not organized as first agreed to among the subscribers, held not to permit him to defeat his subscription obligation if he had participated to such an extent as would constitute a waiver of the terms of the subscription contract. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936.

Where a stock subscription contract was void because providing for the issue of stock for note, as between stockholder and corporation, held that corporation could not invoke defense of estoppel to stockholder's action for a cancellation of note and deed of trust given to secure it. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

**11. — Effect of fraud and remedies of subscriber.**—In a suit to set aside a subscription to stock, an allegation held to sufficiently show that plaintiff was damaged by the false representations. *Commonwealth Bonding & Casualty Ins. Co. v. Bomar* (Civ. App.) 169 S. W. 1060.

A subscription to capital stock of a corporation induced by fraudulent representations of its agent is not void, but voidable only. *Davis v. Burns* (Civ. App.) 173 S. W. 476.

One who has been induced to subscribe for stock by fraudulent representations may disaffirm his contract and recover any money or thing of value paid thereon. *Id.*

Stock subscriptions procured by fraudulent representations may be rescinded by the subscriber by notifying the corporate authorities, without taking legal proceedings. *Bohn v. Burton-Lingo Co.* (Civ. App.) 175 S. W. 173.

Where the managing officers of a corporation, at the time of accepting a subscription procured by the promoters through fraud, have no notice of the fraud, the subscriber cannot thereafter cancel his subscription contract by reason of the fraud. *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

A subscription procured by fraud of the officers or agents of an existing corporation is voidable at the option of the subscriber. *Id.*

A misrepresentation, by an agent of the promoters, as to the amount of cash paid in, held material, so as to authorize cancellation of a subscription, if the corporation had had notice thereof when it accepted the subscription. *Id.*

Cancellation of stock subscription will not be decreed in favor of a subscriber who has transferred the stock to a third person, who retains possession thereof. *Id.*

Fraudulent promises of defendant's agent to obtain stock subscription contract, contained in the contract, to the effect that the company would loan plaintiff money, would give plaintiff an action for damages. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936.

Corporation accepting subscription contract and notes held not affected by fraud inducing the subscription of which it had no actual notice. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

A concealment and misrepresentation by promoter of corporation to induce plaintiff to purchase its stock held to warrant rescission of contract. *Peerless Fire Ins. Co. v. Reveire* (Civ. App.) 188 S. W. 254.

In view of doctrine whereby subscriptions become trust fund for benefit of its general creditors, corporation's insolvency is a bar to a rescission of subscription contract for fraud. *Thompson v. First State Bank of Amarillo* (Civ. App.) 189 S. W. 116.

In a suit by receiver of an insolvent corporation to collect unpaid stock subscriptions as a general rule, it is no valid defense that subscription contract was procured by fraudulent misrepresentations. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.



**12. Conditional subscription.**—Subscriber to corporate stock who was active in the organization of the company, was elected director, signed affidavit for a charter, and who was also elected second vice president, held to have waived condition of his subscription that it should not be binding until he paid half. *Panhandle Packing Co. v. Stringfellow* (Civ. App.) 180 S. W. 145.

By appointing a representative to act for him at stockholders' meeting at which it was agreed to organize under the laws of Arizona with a paid-up capital stock of less than \$200,000, and accepting an agreement from the new corporation, held that a subscriber waived the conditions of his subscription contract that the corporation should be organized in Texas with a paid-up capital of \$200,000. *Medlin v. Commonwealth Bonding & Casualty Ins. Co.* (Civ. App.) 180 S. W. 899.

Subscriber to corporate stock, who gave note therefor, by executing renewals to the holder, paying interest, and treating the notes as his individual debt, did not waive his option, under collateral contract, to take back the stock, where, before each successive renewal, the subscriber had the same agreement in substance with the party who induced him to subscribe and executed the option. *Bean v. Hall* (Civ. App.) 185 S. W. 1054.

In action by bank, on note given for stock, against subscriber and indorser, facts that subscriber executed renewals and paid interest, treating note as personal debt, was not conclusive, on question of waiver by subscriber of his option, under collateral contract with party who induced him to subscribe, to take back the stock. *Id.*

Promise of corporation to establish loan agency and to make plaintiff its agent, alleged as consideration of plaintiff's contract of subscription, was a condition precedent to plaintiff's liability on his subscription contract. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

**13. Withdrawal or cancellation.**—Under an agency contract whereby plaintiff was to purchase shares of the stock of defendant company, agreement that, on termination of the agency, the company would repurchase the stock at the price paid for it held valid, where the stock was not a part of the original unsubscribed stock. *Hesse Envelope Co. of Texas v. Addison* (Civ. App.) 166 S. W. 898.

The rule that a stock subscription contract cannot be canceled except with the consent of all stockholders does not apply to a contract procured by fraudulent representations of the promoter. *Bohn v. Burton-Lingo Co.* (Civ. App.) 175 S. W. 173.

Failure of a corporation to make plaintiff a loan held not an available ground for cancellation of his stock subscription, where the loan was to be made only on "full payment of said subscription." *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

That the corporation was organized in a state other than that stipulated held sufficient ground for cancellation of the note and deed of trust given in payment for the stock subscribed for. *Id.*

In the absence of waiver or estoppel, a subscription to the stock of a corporation to be organized in Texas with a certain paid-up capital may be avoided, where the company is incorporated in Arizona with a less paid-up capital. *Medlin v. Commonwealth Bonding & Casualty Ins. Co.* (Civ. App.) 180 S. W. 899.

Plaintiff in suit against company to recover amount paid and to cancel note for balance on his stock subscription contract, not showing any pecuniary loss, held not entitled to recover. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936.

In suit to cancel notes given upon a stock subscription, to recover vendor's lien notes given as collateral to such notes, and to recover money paid to defendant company, evidence held to sustain a finding that plaintiff was not guilty of laches in not instituting his suit earlier. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

Where agreement between plaintiff, subscribing to stock in defendant company, and defendant's agent was not notice of alleged misrepresentations with references to amount of capital stock, etc., plaintiff could not rescind without showing that before subscription was accepted defendant had notice thereof. *Id.*

**14. Release or discharge.**—The incorporation of a company for \$10,000, instead of \$15,000, releases subscribers not consenting thereto. *Bohn v. Burton-Lingo Co.* (Civ. App.) 175 S. W. 173.

Action of incorporators making affidavit for charter in naming themselves as only subscribers for the stock, ignoring previous subscribers, including themselves, to written subscription lists, did not affect the mutual obligation of such subscribers to such lists, or the right of the corporation when organized to sue such a one. *Panhandle Packing Co. v. Stringfellow* (Civ. App.) 180 S. W. 145.

**15. Payment.**—See art. 1146 and notes.

Where a stock subscription contract provided that \$5 a share should be paid in cash to the corporation's agents as compensation for services, the corporation could not object that they accepted a less sum from the purchaser, except that, upon rejection of the contract, it was bound to return the sum accepted by the agents under the provision requiring the return of the amount paid in case the contract was rejected. *Amicable Life Ins. Co. v. Kenner* (Civ. App.) 166 S. W. 462.

Where a subscriber to the capital stock of a corporation has paid his subscription or complied with the requisites entitling him to stock, he thereby becomes a stockholder, regardless of whether a certificate is ever issued to him. *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710, answering certified questions (Civ. App.) 173 S. W. 489.

A voluntary payment by a third person to a corporation of the amount due on a stock subscription extinguishes the debt due from subscriber. *General Bonding & Casualty Ins. Co. v. Mosely* (Civ. App.) 174 S. W. 1031.

**19. Estoppel to allege invalidity.**—Evidence held insufficient to show estoppel in pais of corporation to deny validity of trustees' certificates as shares of stock in it. *Yeaman v. Galveston City Co.* (Civ. App.) 173 S. W. 489, certified questions answered by Supreme Court, 106 Tex. 389, 167 S. W. 710.

Where a subscriber to stock, induced thereto by misrepresentations, after discovering the facts renewed the note given for the price, he waived the fraud and acquiesced there-

in, and could not have cancellation of the note. *Cattlemen's Trust Co. of Ft. Worth v. Pruett* (Civ. App.) 184 S. W. 716.

In suit by a subscriber to stock, induced thereto by misrepresentations as to par value, to cancel the note given for the price, evidence held to show conclusively that plaintiff, when he renewed the original note, knew the untruth of the representations, and had consulted with his attorneys. *Id.*

Executing proxy by subscriber to stock of corporation, to be organized in Texas, held not to estop him from rescinding his subscription, where the corporation was organized in another state. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

#### Art. 1170. [668] [592] Stock forfeited, when and how.

What constitutes issue of stock.—Under Const. art. 12, § 6, and in view of this article, subscription to stock of corporation to be organized, accompanied by subscription notes secured by deed of trust on land, without delivery of the stock, held not an issue of stock, and hence not illegal or void. *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

#### Art. 1173. [676] [600] Corporation may convey lands, how.

Execution of deed.—A deed executed by a corporation, attested by its seal, carries with it prima facie evidence of antecedent authority for its execution, though it does not recite such authority on the part of its president and secretary, duly executing and acknowledging the deed. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

A deed executed by a corporation is not inadmissible in evidence because it was made by the president of the corporation to himself. *Coleman v. Luetcke* (Civ. App.) 164 S. W. 1117.

Purported deed of railroad company incorporated by the act approved February 2, 1856 (4 Gammel Laws of Texas, p. 347), signed by its president and secretary, without proof of precedent authority or holding out, or former course of dealing or of ratification, held inadmissible to show that title had passed out of the company. *Emory v. Bailey* (Civ. App.) 181 S. W. 831.

Release of mortgage.—In view of this article, release of mortgages executed by a church by its corresponding secretary held not valid. *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

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## CHAPTER FOUR

### LAND—ACQUISITION, ETC., OF, RESTRICTED

#### Article 1175. Purchase of land, unless necessary to business or to secure debts, prohibited.

In general.—In the absence of prohibition in statute or charter a corporation can take and hold land, except as restricted by the objects of its creation and the limitations of its charter. *Wooten v. Dermott Town-Site Co.* (Civ. App.) 178 S. W. 598.

Since a corporation may recover land on record title acquired by ultra vires act, no reason can be advanced why it cannot do so on a title by limitation so acquired. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

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## CHAPTER EIGHT

### LIABILITY OF STOCKHOLDERS AND DIRECTORS

Art.	Art.
1198. When and how stockholders may be made liable on execution.	1200. Directors liable for debts of corporation, when and to what extent.

#### Article 1198. [671] [595] When and how stockholders may be made liable on execution.

Cited in dissenting opinion *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Civ. App.) 184 S. W. 776.

Creditor can sue stockholders directly, when.—A petition merely stating that defendants were the principal shareholders of a corporation, for which plaintiff rendered services, held not to state a cause of action against the defendant shareholders; the petition not coming within arts. 1198, 1206, 1208. *Seaton v. Majors* (Civ. App.) 182 S. W. 712.

Liability as stockholders—In general.—The charter of a foreign corporation or the statute under which it was organized determines the liability of resident shareholders to its creditors, and, if a shareholder is liable at all, he is liable only according to the law of the corporation's domicile. *Nesom v. City Nat. Bank* (Civ. App.) 174 S. W. 715.

In a creditor's action to recover unpaid stock subscription, held that evidence that defendants had repudiated the subscriptions for fraud with the corporation's consent be-

fore credit was extended by plaintiff was admissible. *Bohn v. Burton-Lingo Co.* (Civ. App.) 175 S. W. 173.

A person induced by fraud to become a subscriber to corporate stock is relieved from liability to corporate creditors, where he repudiates his subscription promptly and before the rights of creditors have intervened. *Id.*

Capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of its general creditors. *Thompson v. First State Bank of Amarillo* (Civ. App.) 189 S. W. 116.

— **Unpaid subscriptions.**—Where the principal stockholder and manager of a corporation advanced money to it with knowledge of the stockholders and other directors, he may, upon being held liable for an unpaid amount on his stock, set off his claim against that of the corporation's creditors; the money advanced having become part of the corporate assets. *Witt v. Nelson* (Civ. App.) 169 S. W. 381.

Under Const. art. 12, § 6, and Rev. St. 1911, arts. 1146, 1198, held that stockholders who paid nothing for common stock issued to them were liable for an amount sufficient to pay unsecured creditors of the insolvent corporation. *Rowan v. Texas Orchard Development Co.* (Civ. App.) 181 S. W. 871.

Each of several stockholders to whom stock had been issued without any payment being made therefor held liable on such stock only for his proportionate part of debts due unsecured creditors of the insolvent corporation. *Id.*

— **Effect of transfer of stock.**—Stockholder's liability may be enforced as against subscribers and transferees with knowledge of nonpayment of the stock. *Witt v. Nelson* (Civ. App.) 169 S. W. 381.

Where, upon organization of a corporation, half of its capital was paid in and stock issued therefor, and thereafter stockholders became indebted to the corporation, which took over their shares, a subsequent purchaser of such shares, who bought for a sum less than par, is not liable to the creditors of the corporation. *Id.*

Where corporate stock is transferred before the whole of the subscription price has been paid, and the transfer is duly recorded, the transferee is usually discharged from further liability upon the subscription. *Rich v. Park*, 177 S. W. 184.

Under Const. art. 12, § 6, subscribers to the stock of a corporation who had not fully paid for stock received are guarantors of the balance due regardless of transfer. *Id.*

A purchaser of corporate stock is liable for sums due thereon if he bought with knowledge, notwithstanding representations that it was fully paid in. *Id.*

**Art. 1200. [670] [594] Directors liable for debts of corporation, when and to what extent.**

**Misapplication of funds.**—Corporate directors are liable for the misapplication of funds held in trust by the corporation. *Dollar v. Lockney Supply Co.* (Civ. App.) 164 S. W. 1076.

Corporate directors or trustees, who commingle money collected for another with the corporate funds, contrary to the instructions of the owner, or knowingly permit their employes to do so, resulting in the loss of such funds, are personally liable therefor. *Id.*

## CHAPTER NINE

### INSOLVENT CORPORATIONS

<p><b>Art.</b> 1201. Unlawful for insolvent corporations to do business in state. 1202. Attorney general, etc., to bring quo warranto, etc., to forfeit charter or cancel permit; receiver, etc.</p>	<p><b>Art.</b> 1203. Stockholders or creditors may sue to dissolve when; by leave of court, with notice, etc. 1204. Rights and remedies cumulative.</p>
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**Article 1201. Unlawful for insolvent corporations to do business in state.**

Cited, *Texas Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298; *Floore v. Morgan* (Civ. App.) 175 S. W. 737.

**Art. 1202. Attorney general, etc., to bring quo warranto, etc., to forfeit charter or cancel permit; receiver, payment of indebtedness as affecting suit, etc.**

Cited, *Texas Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298.

**Art. 1203. Stockholders or creditors may sue to dissolve when; by leave of court, with notice, etc.**

Cited, *Texas Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298; *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835; *Leary v. International Coal & Wood Co.* (Civ. App.) 185 S. W. 665.

**Receiver.**—A corporation having joined a plaintiff in a suit for dissolution, its statutory right to be served with 10 days' notice of the application for receiver is waived. *Floore v. Morgan* (Civ. App.) 175 S. W. 737.

It is an objection to a petition for the appointment of a receiver of a corporation that it does not show that the receiver could care for its property better than could be done by its officers as trustees, pursuant to art. 1206. *Id.*

In a suit for receivership and for an injunction against sale on foreclosure of a first lien against corporate property, an allegation that it would not sell for its full value by reason of uncertainty of title, unpaid judgments, and suits against it, is insufficient for the appointment of a receiver. *Id.*

Under arts. 1203, 2128, § 3, suit by minority stockholders for receivership of going corporation, not shown to be insolvent or in imminent danger of insolvency, held not maintainable. *Toomey v. First Mortgage Trust Co. (Civ. App.) 177 S. W. 539.*

Under this article held, that appointment of receiver is not authorized. *Kokernot v. Roos (Civ. App.) 189 S. W. 505.*

No notice is required to be given a corporation by the stockholder owning 25 per cent. of its stock seeking to dissolve it, and in such suit the appointment of a receiver is not authorized. *Id.*

#### Art. 1204. Rights and remedies cumulative.

Cited, *Texas Mexican Ry. Co. v. State (Civ. App.) 174 S. W. 298.*

**Exclusive remedy.**—Art. 1201 et seq. held not to provide an exclusive remedy where a corporation has failed to pay its franchise tax. *Canadian Country Club v. Johnson (Civ. App.) 176 S. W. 835.*

## CHAPTER TEN

### DISSOLUTION OF PRIVATE CORPORATIONS

<p>Art. 1205. Corporation is dissolved, how. 1206. Unless receiver appointed, president etc., to be trustees, and close business.</p>	<p>Art. 1207. Trustees responsible to creditors, etc., to what extent. 1208. Liability of stockholders to creditors and to each other. 1210. Only liable for unpaid stock.</p>
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#### Article 1205. [680] [604] Corporation is dissolved, how.

**Acts of incorporators.**—Failure of a corporation to pay its franchise tax is not an act of dissolution. *Canadian Country Club v. Johnson (Civ. App.) 176 S. W. 835.*

**Actions by or against corporation after dissolution.**—In an action by a creditor of a corporation after dissolution, a director held not injured because an equitable lien was established and foreclosed on property of the corporation in his hands. *Lakeside Irr. Co. v. Buffington (Civ. App.) 168 S. W. 21.*

That the foreclosure of a lien in an action by a creditor against a corporation after dissolution was against property in the hands of a director, while the judgment was in name against the corporation, was immaterial; it being in effect a suit to subject the property of the corporation to plaintiff's demand. *Id.*

A corporation which had become nonexistent by its dissolution had no capacity to prosecute an appeal from a judgment against it. *Corsicana Transit Co. v. Walton (Civ. App.) 189 S. W. 307.*

**Abatement of action.**—Where a corporation was dissolved, the remedy was to abate an action against it, and not to direct a judgment on the merits in its favor. *Corsicana Transit Co. v. Walton (Civ. App.) 189 S. W. 307.*

**Forfeiture—Grounds.**—Under this article a quasi public corporation organized to dredge a channel across Galveston Bay, that has been guilty of nonuser of its corporate franchise, and that has rendered future exercise impossible by sale of essential property, will forfeit its charter to the state. *West End Dock v. State (Civ. App.) 173 S. W. 285.*

Where no showing is made that such corporation owes debts, judgment in favor of the state for public lands granted it at its incorporation is proper. *Id.*

#### Art. 1206. Unless receiver appointed, president, etc., to be trustees, and close business.

Cited, *Allison v. Richardson (Civ. App.) 171 S. W. 1021*; *Canadian Country Club v. Johnson (Civ. App.) 176 S. W. 835.*

**Application.**—A petition merely stating that defendants were the principal shareholders of a corporation, for which plaintiff rendered services, held not to state a cause of action against the defendant shareholders; the petition not coming within arts. 1198, 1206, 1208. *Seaton v. Majors (Civ. App.) 182 S. W. 712.*

**Appointment of receiver.**—Under this article a receiver, appointed and discharged prior to dissolution, was not a receiver within the exception of the statute; the corporation not having been dissolved. *Lakeside Irr. Co. v. Buffington (Civ. App.) 168 S. W. 21.*

It is an objection to a petition for the appointment of a receiver of a corporation that it does not show that the receiver could care for its property better than could be done by its officers as trustees, pursuant to this article. *Floore v. Morgan (Civ. App.) 175 S. W. 737.*

**Injunction.**—Where no cause of action against a corporation was alleged nor was its dissolution warranted, a temporary injunction restraining corporation officers from carrying on the business will be denied; it being asked as an adjunct to the appointment of a receiver which was refused. *Leary v. International Coal & Wood Co. (Civ. App.) 185 S. W. 665.*

**Effect of dissolution.**—The abatement of a suit pending against a corporation on appeal when such corporation was dissolved was prevented by this article. *Clark Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273, 37 Sup. Ct. 283, 61 L. Ed. 715.*

A Texas corporation after its legal dissolution was incapable of defending suit on contract incurred during its corporate existence, this article not expressly or inferentially conferring such power. *Orange Lumber Co. v. Toole* (Civ. App.) 181 S. W. 823.

**Trustees to close business.**—After forfeiture of the right of a corporation to do business under art. 7399, directors held entitled to sue as stockholders to set aside a void judgment against the corporation, though not as trustees under this article. *Favorite Oil Co. of Beaumont & Cleburne v. Jef Chaison Townsite Co.* (Civ. App.) 162 S. W. 423.

In an action by a creditor of a corporation after dissolution against the president and directors as trustees, as authorized by this article, the stockholders were not necessary parties. *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

Under this article the stockholders could not, after dissolution, appoint a third party trustee so as to prevent the president and directors from becoming trustees of the creditors. *Id.*

In action against corporation after its dissolution, and against its statutory trustee to wind up its affairs, not alleging that the corporation on its dissolution had any assets or that the trustee received any assets, judgment against the trustee was erroneous. *Orange Lumber Co. v. Toole* (Civ. App.) 181 S. W. 823.

**Limitation of action.**—Where the director and officer of a legally dissolved corporation was sued on the corporation's contract as its trustee under this article, limitations would run in his favor as against the creditor, although the trustee did not give notice of his repudiation of the trust. The limitation was not suspended until 12 months after such dissolution; the provision of article 5704 not applying. *Orange Lumber Co. v. Toole* (Civ. App.) 181 S. W. 823.

**Art. 1207. [683] [607] Trustees responsible to creditors, etc., to what extent.**

**Lien on assets.**—The creditors of a liquidating corporation have an equitable lien on its assets in the hands of the stockholders or trustees to secure their claims. *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

**Art. 1208. [684] [608] Liability of stockholders to creditors and to each other.**

See *Seaton v. Majors* (Civ. App.) 182 S. W. 712; note under art. 1206.

Cited in dissenting opinion, *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Civ. App.) 184 S. W. 776.

**Art. 1210. [686] [610] Only liable for unpaid stock.**

Cited in dissenting opinion *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Civ. App.) 184 S. W. 776.

## CHAPTER ELEVEN

### RELIGIOUS, CHARITABLE AND OTHER CORPORATIONS

Art.	Art.
1212. Powers and privileges of.	1214. Certain orders may incorporate, how.

**Article 1212. [713] [637] Powers and privileges of.**

**In general.**—Where a church was operating under a charter for some time acquiesced in by defendants, it had a right to proceed without interference from them, whether or not the charter was in accord with their ideas. *Richardson v. General Assembly of the Church of the Living God* (Civ. App.) 191 S. W. 148.

**Officers.**—Where application for writ of garnishment shows on its face that the affiant is a trustee of a church, his act will be considered as act of church itself. *Queen Ins. Co. v. Keller* (Civ. App.) 186 S. W. 359.

**Art. 1214. Certain orders may incorporate, how.**

**Right to name.**—A colored order, known as the Free and Accepted Masons, held not entitled to enjoin a rival order from the use of the name of the Ancient Free & Accepted Masons, Colored. *Free and Accepted Masons of the State of Texas v. Ancient Free and Accepted Masons, Colored* (Civ. App.) 179 S. W. 265.

## CHAPTER THIRTEEN

### TELEGRAPH CORPORATIONS

Art.	Art.
1231. May set poles, etc., across public roads, etc.	1235. Cities, etc., may direct as to posts, etc.
1232. May enter upon lands, etc.	

**Article 1231. [698] [622] May set poles, etc., across public roads.**

**Construction and application in general.**—Rev. St. 1911, arts. 1231, 1235, relating to the use of streets and roads by telegraph companies, applies only to companies organized to construct and maintain telegraph or telephone lines. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

A county which has an easement in a public road cannot authorize the establishment of a private telephone line thereon. *Id.*

**Interstate commerce.**—Franchise granted by municipality to telegraph company held taxable as property, so that imposition of taxes thereon placed no burden on interstate commerce, though company was engaged in interstate business. *Western Union Telegraph Co. v. City of Houston* (Civ. App.) 192 S. W. 577.

**Rights in and use of streets, roads, and other public places.**—While, under this article, distance telegraph and telephone companies may use the streets of a town or village without interference from it, a company doing a local telephone business is subject to regulation by the town or village. *Athens Telephone Co. v. City of Athens* (Civ. App.) 163 S. W. 371.

The erection of telephone poles and wires along a public street or highway does not impose any additional servitude upon the highway, so as to require a telephone company to condemn the land of the street for that purpose. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

Under this article, art. 1232, permitting such corporations to condemn a right of way, and art. 1235, permitting municipal authorities to specify where telegraph posts, etc., shall be permitted, a reservation in a dedication deed, retaining power to grant to such corporations a right to construct a line over and across the streets, was void. *Id.*

A *de facto* corporation is considered such for all purposes, including that of constructing a telephone line upon and across any street, which right is given to telegraph corporations by this article. *Id.*

Subject to regulation restriction of art. 1235, telegraph and telephone companies have absolute right to use ways of municipalities for transmitting telegrams and long-distance telephone messages, as provided by this article. *Athens Telephone Co. v. City of Athens* (Civ. App.) 182 S. W. 42.

Telephone companies have no right to place wires over railway tracks in space necessary to railway company's use without consent or condemnation, and, in absence of such right, must place wires at a reasonable elevation. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

Telephone company, when occupying its own zone above a railway track, is similar to tenant of upper story of building, and it must use its property so as not to interfere with railway company's right. *Id.*

**Consent of municipality.**—Condition of grant of right to use streets for local telephone business, limiting the rental which might be charged, held binding on a telephone company which acquired the rights of the grantee. *Athens Telephone Co. v. City of Athens* (Civ. App.) 163 S. W. 371.

Telephone company, agreeing to maximum rate to secure franchise from town incorporated under general laws, held bound by provision therefor in franchise. *Athens Telephone Co. v. City of Athens* (Civ. App.) 182 S. W. 42.

Telephone rate fixed in franchise to local telephone company held not inoperative, because not evidenced by separate contract therefor signed by company. *Id.*

Where owners of telephone system, legally obligated to maximum rate in franchise from town incorporated under general laws, sold system to company incorporated to own and operate it, which took system over in payment for four-fifths of capital stock, corporation could not increase such maximum rate. *Id.*

**Payment for use of streets or roads.**—Const. art. 8, § 1, providing for equal and uniform taxation, is not violated by an ordinance requiring certain of the companies maintaining poles in the streets to pay an annual privilege fee therefor. *Southwestern Telegraph & Telephone Co. v. City of Dallas* (Civ. App.) 174 S. W. 636.

If poles of a telephone company used for long distance are not subject to ordinance imposing annual fee of \$2 per pole in its streets, the company sued for the fee must make known the poles so used. *Id.*

Under power in city's charter to regulate use of its streets, it can charge telephone companies for use and occupation of streets with poles. *Id.*

That a telephone company is unlawfully on streets does not, in absence of power in the city's charter, give it right to require payment by the company of a privilege fee. *Id.*

A fee of \$2 per pole per year imposed by an ordinance for maintaining telephone poles in streets cannot be said, as matter of law, to be unreasonable. *Id.*

### Art. 1232. [699] [623] May enter upon lands, etc.

**De facto corporation.**—A *de facto* corporation may exercise the power of eminent domain. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

**Damages—Additional use or burden.**—Where the fee of a county road, as well as that of the right of way of a railroad company, remains in the landowner, the erection of a telephone line on either is an appropriation of his property which cannot be justified, except in case of condemnation by a public service telegraph or telephone company. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

**Reservation in dedication deed.**—Under art. 1231, permitting telegraph corporations to set their poles, etc., in streets, article 1232, permitting such corporations to condemn a right of way, and article 1235, permitting municipal authorities to specify where telegraph posts, etc., shall be permitted, a reservation in a dedication deed, retaining power to grant to such corporations a right to construct a line over and across the streets, was void. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

### Art. 1235. [702] [626] Cities, etc., may direct as to posts, etc.

Cited, *Athens Telephone Co. v. City of Athens* (Civ. App.) 163 S. W. 371.

**Application.**—Arts. 1231 and 1235, apply only to companies organized to construct and maintain telegraph or telephone lines. *Acme Cement Plaster Co. v. American Cement Plaster Co.* (Civ. App.) 167 S. W. 183.

**Right to use streets, etc.**—Subject to regulation restriction of this article telegraph and telephone companies have absolute right to use ways of municipalities for transmitting telegrams and long-distance telephone messages, as provided by article 1231. *Athens Telephone Co. v. City of Athens* (Civ. App.) 182 S. W. 42.

**Reservation in dedication deed.**—See *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50; note under art. 1232.

## CHAPTER FOURTEEN

### TELEPHONE AND TELEGRAPH COMPANIES

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**4. Injuries from construction or maintenance.**—Notwithstanding wires of an electric company were originally properly constructed, it was bound to maintain them so as to prevent their coming in contact with other wires that might be thereafter stretched across the street, and to keep them properly insulated. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

A telephone company, liable for injury to traveler from its wire over the road being too low, may not recover over against the owner of a boat, during the moving of which by an independent contractor the wire was lowered, though such owner agreed with the contractor to be responsible for damage to wires. *Texarkana Telephone Co. v. Burge* (Civ. App.) 192 S. W. 807.

A telephone company held liable for injury to a traveler on a road through its wire being too low, though lowered by a third person, it not having remedied it in a reasonable time after notice. *Id.*

**7. What law governs.**—A telegraph company receiving a message in Tennessee for delivery in Texas is liable for mental anguish caused by its failure to deliver the message in Texas. *Bailey v. Western Union Telegraph Co.* (Civ. App.) 171 S. W. 839.

In determining the liability of a telegraph company for negligence in the transmission of an interstate dispatch, as affected by the contract limiting its liability, the federal law is controlling, since by Act Cong. June 18, 1910, Congress has undertaken the regulation of interstate telegraphic communication. *Western Union Tel. Co. v. Schoonmaker* (Civ. App.) 181 S. W. 263.

Where telegraph company negligently failed to deliver message originating in state where damages for mental anguish could be recovered, court of forum in allowing recovery of such damages did not place burden on interstate commerce contrary to Const. U. S. art. 1, § 8, subd. 3. *Western Union Telegraph Co. v. Bailey* (Civ. App.) 184 S. W. 519.

Until Congress has acted and passed laws regulating the recovery for breach of a contract for the delivery of an interstate telegram, the state courts are warranted in following their own laws. *Id.*

While the mental anguish doctrine prevails in Texas, such damages cannot be recovered in action for delay or nondelivery of a telegram originating in a state where such damages are not allowed. *Id.*

In suit for negligent delay in delivering telegram, law of state where message was sent and contract for transmission made governed question of whether damages for mental suffering without physical injury were recoverable. *Western Union Telegraph Co. v. Smith* (Civ. App.) 188 S. W. 702.

If, by Act Cong. June 18, 1910, amending Interstate Commerce Act, subjecting telegraph companies to provisions of the act, Congress has taken full charge of the subject, sender of interstate telegram which is negligently delayed cannot recover for mental suffering, a right given by statute in Texas. *Id.*

In action for tort, law of place where wrong was committed controls on question of damages. *Id.*

Permitting the recovery of damages for mental anguish caused by failure to deliver an interstate telegram is not an arbitrary burden on interstate commerce, or an unreasonable interference with such commerce. *Western Union Telegraph Co. v. Martin* (Civ. App.) 191 S. W. 192.

Where Congress once assumes control over a subject or territory committed to it by the Constitution of the United States, all power of the separate states over such subject or territory is at an end. *Western Union Telegraph Co. v. Piper* (Civ. App.) 191 S. W. 817.

That federal Const. art. 1, § 8, gave Congress power to regulate interstate commerce, and that Congress passed Interstate Commerce Act in 1887 will not deprive states of power to enforce their own rules and public policy over interstate commerce, when not in conflict with some congressional enactment. *Id.*

Despite amendment of June 18, 1910, to Interstate Commerce Act, classifying telegraph companies as common carriers subject to Interstate Commerce Laws, rules of decision of the state determine the liability of a telegraph company for negligence in transmitting an interstate message. *Id.*

Under the Carmack Amendment to Interstate Commerce Act, § 6, telegraph company cannot assert validity and binding force of rate or regulation under interstate commerce law, when it has not complied with plain requirement of such law by filing its rates and regulations with Interstate Commerce Commission. *Id.*

Amendment of June 18, 1910, to Interstate Commerce Act subjected telegraph companies to regulations of Congress that can be appropriately applied to them and to their character of business. *Id.*

**8. Conduct of business in general.**—By Interstate Commerce Act, providing that interstate carriers publish and post in conspicuous places their rates and regulations, Congress intended that sender of telegraph message have open notice of all rates or regula-

tions, in addition to that implied by law from fact of sending telegram which bears printed terms on back. *Western Union Telegraph Co. v. Piper* (Civ. App.) 191 S. W. 817.

14. **Delivery of messages, and failure to deliver or misdelivery.**—A telegraph company is bound only to exercise ordinary care to transmit and deliver a message within a reasonable time and is not under the absolute duty of so doing. *Western Union Telegraph Co. v. Cathey* (Civ. App.) 166 S. W. 714.

That a telegraph company did not deliver a message consigned to the care of a telephone company to that corporation, or disclose the contents of the message, warrants a finding that the telegraph company did not use ordinary care to deliver the message. *Western Union Telegraph Co. v. Oakley* (Civ. App.) 181 S. W. 507.

Where the agent of a telegraph company, instead of delivering a message to a telephone company to which it was consigned, attempted to discover the addressee through the agency of the telephone company, the telegraph company was liable for the negligence of the telephone company. *Id.*

15. — **Delivery to person other than addressee.**—Where a telegram is addressed to the addressee in care of another person, delivery to either promptly made is sufficient, but a delivery to one in the office of such person to still a third person is not sufficient, in the absence of authority on his part to receive messages. *Western Union Telegraph Co. v. Hill* (Civ. App.) 162 S. W. 382.

Where a telegram is sent to an addressee in care of a third person or a corporation, delivery to either relieves the telegraph company of liability. *Western Union Telegraph Co. v. Oakley* (Civ. App.) 181 S. W. 507.

Where a telegram is addressed to a person in care of another, delivery by the company to the other relieves the company from all liability. *Western Union Telegraph Co. v. Winter* (Civ. App.) 184 S. W. 335.

16. — **Delivery outside of city or free delivery limits.**—Where three telegrams were delivered to a telegraph company, two addressed to "J. C. Stewart, Bernice, La." and the other to "J. C. Stewart, Junction City, Ark." and the contract was to deliver the telegrams to J. C. Stewart at those places, the company was not required to deliver the telegrams to the addressee in the country six miles from Bernice, La., and ten miles from Junction City, Ark. *Stewart v. Western Union Telegraph Co.* (Civ. App.) 158 S. W. 1034.

In the absence of a special contract, a company is not liable for failure to deliver a message beyond the limits of the city of destination or beyond the free delivery limits thereof. *Western Union Telegraph Co. v. Kersten* (Civ. App.) 161 S. W. 369, rehearing denied 161 S. W. 1091.

Where a telegraph company establishes free delivery limits, the burden rests on it to ascertain whether the addressee of a message resides within the limits, and if necessary, make demand for the requisite fee for delivery beyond the limits. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

20. — **Effect of misspelling of name of addressee.**—A telegraph company not negligent in transmitting a telegram addressed to plaintiff, but which, with notice of probable damage, was negligent in not delivering it to him, although, as received, the middle initial was different, was liable in damages. *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925.

A telegraph company held bound to use ordinary diligence, notwithstanding a mistake in the addressee's name. *Western Union Telegraph Co. v. Holcomb* (Civ. App.) 175 S. W. 750.

Where a telegram addressed in care of a third person had the addressee's name changed beyond recognition by the negligence of the sending agent of the company, so that it reached such third person with the name of the addressee changed, the delivery to the third person did not constitute in law a delivery to the addressee. *Western Union Tel. Co. v. Schoonmaker* (Civ. App.) 181 S. W. 263.

Where the sending agent of a telegraph company negligently changed the name of the addressee of a message sent in care of a third person, the fact that the third person, on receipt of the message, thought it might be intended for the addressee did not render delivery to him a delivery to the addressee. *Id.*

22. — **Nature and contents of message and relationship between sender and addressee, and notice thereof to company.**—A telegraph company must take notice of the relationship of an addressee to a person whose illness or death is announced in the telegram. *Western Union Telegraph Co. v. McMillan* (Civ. App.) 174 S. W. 918.

Where a telegraph message relates to death or sickness, notice of relationship need not be conveyed by the face of the message, but may be conveyed by oral statement to the agent of the telegraph company who receives the message for transmission. *Herring v. Western Union Telegraph Co.* (Sup.) 185 S. W. 293.

That a telegraph message relates to death or sickness is sufficient to put the agent of the telegraph company upon inquiry, and if he fails to make such inquiry, his principal will be charged with the information which would have been disclosed. *Id.*

Where a telegraph message was worded, "Your father died this afternoon at four o'clock," being insufficient to charge telegraph company with notice that addressee of message would request a postponement of funeral until he could arrive, damages suffered by addressee held too remote. *Western Union Telegraph Co. v. Griffiths* (Civ. App.) 187 S. W. 348.

A telegraph company held charged with notice of the relationship existing between the addressee and the parties named in a telegram. *Goodson v. Western Union Telegraph Co.* (Civ. App.) 188 S. W. 736.

A telegram, reading, "Send Oscar at once to wait on father," held sufficient to put the telegraph company on notice that the father of the addressee and Oscar, brothers, was sick. *Id.*

A telegram: "Sterling Dosier, Colo. Texas. Tom Tucker's baby died to-day. If any one can come send telegram. [Signed] Sam Corley"—sufficiently put the telegraph company on inquiry which would have disclosed the relationship between the parties. *Western Union Telegraph Co. v. Tucker* (Sup.) 194 S. W. 130.

Where a telegraph message related to death, notice of relationship could be conveyed.



ed by an oral statement to agent of telegraph company as effectively as if imparted by the message. *Horn v. Western Union Telegraph Co.* (Sup.) 194 S. W. 386.

24. **Delay.**—Evidence held to support a finding that the company negligently delayed the telegram. *Western Union Telegraph Co. v. Hill* (Civ. App.) 162 S. W. 382.

Facts held not to excuse a delay in delivery of a message. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

A telegraph company is bound to exercise ordinary diligence to deliver a message promptly. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 164 S. W. 903.

In an action for delay in delivering a telegram, held that the delay was caused by failure to forward directions to the receiving agent, and that the latter was negligent in not delivering the message. *Western Union Telegraph Co. v. Holcomb* (Civ. App.) 175 S. W. 750.

The prompt delivery of a second telegram for addressee to the person in whose care it was sent, who failed to communicate it to addressee, held not to relieve the company from liability for delay in delivering a former telegram. *Western Union Telegraph Co. v. Winter* (Civ. App.) 184 S. W. 335.

25. — **Messages received after office hours.**—It is permissible for a telegraph company to establish office hours in certain localities, so that no action will lie for failure to receive and deliver messages during other hours. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 164 S. W. 903.

That a telegram sent from C. to H. did not reach H. till after office hours furnishes no excuse for failure to seasonably deliver it; the company's agent having in fact received it when it arrived and undertaken to deliver it. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

The transmitting agent of a telegraph company is bound to know of the rules of the office to which a message is to be sent, and, not informing the sender that the message will not reach there till after office hours, such fact furnishes no excuse for delay in its delivery. *Id.*

26. — **Effect of addressee's living outside free delivery limit.**—A telegraph company having undertaken to transmit a message and deliver it beyond its free delivery limits, it is immaterial, as regards liability for delay in delivery, that the charges were not prepaid but only guaranteed. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

A contract stipulation between a telegraph company and the sender of a message that an extra fee would be charged for delivery beyond certain distances was no defense to an action for delay, where such fee had been paid by the addressee. *Western Union Telegraph Co. v. Holcomb* (Civ. App.) 175 S. W. 750.

27. — **Nature and contents of message, and relationship between sender and addressee and notice thereof to company.**—A telegram delayed in delivery held to charge the company with notice of addressee's brother's death, and that addressee would probably desire to attend the funeral. *Western Union Telegraph Co. v. Winter* (Civ. App.) 184 S. W. 335.

Delay in delivering a telegram held to render telegraph company liable, notwithstanding its lack of knowledge of the place where the funeral was held. *Id.*

28. — **Duty to notify sender of inability to transmit or deliver message within reasonable time or time stipulated.**—In a suit for delay in telegrams sent plaintiff, announcing death of his mother, whereby he was prevented from attending her funeral, that plaintiff lived outside free delivery limits is no defense if telegraph company did not inform sender of that fact or make demand for extra charge for delivery. *Western Union Telegraph Co. v. Wilson* (Sup.) 194 S. W. 385.

29. **Errors.**—The substitution of "Dallas" for "Galveston," Tex., as the sender's address, was negligence entitling the sender to damages, if no answer was received because of such mistake. *Western Union Telegraph Co. v. McFarlane* (Civ. App.) 161 S. W. 57.

33. **Liability for acts or omissions of employes.**—Where a telegraph agent converted money paid by the cousin of one accused of crime in order to stop proceedings, held, that creditors who instituted the proceedings had no right of action against the telegraph company; title not having passed, and the agreement being illegal. *Western Union Telegraph Co. v. Smith* (Civ. App.) 179 S. W. 548.

A telephone company is liable for violation of its duty to protect employes from insult by slander uttered by manager. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

Slander by manager of telephone company in giving reason to new employe for discharge of plaintiff held not within the scope of his employment. *Id.*

35. **Contributory negligence.**—Because on arrival of a telegram, announcing a death and time and place of funeral, too late for the regular train, deceased's sister did not take a roundabout train route unknown to her, or take a 40-mile drive by night over muddy roads, was not contributory negligence, preventing recovery for delay in delivery of the message. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

That the addressee of a telegram, telling him his son was dying, negligently delayed in delivery, was contributorily negligent in not leaving a junction point for his destination by automobile sooner than he did did not relieve the company of liability for the additional cost of transportation resulting from having to hire the car, where the delay caused the addressee to miss his train at the junction point. *Western Union Tel. Co. v. Schoonmaker* (Civ. App.) 181 S. W. 263.

36. **Prevention of damage from default or error.**—A customer, wiring his broker to buy, and believing that his broker's purchase was in disregard of his instructions, held bound to take steps to avoid or reduce loss, so that if he failed to do so he could not recover the loss resulting from the transaction. *Western Union Telegraph Co. v. Peter & Neylon* (Civ. App.) 160 S. W. 991.

Where, in an action for damages from error in transmitting a telegram directing the sale of futures on the Liverpool market to protect an actual purchase in the state, the evidence showed that after discovering the mistake plaintiffs protected themselves by selling on the New Orleans market and making a profit which would more than offset

loss due to the mistake in the telegram, held error not to instruct that, under the circumstances, the jury should find for defendant. *Mackay Telegraph-Cable Co. v. Bain* (Civ. App.) 163 S. W. 98.

**37. Proximate cause of loss or damage.**—In an action for damages from change in a customer's telegram to his broker to sell, making it read an order to buy, which was executed as such, held that the customer's failure to promptly repudiate on notice of the purchase was the proximate cause of his loss upon the transaction, so that he could not recover. *Western Union Telegraph Co. v. Peter & Neylon* (Civ. App.) 160 S. W. 991.

A mistake in substituting "Dallas" for "Galveston" as the sender's address, by reason of which no answer was received to a telegram wiring for money and stating that the sender's wife had just died, was the proximate cause of mental anguish to the sender, resulting from inability to properly bury his wife because of lack of money. *Western Union Telegraph Co. v. McFarlane* (Civ. App.) 161 S. W. 57.

In an action for delay in the delivery of a message announcing the death of the sendee's brother, evidence held not to sustain a finding that he would have attended the funeral had the telegram been promptly delivered. *Western Union Telegraph Co. v. Kersten* (Civ. App.) 161 S. W. 369, rehearing denied 161 S. W. 1091.

Where a message that if plaintiff wanted to see his father alive he should come at once, sent January 30th, was not received until February 3d, when he sent a message of inquiry, alleged to have been delayed in delivery, there was a necessary inference of plaintiff's doubt whether an immediate trip would enable him to see his father, so that there was no information defeating his action. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 164 S. W. 903.

**38. Limitation of liability.**—Where the receiving agent of a telegraph company agreed to transmit the message immediately and collected the day rate, the company was estopped to claim that its liability for delay in delivery was governed by the part of the contract relating to night messages. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

When a telegraph company for an extra charge undertakes to deliver a message beyond its free delivery limit, it is bound to exercise reasonable diligence, and cannot avoid liability for negligent failure in that respect by the printed provision on the back of the message that such undertaking is as agent of the sender without liability. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

A stipulation in a contract for transmission and delivery of an interstate message by a telegraph company, made a common carrier by Act Cong. 1910, amending the Interstate Commerce Act, held invalid. *Bailey v. Western Union Telegraph Co.* (Civ. App.) 171 S. W. 839.

A stipulation limiting liability for mistake, or delay, or failure to deliver, held void because unreasonable. *Id.*

**39. — Requirement of notice of loss and presentation of claim therefor.**—Action held presentation of a claim, within stipulation that a telegraph company will not be liable where the claim is not presented within a specified time. *Western Union Telegraph Co. v. McMillan* (Civ. App.) 174 S. W. 918.

Where a telegraph company fraudulently misrepresented to a sendee the date of the message, the time within which notice of claim for damages must be given did not begin to run until discovery of the facts. *Id.*

**40. — Requirement of repetition.**—Clause of contract, subject to which interstate telegram was accepted, limiting liability for delay in delivery of an unrepeatable message to the cost of transmission, was not effectual to bar the addressee's recovery, for negligent delay in delivery, of more than such cost, in view of Act Cong. June 18, 1910, declaring telegraph companies to be common carriers. *Western Union Tel. Co. v. Schoonmaker* (Civ. App.) 181 S. W. 263.

Clause of contract, for transmission of interstate telegram, limiting company's liability for delay of an unrepeatable message to the cost of transmission, held ineffectual to bar the addressee's recovery of all damages, where the delay was occasioned by the company's gross negligence. *Id.*

Repetition of a telegram at instance of addressee inured to benefit of sender to bring him within company's stipulation that it would be liable in excess of certain amount only if message were repeated. *Western Union Telegraph Co. v. Piper*, 191 S. W. 817.

**41. — Of amount of liability.**—A provision on the back of a telegraph blank, which embodied the contract, limiting the company's liability for failure to discharge its duty to a sum not exceeding \$50, is void. *Western Union Telegraph Co. v. Bailey* (Civ. App.) 184 S. W. 519.

**47. Persons entitled to damages—Third persons.**—That a telegram providing money for the burial of plaintiff's wife was sent to M. and not to plaintiff, held no defense to plaintiff's action against the telegraph company for damages sustained by reason of its failure to deliver the message. *Western Union Telegraph Co. v. Richards* (Civ. App.) 158 S. W. 1187.

A telegraph company is not liable for damages from mental suffering on the part of any person who is not referred to in a message, unless it has notice that such other person is interested in its prompt delivery. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 162 S. W. 999.

A telegraph company may be liable to one not appearing on the face of the message for her mental suffering resulting from delay in its delivery, where the company's agent was apprised, when the message was received, of the relationship of the parties. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

**48. Companies and persons liable for damages.**—Where plaintiff delivered message to joint agent of telegraph and railroad companies who sent it over railroad's wire to railroad agent at destination, plaintiff not knowing such facts, defendant telegraph company could not escape liability for failure to deliver on the ground that plaintiff had not delivered message to it. *Western Union Telegraph Co. v. Sims* (Civ. App.) 181 S. W. 800.

**50. Actions for damages—Evidence.**—A finding of negligence in not seasonably delivering a telegram in the country, beyond the free delivery limit, as had been contracted for, held authorized by the evidence. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

Evidence in an action for mental suffering caused by plaintiff's financial embarrassment from delay in transmission of telegram, with the body of her mother unprepared for burial, and without money for 24 hours, held to sustain a verdict for plaintiff. *Western Union Telegraph Co. v. Chilson* (Civ. App.) 168 S. W. 878.

Evidence, in an action for failure to transmit a telephone call, whereby attempt was made to notify plaintiff of the expected death of his sister, who died and was buried the next day, held insufficient to show whether plaintiff, had he received the message, would have arrived in time for the funeral. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

Evidence held to justify a finding of negligent delay in the delivery of a telegram. *Western Union Telegraph Co. v. McMillan* (Civ. App.) 174 S. W. 918.

Evidence, regardless of negligence in transmission, held to show negligence in failing to deliver a telegram addressed to plaintiff, although, as received, the middle initial was different from plaintiff's. *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925.

In an action for damages for failure to deliver a telegram announcing the death of plaintiff's father, evidence held sufficient to charge the telegraph company with notice that a child or friend had a beneficial interest. *Herring v. Western Union Telegraph Co.* (Sup.) 185 S. W. 293.

Evidence, in action against telephone company for its negligent delay in service, whereby plaintiff's residence was partly destroyed by fire, held not to show that the alleged negligence was the proximate cause of the loss. *Southwestern Telegraph & Telephone Co. v. Thomas* (Civ. App.) 185 S. W. 396.

Evidence held to show notice to telegraph agent of special character of message, so as to render company liable for failure to transmit. *Western Union Telegraph Co. v. Huffstutler* (Civ. App.) 188 S. W. 455.

The addressee of a telegram is presumed to be the person for whose benefit the message is sent, and where it relates to a sick person, the addressee is presumed to have a serious interest in the condition of such person. *Goodson v. Western Union Telegraph Co.* (Civ. App.) 188 S. W. 736.

Evidence showing delay of telegram sending money by parents to son who was unable to obtain medical aid and was forced to rely on charity, sustained finding that the son suffered physical pain and mental anguish. *Western Union Telegraph Co. v. Finck* (Civ. App.) 191 S. W. 181.

In an action for delay in delivering money transmitted by telegraph, evidence held sufficient to warrant the jury in finding that the delay in delivering the money was the proximate cause of the failure to have the body of plaintiff's husband shipped to her for burial. *Western Union Telegraph Co. v. Martin* (Civ. App.) 191 S. W. 192.

Evidence held to authorize verdict for plaintiff brakeman, injured by telephone wire improperly placed above railway track. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

In a suit for delay in delivery of telegrams announcing death of plaintiff's mother, evidence held to warrant finding that by ordinary diligence defendant could have delivered telegrams on day received, which would have enabled plaintiff to attend funeral. *Western Union Telegraph Co. v. Wilson* (Sup.) 194 S. W. 385.

In an action for delay of telegram, evidence held to show that person who received message had limited authority to represent defendant in receiving it and accepting payment and to accept as notice to defendant statement as to purpose of sending it. *Horn v. Western Union Telegraph Co.* (Sup.) 194 S. W. 386.

**54. — Defenses.**—Where the release of a claim for a personal injury was obtained on the representation that only a railroad company was released, a telegraph company could not rely on the release which in fact discharged all companies because of the failure of the person injured and her husband to read the release before signing. *Western Union Telegraph Co. v. Walck* (Civ. App.) 161 S. W. 902.

**56. Grounds and elements of compensatory damages in general—Notice or knowledge of circumstances and effect thereof.**—Evidence in an action against a telegraph company for delay in transmitting a telegraphic draft to plaintiff's mother, at whose home plaintiff's wife was ill, held to sustain a finding of negligence, and of the fact that the company knew of the necessity of plaintiff's wife having money quickly. *Goodwin v. Western Union Telegraph Co.* (Civ. App.) 160 S. W. 107.

Where the sender notified the company's agent that his wife was ill and in need, and that the money sent by telegram was for her, the wife's increased suffering from negligent delay in delivering the telegram was reasonably within the defendant's contemplation. *Western Union Telegraph Co. v. Goodwin* (Civ. App.) 173 S. W. 1164.

Where a telegraph company had knowledge of appellee's need for money telegraphed to him and the probable consequences of delay, it is liable for injury caused by its negligent delay. *Western Union Telegraph Co. v. Finck* (Civ. App.) 191 S. W. 181.

**57. — Remote, contingent, or speculative damages.**—Plaintiff held not entitled to recover damages, in purchase of cotton above the market price, as against defendant, who failed to furnish market reports as agreed, such failure not being the proximate cause of the damage. *Western Union Telegraph Co. v. Exum* (Civ. App.) 181 S. W. 558.

**58. — Direct or indirect consequences.**—A contract to furnish cotton market reports, when breached, entitles the other party to all damages which proximately was the result from the breach, but excludes all which do not flow from the breach in ordinary and natural sequence without other intervening cause. *Western Union Telegraph Co. v. Exum* (Civ. App.) 181 S. W. 558.

**59. Damages for mental suffering.**—Evidence in such case held to sustain a finding that mental suffering would naturally result to the wife from her disappointment in failing to receive plaintiff's remittance. *Goodwin v. Western Union Telegraph Co.* (Civ. App.) 160 S. W. 107.

In case of delay or negligence in the transmission of a telegram, damages for resulting mental anguish may, contrary to the rule of the common law, be recovered. *Western Union Telegraph Co. v. Chamberlain* (Civ. App.) 169 S. W. 370.

Mental anguish is that keen and poignant suffering which results from some great grief; hence mere disappointment because plaintiff's grandchildren were prevented from visiting him on account of delay in the transmission of a telegram was not mental anguish for which damages might be recovered. *Id.*

The states have no power to control beyond their own limits the conduct of corporations and individuals engaged in interstate commerce, and any such legislation is void as creating an unwarranted burden thereon. *Bailey v. Western Union Telegraph Co.* (Civ. App.) 171 S. W. 339.

The amendment of 1910 to the Interstate Commerce Act does not supersede the laws of a state permitting the recovery for mental anguish for the failure to deliver an interstate message, notwithstanding the Carmack Amendment. *Id.*

Mental suffering will be implied from illness, or injuries accompanied by physical pain, and may arise from a sense of discomfort or inconvenience. *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

Where plaintiff was obliged to leave his child in Chattanooga to travel to Texas alone, because of defendant's failure to transmit a wire requesting money, accepted by them for transmission to Texas, the situation was not productive of such mental suffering proximately caused by defendant's negligence as would entitle the plaintiff to recover. *Western Union Telegraph Co. v. Sherlin* (Civ. App.) 184 S. W. 310.

Mere disappointment or embarrassment is not such mental pain or anguish as to permit a recovery of damages for delay in delivery of a telegram. *Western Union Telegraph Co. v. Finrock* (Civ. App.) 191 S. W. 181.

Recovery may be had for negligence in delivery of a message of death of a baby to sister of its mother, which was proximate cause of mental anguish to mother from failure of sister to attend child's funeral. *Horn v. Western Union Tel. Co.* (Sup.) 194 S. W. 386.

61. — Messages relating to sickness, death, or burial in general.—Fear that others would misconstrue the reason for his absence from his brother's funeral is too remote to be an element of mental suffering for which damages may be recovered in an action for delay in delivering a telegram. *Western Union Telegraph Co. v. Vickery* (Civ. App.) 158 S. W. 792.

Mental distress, caused by plaintiff's being required to resort to charity for the burial of his wife's remains because of defendant's negligent failure to deliver a telegram by which money would have been provided, held actual damage, and not too remote to sustain a recovery. *Western Union Telegraph Co. v. Richards* (Civ. App.) 158 S. W. 1187.

Plaintiff may maintain an action for damages for mental anguish caused by a telegraph company's negligent failure to deliver a telegram to plaintiff's sister, which prevented plaintiff from having the comfort and assistance of her sister immediately following the death of plaintiff's husband. *Western Union Telegraph Co. v. Mooney* (Civ. App.) 160 S. W. 318.

Addressee of telegram informing him of his mother's death, delayed in delivery, held entitled to damages for mental anguish where, if delivered promptly, he would have procured the funeral to be postponed so that he could have attended it. *Johnston v. Western Union Telegraph Co.* (Civ. App.) 167 S. W. 272.

Humiliation caused by plaintiff's financial embarrassment, with the body of her mother unprepared for burial, and without money for an appreciable length of time, by reason of delay in the transmission of a telegram, held a proper element of damages. *Western Union Telegraph Co. v. Chilson* (Civ. App.) 168 S. W. 878.

Telegraph company held liable to the addressee for negligently delaying delivery of a message so that he failed to send his brother to wait on their father, who was ill, not only because he himself was deprived of opportunity to go to his father, but also because he was deprived of opportunity to send his brother. *Goodson v. Western Union Telegraph Co.* (Civ. App.) 188 S. W. 736.

62. — Messages relating to sickness, death, or burial as affected by relationship of parties.—The relationship between plaintiff and his half-sister, whose expected death was attempted to be communicated to him by telephone, authorizes recovery for mental suffering, from being prevented from attending her funeral by negligence of telephone company. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

The notice being that it was desired to transmit to plaintiff a message that his "sister" was expected to die, though she was only his half-sister, yet his mental suffering from the company's negligent failure to transmit the call in not being able to attend the funeral being as great as if she had been his sister, damages to that extent are recoverable. *Id.*

Relation of grandfather and grandchild is not so remote as to prevent a recovery by the grandfather for mental anguish from inability to attend the grandchild's funeral, because of negligent delay in delivering a telegram to him. *Western Union Telegraph Co. v. McMillan* (Civ. App.) 174 S. W. 918.

The relationship between plaintiff and his half-sister, of whose expected death an attempt was made to notify plaintiff by telephone, authorized recovery for mental suffering for being prevented from attending her funeral, by the telephone company's negligent failure to transmit the call. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 178 S. W. 574.

Where through negligence in delivery of telegram of death of a baby to sister of its mother sister was unable to attend baby's funeral, the relationship between the sisters would justify inference that injury to mother's feelings resulted. *Horn v. Western Union Telegraph Co.* (Sup.) 194 S. W. 386.

63. — Messages relating to sickness, death, or burial as affected by contents of message or notice to company.—A telegraph company should have reasonably anticipated mental suffering by plaintiff's wife from delay in delivering a telegraphic draft to her,

where the company was informed when the message was sent that his wife was ill, and needed the money. *Goodwin v. Western Union Telegraph Co.* (Civ. App.) 160 S. W. 107.

Though a telegraph company was not told, when a message was sent, requesting money immediately and stating that plaintiff's wife had just died, that plaintiff desired the money for embalming his wife, it was sufficiently informed that its failure to properly transmit would probably cause plaintiff mental anguish from inability to properly embalm his wife on the nonreceipt of the money. *Western Union Telegraph Co. v. McFarlane* (Civ. App.) 161 S. W. 57.

Delivery of a telegram: "Notify Charlie Taylor that mother is dead," with statement to the agent that the message was important, without proof that defendant had any notice that deceased was the mother of T.'s wife, would not enable the wife to recover for mental suffering from inability to attend her mother's funeral. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 162 S. W. 999.

Telegraph messages held sufficient to notify the company that a reply message was for the benefit of plaintiff, who would probably desire to visit his father if informed that he was still alive, and that mental anguish might be expected to result from negligence in delivering the reply telegram. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 164 S. W. 903.

A telegram: "Moved mama to hospital tonight. Will operate tomorrow; \* \* \* wire money immediately, am very worried"—was sufficient to affect the company with notice that money was necessary and of plaintiff's need therefor, so as to make defendant liable in damages for her mental anxiety incident to delay in its transmission. *Western Union Telegraph Co. v. Chilson* (Civ. App.) 168 S. W. 878.

For the sender of a telegram to recover damages for mental anguish resulting from delay in its transmission, the facts must have been such that the sender would naturally suffer mental anguish in case of delay, and they must have been known to the agent of the telegraph company. *Western Union Telegraph Co. v. Chamberlain* (Civ. App.) 169 S. W. 370.

Contents of a telegram held sufficient to put the telegraph company on notice that it related to illness. *Western Union Telegraph Co. v. Riviere* (Civ. App.) 174 S. W. 650.

That a delayed telegram relating to illness did not mention the name of the person who was ill, did not prevent its being notice to the company of the nature of the message. *Id.*

Sender's statement to telephone operator that message to be transmitted to plaintiff was a "rush call" and a "sick message" held sufficient to put the company on notice of probable mental suffering from a failure to transmit it. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 178 S. W. 574.

A telegram: "Sterling Dosier, Colo. Texas. Tom Tucker's baby died to-day. If any one can come send telegram. [Signed] Sam Corley"—required the company to anticipate the probable delay of the funeral until arrival of the child's grandparents had the message been delivered. *Western Union Telegraph Co. v. Tucker* (Sup.) 194 S. W. 130.

Where agent of a telegraph company was told that a message of death of a baby was sent in behalf of its mother who wanted her sister to be present at burial, it was sufficient notice that mother would probably suffer mental distress from a failure of sister to attend burial. *Horn v. Western Union Telegraph Co.* (Sup.) 194 S. W. 386.

**64. Measure or amount of damages in general.**—In an action against a telephone company for failure to transmit a call, preventing plaintiff from attending funeral of his half-sister, defendant could not set off against the damages for mental suffering, the expense to plaintiff of attending the funeral. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 178 S. W. 574.

A verdict of \$975 is not excessive, where telegram announcing death of addressee's favorite brother was not delivered, causing her to miss his funeral, which she had made prior arrangements to attend. *Western Union Telegraph Co. v. Alexander* (Civ. App.) 187 S. W. 1016.

**66. Inadequate or excessive damages.**—See *Western Union Telegraph Co. v. Richards* (Civ. App.) 158 S. W. 1187; *Western Union Telegraph Co. v. McFarlane* (Civ. App.) 161 S. W. 57; *Western Union Telegraph Co. v. Hill* (Civ. App.) 162 S. W. 382; *Western Union Telegraph Co. v. Gest* (Civ. App.) 172 S. W. 183; *Western Union Telegraph Co. v. Goodwin* (Civ. App.) 173 S. W. 1164; *Western Union Telegraph Co. v. Riviere* (Civ. App.) 174 S. W. 650; *Western Union Telegraph Co. v. Holcomb* (Civ. App.) 175 S. W. 750.

**67. Exemplary damages.**—Where a telegraph company was not negligent in employing an operator, did not authorize him to misdirect a message, and did not ratify his act in so doing, it was not liable for exemplary damages for such operator's gross negligence in so doing. *Western Union Tel. Co. v. Schoonmaker* (Civ. App.) 181 S. W. 263.

## CHAPTER SIXTEEN

### CHANNEL AND DOCK CORPORATIONS

Art.	Art.
1249. This chapter embraces, what.	chapter; additional powers granted.
1250. Added powers.	
1251. Dock corporations, added powers.	1253. Rates, tolls and charges subject to legislative control.
1252. Corporations created under this	

#### Article 1249. [721] [644a] This chapter embraces, what.

See *West End Dock v. State* (Civ. App.) 173 S. W. 285; notes under art. 1250. Cited, *Lawson v. Port Arthur Canal & Dock Co.* (Civ. App.) 185 S. W. 600.

**Art. 1250. [722] Added powers.**

**Grant of land.**—Under this act a corporation chartered to dredge a channel across Galveston Bay cannot, while inactive, hold lands granted it for use in that work indefinitely, and a grant of lands passes no title, but a simple right of user. *West End Dock v. State* (Civ. App.) 173 S. W. 285.

A quasi public corporation, organized to dredge a channel, and given public grants of land in its charter for use in the project, forfeits its rights thereto if it neglects for an unreasonable time to dredge a channel. *Id.*

**Condemnation.**—Under subd. 6 held that the authorization to condemn a strip of land 700 feet wide indicated that the right was given for purposes other than those absolutely necessary for the construction of the channel, including the construction of docks. *Lawson v. Port Arthur Canal & Dock Co.* (Civ. App.) 185 S. W. 600.

The intention of defendant canal corporation to use land for different purpose from that for which it was condemned furnishes no grounds for forfeiture of the rights acquired by it under condemnation proceedings, since no such use has been made of it and the future unlawful use may be enjoined or damages recovered therefor. *Id.*

The transfer by a canal corporation of its title in the channel to the government of the United States held not to work a forfeiture of its rights to use the remaining land for the purposes for which it was lawfully condemned. *Id.*

In a proceeding for the partition of land, evidence held sufficient to sustain a finding that defendant canal corporation and its predecessors have been in continuous possession of the land since acquiring it, that the present intention of the company is to improve the land, and that there never has been any intention to abandon. *Id.*

**Art. 1251. [723] [644c] Dock corporations; added powers.**

See *West End Dock v. State* (Civ. App.) 173 S. W. 285; notes under art. 1250.  
Cited, *Lawson v. Port Arthur Canal & Dock Co.* (Civ. App.) 185 S. W. 600.

**Art. 1252. [724] [644d] Corporations created under this chapter; additional power granted.**

See *West End Dock v. State* (Civ. App.) 173 S. W. 285; *Lawson v. Port Arthur Canal & Dock Co.* (Civ. App.) 185 S. W. 600; notes under art. 1250.

**Art. 1253. [725] [644f] Rates, tolls and charges subject to legislative control.**

See *West End Dock v. State* (Civ. App.) 173 S. W. 285; notes under art. 1250.

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## CHAPTER TWENTY-ONE

### GAS AND WATER CORPORATIONS

Art. 1282. Privileges of such corporations.	Art. 1283. May contract with cities, etc.
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**Article 1282. [705] [629] Privileges of such corporations.**

Cited, *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

**Contracts for service.**—An individual or company authorized to do so may so contract as to incur a liability for damages proximately resulting from a failure to furnish water sufficient to extinguish fires. *Dublin Electric & Gas Co. v. Thompson* (Civ. App.) 166 S. W. 113.

Where water was furnished under a contract through a private pipe line, there being nothing in the contract to the contrary, the duty of keeping the pipe line in repair was upon the owner and not the water company. *Josey v. Beaumont Waterworks Co.* (Civ. App.) 183 S. W. 26.

Under a contract by a gas company that it would repay to a consumer, on the cost of a main extension partly paid for by him, \$55 for each new consumer obtained "on said extension" within one year, the consumer so contracting is not entitled to any refund for new gas consumers whose residences are not on the street in which the extension is laid nor connected directly with the extension, but on a street a block distant and served by another extension. *County Gas Co. v. Templeton* (Civ. App.) 185 S. W. 942.

**Failure to furnish water.**—Evidence held to show that neither party contemplated that a water company promising to furnish consumer water for all purposes should furnish water for fire protection. *Dublin Electric & Gas Co. v. Thompson* (Civ. App.) 166 S. W. 113.

Possession of a franchise to lay water mains in a city and supply water to its citizens did not, irrespective of other considerations, give a right of action in favor of a citizen for failure to furnish water. *Josey v. Beaumont Waterworks Co.* (Civ. App.) 183 S. W. 26.

Failure to notify of a break in a private pipe line and of the fact that the water had been shut off was not the proximate cause of the damage caused by a fire, which could not be checked because of lack of water. *Id.*

**Art. 1283. [706] [630] May contract with cities, etc.**

Cited, *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

## CHAPTER TWENTY-ONE A

## GAS, ELECTRIC CURRENT AND POWER CORPORATIONS

Art.  
1283c. Powers of corporation.

Art.  
1283d. Condemnation of property; poles;  
pipes.

**Article 1283c. Powers of corporation.**

See *Pecos & N. T. Ry. Co. v. Malone* (Civ. App.) 190 S. W. 809; note under Art. 1283d.

**Art. 1283d. Condemnation of property; poles; pipes.**

**Jurisdiction of district court.**—Under art. 6531 and this act district court has jurisdiction, in action by railroad in trespass to try title, to adjudge condemnation in favor of defendant electric light and ice company. *Pecos & N. T. Ry. Co. v. Malone* (Civ. App.) 190 S. W. 809.

**Injuries from defects in lines.**—In an action for damages for the death of a horse from electricity passing from light wires, evidence held not to show that the horse's death was due to defendant's negligence in constructing and maintaining a ground wire. *Lumpkin v. Texarkana Gas & Electric Co.* (Civ. App.) 164 S. W. 435.

A company erecting a light post by cutting a girder supporting an awning extending across a sidewalk, held not liable for injuries by fall of awning by people going out on it. *Houston Lighting & Power Co., 1905, v. Walsh* (Civ. App.) 177 S. W. 1055.

Possession by power company of franchise does not excuse it from ordinary care in location and construction of poles and wires to prevent injuries to others rightfully using public places. *Canyon Power Co. v. Gober* (Civ. App.) 192 S. W. 802.

Where plaintiff's husband was electrocuted by broken transmission line, a requested instruction to find for defendant if the condition was caused by an owl flying against the wires was properly refused where there was evidence that even in such a case a circuit breaker would have prevented the injury. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 194 S. W. 1016.

## CHAPTER TWENTY-TWO

## SEWERAGE COMPANIES

Art.  
1284. Corporation may condemn private property for sewers, etc., when, etc.

Art.  
1285. Method same as for railways.

**Article 1284. Corporation may condemn private property for sewers, etc., when, etc.**

Cited, *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

**Art. 1285. Method same as for railways.**

Cited, *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

## CHAPTER TWENTY-THREE

## CEMETERY CORPORATIONS

Art.  
1289a. Purchase, lease, and condemnation of land by associations incorporated or unincorporated.  
1302a. Trusts for maintaining private lots in cemeteries authorized; conditions.

Art.  
1302b. Same; trustees.  
1302c. Same; number of trustees; perpetuation by founder or court.  
1302d. Same; not to be regarded as a perpetuity.

**Article 1289a. Purchase, lease, and condemnation of land by associations incorporated or unincorporated.**—Cemetery Associations, whether incorporated or unincorporated, shall have the power to purchase, lease, or otherwise acquire, such land as may be needed by them for the purpose of the proper burial of the dead in the communities in which they may be located, and such power shall extend to the acquisition of such land as may reasonably be needed therefor in the future as

well as such land as may be immediately needed at the time of such acquisition. Such land may be acquired also by condemnation proceedings in the manner now provided for the condemnation of lands for right of way purposes by railroad companies; and the acquisition of such lands is hereby declared to be for a public purpose. [Act March 29, 1917, ch. 125, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1302a. Trusts for maintaining private lots in cemeteries authorized; conditions.**—That persons desiring to provide a fund for the maintaining and keeping up and beautifying of private blocks or lots in any Cemetery in this State may do so by setting aside for such purposes a reasonable sum of money and by providing by written instrument for a trustee or trustee's to handle and invest said sum and spend the resources therefrom, in the following manner.

The written instrument shall give the terms of the trust, provided not exceeding seventy-five per cent of the net income therefrom shall be devoted to keeping up and beautifying the private blocks and lots designated in the instrument.

The portion of such income not expended annually as set out in the preceding paragraph, the amount not to be less than twenty-five per cent of such income, shall be devoted to the general upkeep and beautifying of the cemetery in which such blocks or lots are located. [Act March 30, 1917, ch. 155, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1302b. Same; trustees.**—The Trustee's provided for may be natural persons designated by name and their successors, or persons holding designated positions and indicated as holders of such positions and successors, or corporations whose charters authorize them to Act in such capacity. [Id., § 2.]

**Art. 1302c. Same; number of trustees; perpetuation by founder or court.**—The founder of said fund may designate therein the number of Trustees and the manner of renewing same. If no method of perpetuating the trustees shall be set out in the instrument or if the trustees therein provided or their successors shall fail to effect such perpetuity, then any court having equity jurisdiction located within the county wherein such cemetery is maintained shall be authorized (upon application of any person interested or of the court's own motion), if facts come within its cognizance to appoint suitable trustee or trustees to the number specified in such instrument to execute such trust. [Id., § 3.]

**Art. 1302d. Same; not to be regarded as a perpetuity.**—Such trust and the administration thereof shall not be regarded and held to be a perpetuity, but as a provision for the discharge of a duty due from the party founding such trust to the persons interred upon such blocks or lots and to the public. [Id., § 4.]

## CHAPTER TWENTY-FOUR

### OIL, GAS, SALT, ETC., COMPANIES

Art.	Art.
1303. Purposes of incorporation.	mortgage franchises, etc.; powers;
1304. Mode of organization.	separate incorporation of pipe
1305. Powers of corporations.	lines; ownership of stock in other
1306. Right of condemnation; pipes, pipe	corporations; competition.
lines, and aerial tramways.	1308. Discrimination unlawful.
1307. Right to borrow money, issue stock,	1308a. Additional powers conferred.

**Article 1303. Purposes of incorporation.**—Any number of persons, not less than three, may engage themselves into a corporation for the purpose of storing, transporting, buying and selling of oil, gas, salt,



brine and other mineral solutions; also sand and clay for the manufacture and sale of clay products. [Acts 1899, p. 202, § 1; Act April 7, 1915, ch. 152, § 1.]

Took effect 90 days after March 20, 1915, date of adjournment.

**Art. 1304. Mode of organization.**—The manner and method of organizing such corporations shall be the same as provided by law for the organization of private corporations in Chapter 2, Title 25, of the Revised Civil Statutes of 1911, and the provisions of this Act shall apply to all corporations already organized for any purposes of this Act. [Acts 1899, p. 202, § 2; Act April 7, 1915, ch. 152, § 1.]

**Art. 1305. Powers of corporations.**—Such corporations shall have power to store and transport oil, gas, brine and other mineral solutions, and also sand, clay and clay products, and to make reasonable charges therefor; to buy, sell and furnish oil and gas for light, heat and other purposes; to lay down, construct, maintain and operate pipe lines, tubes, tanks, pump stations, connections, fixtures, storage houses and such machinery, apparatus, devices and arrangements as may be necessary to operate such pipes and pipe lines between different points in this State; to own, hold, use and occupy such lands, rights of way, easements, franchises, buildings and structures as may be necessary to the purpose of such corporations. For the transportation of sand and clay, corporations shall have the right to construct, maintain and operate aerial tramways, a system consisting of wire cables supported by wooden, concrete or steel towers, over which buckets or carriers are propelled along and over said wire cables; and may own such connections, fixtures, guy lines and all necessary devices, storage houses and such machinery, apparatus and arrangements as may be necessary to operate such aerial tramways between different points in this State; to own, hold, use and occupy such lands, rights of way, easements, franchises, buildings and structures as may be necessary to the purposes of such corporation. [Acts 1899, p. 202, § 3; Act April 7, 1915, ch. 152, § 1.]

**Art. 1306. Right of condemnation; pipes, pipe lines, and aerial tramways.**—Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corporation, and shall have the right to lay its pipes and pipe lines, which shall not be placed at a distance within three hundred feet of any farm residence or barn, wire cables, supporting towers and connections for same for the construction of aerial tramways, across and under or over any public road or under or over any railroad, railroad right of way, street railroad, canal or stream in this State, and to lay its pipes and pipe lines and wire cables across or along or over and under any street or alley in any incorporated city or town in this State, with the consent and under the direction of the board of aldermen or city council or commission of such city or town. The manner and method of such condemnation shall be the same as is provided by law in the case of railroads; provided, that such pipe lines or aerial tramways shall not pass through or under or over any cemetery, church or college, school house, residence, business or store house, or through or under or over any buildings in this State, except by the consent of the owner or owners thereof; and, provided further, that all such pipes and pipe lines and aerial tramways, when the same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and in case of aerial tramways over and above at a distance of at least twenty-five feet from the level of the ground, and such surface shall be properly and promptly restored by such corporation unless otherwise consented to by the owner or owners of such land; provided, further, that if such pipe or pipe lines shall be laid over or along any uncultivated or unimproved lands of another, and such lands shall thereafter become cultivated or improved, such pipe or

pipe line shall be buried by said corporation as hereinbefore provided within a reasonable time after notice by the owner of said lands, or his agent, to said corporation, or any agent thereof; and, provided further, that whenever such pipe or pipe line or aerial tramway shall cross any public road or highway, railroad, street railroad or street or alley, the said pipes and pipe lines or aerial tramway cables shall be so buried and covered, or elevated in case of aerial tramways, as not to interfere with the use and occupancy of such road, highway, street or alley by the public, or use and occupancy of such railroad or street railroad by the owner or owners thereof; and, provided further, that such pipe line so laid shall not exceed eight inches in diameter. [Acts 1899, p. 202, § 4; Act April 7, 1915, ch. 152, § 1.]

**Art. 1307. Right to borrow money, issue stock, mortgage franchises, etc.; powers; separate incorporation of pipe lines; ownership of stock in other corporations; competition.**—Such corporation shall have the right to borrow money to an amount not in excess of its paid up capital stock, as now provided by law, to issue stock and preferred stock, to mortgage its franchises and property to secure the payment of any debt contracted for any purposes of such corporation, and shall possess all the rights and powers of corporations for profit in this State wherever the same may be applicable to corporations of this character. It may also engage in the oil and gas producing business, prospecting for and producing oil and gas and owning and holding lands, leases and other property for said purposes and subject to the provisions of Chapter 4 of this title; provided that no corporation shall exercise these powers while owning or operating oil pipe lines in this State. Any corporation heretofore or hereafter organized under this Chapter, and owning or operating oil pipe lines in this State, shall separately incorporate such oil pipe lines with the consent of a majority in amount of its stockholders and subject to the restrictions hereinafter imposed, whereupon, in addition to other powers which it may possess, it shall then acquire the right and power to engage in said oil and gas producing business. Such separate incorporation shall be accomplished by the organization of another pipe line corporation under this Chapter and the sale and conveyance to it of such oil pipe lines of the organizing company. In case of the ownership also of oil pipe lines beyond the borders of this State additional pipe line corporations may be organized outside of the State and such oil pipe lines located outside of the State may be sold and conveyed to them. In every case herein provided for the organizing corporation may subscribe for and own the capital stock of the organized pipe line corporation without being precluded from engaging in said oil and gas producing business. In lieu of engaging directly in the oil and gas producing business in any State or country a corporation organized under this chapter and authorized to engage in said producing business may own the stock of other corporations engaged therein, provided that it shall not own the stock of more than one producing corporation, or one pipe line corporation, organized under the laws of this or any other single State. Nor shall any corporation organized in any other State or country be permitted to own or operate oil pipe lines or engage in the oil producing business in this State when the stock of such corporation is owned in whole or in part by a corporation organized under this chapter. But the provisions hereof shall not preclude the ownership or operation by any corporation of private pipe lines in and about its refineries, fields or stations, even though such corporation may be engaged in the producing business. And none of these provisions shall be construed as limiting, modifying or repealing any part of the law regulating oil pipe lines, or as authorizing any ownership or transaction the effect of which would be to substantially lessen competition or to violate any law or laws of this State prohibiting trusts and monopolies and conspiracies in restraint of trade

or to violate any provision of the anti-trust laws of this State. [Acts 1899, p. 202, § 5; Act April 7, 1915, ch. 152, § 1; Act Feb. 20, 1917, ch. 31, § 1.]

**Explanatory.**—Took effect 90 days after March 21, 1917, date of adjournment. The act amends art. 1307, ch. 24, tit. 25, Rev. Civ. St., as amended by ch. 152, Gen. Laws 34th Leg.

**Art. 1308. Discrimination unlawful.**—It shall be unlawful for any corporation organized under this Act to discriminate against any person, corporation, firm, association or place in the charge for such storage or transportation, or in the service rendered; but shall receive, store or transfer oil or gas, salt, sand and clay for any person, corporation, firm or association upon equal terms, charges and conditions with all other persons, corporations, firms or associations for like service. [Acts 1899, p. 202, § 6; Act April 7, 1915, ch. 152, § 1.]

**Art. 1308a. Additional powers conferred.**—Corporations heretofore or hereafter organized under the provisions of Chapter XXIV of Title 25 of the Revised Civil Statutes of 1911, and which shall file with the Secretary of State a duly authorized acceptance of the provisions of this Act, are hereby declared to have, in addition to the powers enumerated in said chapter, the power to carry on the business therein authorized outside of as well as within this state; to own and operate refineries, casing and treating plants, sales offices, warehouses, docks, ships, tank cars and vehicles necessary in the conduct of their business; and to cause the formation of corporations outside of this state, not exceeding one in any state, territory or foreign country, whose purposes and powers exercised shall be only those conferred by law upon the forming or holding corporation as incorporated under the laws of Texas, and own and hold the stock of such corporations when the effect of such formation or stock holding is not substantially to lessen competition or otherwise to violate laws prohibiting trusts and monopolies and conspiracies in restraint of trade. [Act March 6, 1915, ch. 41, § 1.]

Took effect 90 days after Legislature adjourned on March 20, 1915.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Damages caused by escape of oil.**—The owner of a pipe line which carries oil through the ground is liable for damages caused by its escape regardless of his negligence. *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28.

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## CHAPTER TWENTY-FIVE

### BOND INVESTMENT COMPANIES

#### Articles 1309–1313.

By Act May 27, 1915, ch. 5, § 28, p. 15, post, § 1313½y, bond investment companies are subjected to the law relating to co-operative savings and contract loan companies.

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## CHAPTER TWENTY-FIVE A

### BUILDING AND LOAN ASSOCIATIONS

#### Articles 1313a–1313y.

See art. 1313½ et seq., conferring on co-operative savings and contract loan companies the powers of building and loan associations.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Loans—In general.**—In suit against a loan society for breach of the loan contract actually made as explained by its agent, plaintiff held not entitled to judgment, where he did not prove damages. *National Equitable Soc. of Belton v. Carpenter* (Civ. App.) 184 S. W. 585.

Plaintiff, not prevented by any fraud of agent of defendant loan society from reading application for a loan contract before signing, could not claim ignorance of contents of application. *Id.*

Plaintiff, whose application for defendant's loan contract stated that he had examined its plans, read a printed copy of the contract and understood its provisions, and that he did not rely upon any statements of the agent, could not rescind for the agent's representations. *Id.*

Plaintiff charged with knowledge of the falsity of the statements of the agent of defendant loan society before she acted upon them in the making of a loan contract, held to have no action for damages against the society for the agent's alleged fraud. *National Equitable Soc. of Belton v. Camp* (Civ. App.) 184 S. W. 589.

Suit to rescind contract with loan society and to recover the money paid under it, could not be maintained where it could not be said that plaintiff was actually misled by the statement of the society's agent into accepting the contract as written. *Id.*

Plaintiff, if entitled to reject the contract of defendant loan society when tendered, because it materially differed from what its agent said it would be, was required to act promptly upon a discovery of the fraud. *National Equitable Soc. of Belton v. Dunnington* (Civ. App.) 184 S. W. 590.

**Actions by and against associations.**—In a suit to recover the sum paid to the defendant loan society under an agreement for a future loan as damages from the fraudulent representations of its agent, evidence held insufficient to sustain a judgment for the plaintiff. *National Equitable Soc. of Belton v. Dunnington* (Civ. App.) 184 S. W. 590.

## CHAPTER TWENTY-FIVE B

### CO-OPERATIVE SAVINGS AND CONTRACT LOAN COMPANIES

Art.	Art.
1313½. Certified copy of charters to be filed with commissioner of insurance and banking.	1313½m. Dividends.
1313½a. Supervision of companies.	1313½n. Investment of funds.
1313½b. Capital stock; payment; notes.	1313½o. May invest in same manner as life insurance companies.
1313½c. Powers.	1313½p. Purchase of, or loans on, real estate.
1313½d. Investment in securities; deposit; reserve; real estate; appraisal; statement on contracts.	1313½q. Taxation.
1313½e. Forms of contracts; approval; register of contracts; commutation; valuation; additional deposits; withdrawal; custody of securities.	1313½r. Statement by foreign companies.
1313½f. Fees; proceeds, how disposed of.	1313½s. Same; filing copy of articles, etc.
1313½g. Capital stock as part of reserve deposits; maintenance of reserve deposits; commissions, etc., to corporate officers prohibited; bonds of officers.	1313½t. Capital of foreign companies; reciprocal measures as to deposit of securities.
1313½h. Approval of by-laws, contracts, circulars, etc., impairment of capital; receiver.	1313½u. Deposit of securities by foreign companies; investments.
1313½i. Certificate of authority.	1313½v. Power of attorney by foreign companies to accept service.
1313½j. Contracts not to be forfeited.	1313½w. Venue of suits; agents; bond; license.
1313½k. Withdrawal of contracts.	1313½x. Forfeiture of charter for violation of act; penalties; acceptance of act.
1313½l. Liability on contracts.	1313½y. Bond investment and other companies to be governed by this act; unincorporated organizations to file certificate.
	1313½z. Partial invalidity; operation of general laws.

**Article 1313½.** **Certified copy of charter to be filed with Commissioner of Insurance and Banking.**—Co-operative savings and contract loan institutions organized under the general corporation laws of this State in the manner therein provided, and all such institutions as may be organized hereafter, shall file certified copy of the charter issued to such companies by the Secretary of State with the Commissioner of Insurance and Banking. [Act May 27, 1915, 1st C. S., ch. 5, § 1.]

Took effect 90 days after May 28, 1915, date of adjournment.

**Art. 1313½a. Supervision of companies.**—All such corporations shall be under the supervision and control of the Commissioner of Insurance and Banking. [*Id.*, § 2.]

**Art. 1313½b. Capital stock; payment; notes.**—The capital stock of all such institutions hereafter organized shall not be less than twenty-five thousand dollars, and not less than one-half of the capital stock must be paid in in actual currency, bank notes, or certified checks; while the

remainder may be paid in deferred payments, payable in equal or greater installments annually, for a period of time not exceeding two years; but the deferred payments must be evidenced by the subscriber's note secured by the paid-up stock certificates issued him equal in amount to his deferred payments and by collateral equal to said amount of such character as the corporation shall have the right to invest its funds in, which said notes of the subscriber and the collateral attached thereto must be examined and approved by the Commissioner of Insurance and Banking and certified by him to be ample and sufficient. [Id., § 3.]

**Art. 1313½c. Powers.**—Corporations chartered hereunder shall have all the powers of building and loan associations chartered under the laws of this State and in addition shall have authority to engage in the business of issuing contracts or agreements, whether in the nature of bonds, debentures, certificates, or otherwise, providing for the redemption or for the fulfilling of such contracts or agreements by the accumulation of a fund or funds by the contributions made by a subscriber to or the holders of such contracts or agreements; or providing for the maturing or fulfilling of such contracts or agreements in the order of their issue or in series or in some other fixed or arbitrarily determined order or manner; or providing for the payment of moneys or the granting or giving of any consideration of any money or personal property, real or mixed, greater in value or represented to be greater in value than the amount paid in upon such contracts or agreements, together with the actual net earnings accrued and accumulated thereon; or providing for the loaning of the funds contributed by the subscribers to or the holders of such contracts or agreements to such subscribers or holders in any fixed or arbitrarily determined order or manner; or for the making of loans or advance from such funds to or for such subscribers or holders to be repaid in installments; and shall have the right to place or sell bonds, certificates or debentures on the partial payment or installment plan. [Id., § 4.]

**Art. 1313½d. Investment in securities; deposit; reserve; real estate; appraisal; statement on contracts.**—All corporations hereafter chartered shall invest not less than thirty-three and one-third per cent of its capital stock in securities of the kinds in which by law it is permitted to invest or loan its funds and shall deposit the same with the Commissioner of Insurance and Banking for the common benefit of all the holders of all contracts issued by it. All savings and contract loan companies as herein defined shall keep on deposit with the Commissioner of Insurance and Banking at all times an amount equal to the legal reserve required by this Act on all its outstanding contracts, which amount shall be either in cash or in such securities as it is permitted by law to invest in, which said deposit of capital stock and reserve securities shall be held by the said commissioner in trust for the common benefit of all the holders of contracts issued by such corporations. Any such company may deposit the lawful money of the United States in lieu of the securities above referred to or any portion thereof and may also for the purpose of such deposit convey to said commissioner in trust the real estate in which any portion of said capital or reserve may be lawfully invested, and in such case said commissioner shall hold the title thereto in trust until other securities in lieu thereof shall be deposited with him, whereupon he shall reconvey the same to such company; said commissioner may cause any such securities or real estate to be appraised and valued prior to their being deposited with or conveyed to him in trust as aforesaid; the reasonable expense of which is to be paid by the company.

All contracts issued by any such company shall have upon their face a certificate substantially in the following words: "This contract is registered, and approved securities equal in value to the legal reserve hereon are held in trust by the Commissioner of Insurance and Banking of the

State of Texas," which certificates shall be signed by the commissioner and sealed with the seal of his office. [Id., § 5.]

**Art. 1313½e. Forms of contracts; approval; register of contracts; commutation; valuation; additional deposits; withdrawal; custody of securities.**—All contracts, whether bonds, debentures, or whatsoever form or class, shall be first submitted to the Commissioner of Insurance and Banking before their issuance and be approved by him as fair to the purchaser thereof, to the corporation and to its stockholders, and shall have printed thereon some appropriate designating letter or figure, combination of letters or figures or terms identifying the particular form of contract, together with the year of the adoption of such form, and whenever any change or modification is made in the form of contract, the designating letters, figures or terms and year of adoption shall be correspondingly changed.

The Commissioner of Insurance and Banking shall prepare and keep such registers thereof as will enable him to commute the value of such contracts at any time. Upon written proof, attested by the president or vice president and secretary of the company which shall have issued such contracts that any of them have been commuted or terminated, the commissioner shall commute or cancel them upon his register, and until such proof is furnished, all registered contracts shall be considered in force for the purpose of this Act. The net value of every contract according to the standard prescribed herein for the valuation of such contracts, when the first installment shall have been paid thereon, less the amount of such liens as the company may have against it (not exceeding such value) shall be entered opposite the records of each contract in the register aforesaid at the time such record is made. On the first day of January of each year, or within sixty days thereafter, the commissioner shall cause the contracts of each company chartered hereunder or operating hereunder to be carefully valued, and the actual value thereof at the time fixed for such valuation, less such liens as the company may have against it, not exceeding such valuation, shall be entered upon the register opposite the record of such policy or bond, and the commissioner shall furnish a certificate of the aggregate of such valuation.

Each company shall make additional deposits from time to time, in amounts of not less than one thousand dollars, and of such securities as are permitted by this Act to be deposited, so that the market value of the securities deposited shall always be equal to the net value of the contracts issued by said company, less such items as the company may have against them not exceeding such net value. So long as any company shall maintain its deposit as herein prescribed at an amount equal to or in excess of the net value of its contracts, it shall be the duty of the commissioner to sign and affix his seal to the certificate before mentioned on every contract presented to him for that purpose by any such company.

Any company depositing under the provisions of this Act may increase its deposits at any time by making additional deposits of not less than one thousand dollars of such securities as are authorized by this chapter. Any such company whose deposits exceed the net value of the contracts which it has in force, less its liens thereon (not exceeding such value) may withdraw such excess and it may withdraw any such securities at any time by depositing others of equal value and of the character authorized by this Act in their stead, and it may collect the interest, coupons, rents, and other income on the securities deposited, as the same accrues.

The securities deposited under this Act shall be placed and kept by the Commissioner of Insurance and Banking of the State in some secure, safety deposit fireproof box or vault in the city or town in or near the home office of the company, and the officers of the company shall have access to such securities for the purpose of detaching interest coupons and crediting payments and exchanging securities as above provided,

under such reasonable rules and regulations as the commissioner may establish. [Id., § 6.]

**Art. 1313½f. Fees; proceeds, how disposed of.**—Every company making deposit under the provisions of this Act shall pay to the Commissioner of Insurance and Banking for each certificate placed on such contracts a fee of ten cents and the fee so received shall be disposed of by the said commissioner as follows:

(1) The payment of the rent or hire of the safety deposit fireproof box as above provided.

(2) Payment for the services of a competent and reliable representative of said commissioner to be appointed by him, who shall have direct charge of the securities and safety deposit containing same, and through whom and under whose supervision the company may have access to its securities for the purpose above provided. The sum paid such representative shall not exceed the sum of one hundred dollars per annum for each such company.

(3) The balance of such fees shall be paid to or be deposited with the State Treasurer to the credit of the general fund. [Id., § 7.]

**Art. 1313½g. Capital stock as part of reserve deposits; maintenance of reserve deposits; commissions, etc., to corporate officers prohibited; bonds of officers.**—Any company chartered hereunder may include as a part of its reserve deposits the remaining of its capital stock, if the same has been paid in and invested in such securities as such company is permitted by this law to invest in. Deposits of securities hereunder to the value of the reserve on all outstanding contracts shall be added to and maintained from time to time as the reserve values increase, by the company issuing such contracts, or by any company which may assume them, and such securities shall be held by the commissioner and his successors in office in trust for the benefit of such contracts as long as the same shall remain in force. No company chartered hereunder shall pay or contract to pay, directly or indirectly, to its president, vice president, secretary, treasurer, or actuary, any commission or other compensation contingent upon the writing of contracts or upon the continuous payment of installments upon such contracts and should any company violate the provisions of this section, it shall be the duty of the Commissioner of Insurance and Banking to revoke its certificate of authority to transact business until such illegal contract has been abrogated and all funds paid thereunder paid into the company.

All officers of the company having charge or through whose hands pass any funds or securities of any such company shall give bond to the company in the form approved by the Commissioner of Insurance and Banking, and in such amount as may be fixed by the board of directors to be not less than five per cent of the capital stock of any such corporation and in no event less than one thousand dollars. [Id., § 8.]

**Art. 1313½h. Approval of by-laws, contracts, circulars, etc.; impairment of capital; receiver.**—The by-laws, all forms of contracts and all literature in circular or permanent form, which undertake to state the benefits and advantages of the contract to the investor or holder thereof, shall be first submitted to the Commissioner of Insurance and Banking for his examination and approval before such advertisements are promulgated and before such contracts are issued.

If the Commissioner of Insurance and Banking should approve such literature or contracts, then the same may be thereafter issued and sold. If he should disapprove the same, such company may institute a proceeding in any court of competent jurisdiction and venue to review his action thereon.

Any such company chartered hereunder whose capital stock shall become impaired to the extent of thirty-three and one-third per cent thereof, computing its liabilities according to the terms of this Act, shall make

good such impairment within sixty days by reduction of its capital stock or otherwise, provided its capital stock may never be reduced below the minimum required by this Act, and failure to make good such impairment within said time shall forfeit its right to write new business in this State until such impairment shall have been made good; and provided that the Commissioner of Insurance and Banking may apply to any court of competent jurisdiction for the appointment of a receiver to wind up the affairs of such company when its capital stock shall become impaired to the extent of fifty per cent; provided also that its affairs may be placed in the hands of a receiver by the commissioner and by the State, acting through the Attorney General, when its assets shall not equal its liabilities, in which shall be included its outstanding debts, and its contract reserves, plus 50 per cent of its capital stock. [Id., § 9.]

**Art. 1313½j. Certificate of authority.**—No foreign or domestic company shall transact business under this Act unless it shall first procure from the Commissioner of Insurance and Banking a certificate of authority stating that the requirements of the laws of this State have been fully complied with by it and authorizing it to do business in this State. Such certificate of authority shall expire on the last day of February in each year and shall be renewed annually so long as the company shall continue to comply with the laws of the State, such renewals to be granted upon the same terms and conditions as the original certificate.

In order to obtain a certificate of authority the corporation must deposit with the commissioner certified copy of its articles of association or incorporation, its by-laws, and the detailed statement of its plans for doing business, together with copies of all contracts and agreements proposed to be used in the conduct of its business. It shall be the duty of the commissioner to investigate and thoroughly examine into all such matters and if he finds that the law has been complied with and that the business proposed to be done is not in conflict with the laws and Constitution of this State, he shall grant a certificate authorizing such corporation to do business and such contracts and plans so submitted and approved shall not in any manner be changed or altered until the portion changed is submitted to and approved by the commissioner. [Id., § 10.]

**Art. 1313½j. Contracts not to be forfeited.**—No contract or agreement by any corporation chartered or doing business hereunder shall be forfeited for non-payment but upon a failure to pay upon the same according to the terms thereof for a period of three months, the same may be cancelled and the holder thereof shall be credited with all payments made to the reserve fund as provided in Section 12 hereof [Art. 1313½k] and such payments and such credit shall be payable to the holder in cash or paid-up certificate within sixty days thereafter at the option of the holder provided he surrenders at the time of demand such cancelled contract or agreement. [Id., § 11.]

**Art. 1313½k. Withdrawal of contracts.**—The holder of any contract issued hereunder may withdraw the same at any time upon ninety days written notice and shall be entitled to receive thereafter on demand the full amount paid into the said loan or reserve fund, provided six consecutive monthly payments of dues have been paid on the contract, in addition to the purchase price of said contract, less 15 per cent if the same is withdrawn after six months and before twelve months. If the same is withdrawn after one year and before two years after date the amount paid into the loan and reserve fund less 10 per cent of such amount, and if withdrawn after two years and before three years after the date hereof he shall receive the full amount paid into said reserve fund, less 5 per cent, and if withdrawn after three years after date hereof, he shall receive the full amount paid into said reserve fund, together with three per cent interest thereon; provided that the certificate holder may at his op-



tion accept a paid-up certificate of contract for the amount to the credit of the contract in the reserve fund, plus three per cent interest to the date of withdrawal, which certificate shall bear five per cent annual interest, and be payable not later than the maturity date of the original contract. [Id., § 12.]

**Art. 1313 $\frac{1}{2}$ l. Liability on contracts.**—The liabilities of the contracts issued by any corporation transacting business hereunder shall at all times be the amount paid into the loan or reserve fund, together with interest at the rate of three per cent per annum thereon less sixteen and two-thirds per cent paid to loan or reserve fund, which may be deducted for expenses, to become the actual property of the corporation, eighty-three and one-third per cent of amount paid into loan or reserve fund, together with three per cent thereon shall constitute the certificate or contract reserve of the company, which must be invested in approved securities to be deposited with the Commissioner of Insurance and Banking as herein provided. The sixteen and two-thirds per cent of all sums collected and here referred to as the expense deduction shall become the absolute property of the corporation, and shall be carried on its books as an expense and profit deduction. Provided, however, that any corporation may require the payments into the expense fund before any amount shall be paid into the reserve fund of a loaning charge of not exceeding two and four-tenths per cent of the face of the loan value of the contract as the expense of selling and booking the contract. [Id., § 13.]

**Art. 1313 $\frac{1}{2}$ m. Dividends.**—It shall not be lawful for any company organized hereunder to make any dividends, except from surplus profits arising from its business, and in estimating such profits there shall be reserved therefrom the lawful reserve on all unexpired contracts, and also the amount of all unpaid withdrawals or cancelled certificates and all other debts due and payable or to become due and payable by the company. Any dividends made contrary to the provisions of this article shall subject the company making them to a forfeiture of its charter, and the Commissioner of Insurance and Banking shall forthwith revoke its certificate of authority; provided, that he shall give such company at least ten days' notice in writing of his intention to revoke such certificate, stating specifically the reason why he intends to revoke same. [Id., § 14.]

**Art. 1313 $\frac{1}{2}$ n. Investment of funds.**—Corporations chartered hereunder shall invest their funds in the following and no other way:

(1) If building or loan association, in such manner and in such property as building and loan associations are permitted to invest their funds under the building and loan laws of this State.

(2) In the purchase of lands or building lots and erecting buildings and improvements thereon, or in the purchase of lands and improvements, shall be or be contracted to be sold to a certificate holder of the company, payable by the periodical contribution of the certificates of the association or in periodical installments of such period of time as shall be agreed upon and designated in the by-laws of the company; at the expiration of which term all payments having been made, the lands, dwelling and improvements so sold and conveyed to such certificate holder shall become the property of the grantee discharged from further payment.

(3) In loans to certificate holders on bonds secured by mortgage which shall be a first lien on real estate in this State not to exceed eighty per cent of the cash value thereof, payable in certificates of the company or by periodical installments; except where any company holds a mortgage on real estate which is a first lien, such company may increase its loan thereon and secure the same by a second or subsequent mortgage; provided, the total indebtedness to the company, less the amount paid on certificates pledged for such loan shall not exceed eighty per centum of

the cash value of the real estate loaned on and all mortgages held by such company shall be prior to any other incumbrance on said real estate.

(4) In the redemption of certificates or contracts of the company.

(5) In loans upon the pledged or collateral security of the certificates or contracts of the company not to exceed ninety per cent of the withdrawal value of such contracts.

(6) In loans to persons not certificate or contract holders without pledge or their contracts as collateral security, on bonds secured by mortgage which shall be a first lien on improved real estate in this State not to exceed two-thirds the cash value thereof; provided, however, a purchase money mortgage or vendor's lien given to any company upon real estate sold by it shall not be considered a loan within the meaning of this subdivision. [Id., § 15.]

**Art. 1313½o. May invest in same manner as life insurance companies.**—Corporations chartered hereunder may invest in or loan upon any of the securities in which life insurance companies are permitted to invest in or loan upon in accordance with the terms and provisions of Article 4734, Revised Civil Statutes, 1911. [Id., § 16.]

**Art. 1313½p. Purchase of, or loans on, real estate.**—No real estate shall be purchased by any such company or any loan made upon bond and mortgage except upon a report in writing of the loan committee of such corporation signed by them, certifying to the kind and quality, and value of the real estate in question to the best of their judgment; such report shall be filed and preserved among the records of the company and any stockholder shall have access to such reports. [Id., § 17.]

**Art. 1313½q. Taxation.**—Corporations chartered hereunder shall be required to render for State, county and municipal taxation all of their real estate as other real estate is rendered, and all of the personal property of such company shall be valued as other property is valued for assessment in this State in the following manner:

From the total valuation of its assets shall be deducted the reserve, being the amount of the debts of such company by reason of its outstanding certificates or contracts, and from the remainder shall be deducted the assessed valuation of all the real estate owned by the company and the then remainder shall be the assessed taxable valuation of its personal property. For the purpose of State, county and municipal taxation the situs of all personal property belonging to such companies shall be at the home office of such company. [Id., § 18.]

**Art. 1313½r. Statement by foreign companies.**—Any corporation having authority to transact the business permitted by this Act incorporated under the laws of any other State, territory or country desiring to transact such business in this State, shall furnish the Commissioner of Insurance and Banking with a written or printed statement under oath of the president or vice president or treasurer and secretary of such company, which shall show:

- (a) The name and locality of the company.
- (b) The amount of its capital stock.
- (c) The amount of its capital stock paid up.
- (d) The assets of the company including:
  - (1) The amount of cash on hand and in the hands of other persons, naming such persons and their residences.
  - (2) Real estate income, where situated and its value.
  - (3) The bonds owned by the company and how they are secured and the rate of interest thereon.
  - (4) Debts due the company secured by mortgage describing the property mortgaged and the market value.
  - (5) Debts otherwise secured stating how secured.
  - (6) Debts due or to become due on certificates or contracts.
  - (7) All other moneys and securities.

(e) Amount of liabilities of the company, stating the name of the person or corporation to whom liable.

(f) Contracts surrendered or cancelled and unliquidated and all other matters of liability in suspense.

(g) Provided, however, that the Commissioner of Insurance and Banking may require other additional facts to be shown by such statement. The same character of statement shall be made annually and each company shall be required to file a similar statement not later than March 1st of each year. [Id., § 19.]

**Art. 1313 $\frac{1}{2}$ s. Same; filing copy of articles, etc.**—Such foreign company shall accompany such statement with a certified copy of its articles of incorporation, of all amendments thereto, and copy of its by-laws, together with the name and residence of each of its officers and directors, all of which must be certified to under the hand of the president or secretary of such corporation; he shall also furnish copies of its contracts and a detailed statement of its plans for doing business in the same manner that these are required to be furnished by domestic companies. [Id., § 20.]

**Art. 1313 $\frac{1}{2}$ t. Capital of foreign companies; reciprocal measures as to deposit of securities.**—Such foreign company must as to its capital stock be in conformity with the provisions of this Act relative to domestic companies. Whenever the existing or future laws of any other State or territory of the United States, or of any other country, shall require of companies chartered under this Act any deposit of securities from such other State, territory or country before transacting business therein, then in all such cases such company shall before doing any business in this State be required to make the same deposit of securities with the Treasurer of this State. [Id., § 21.]

**Art. 1313 $\frac{1}{2}$ u. Deposit of securities by foreign companies; investments.**—No company, incorporated or organized under the laws of any other State, territory or country, shall transact business in this State, unless it shall first deposit and keep deposited with the Commissioner of Insurance and Banking of this State for the benefit of all the contract holders of such company, an amount in securities, such as domestic companies may invest in, equal to not less than thirty-three and one-third per cent of its capital stock; provided, however, that if a deposit of approved securities has been made under the laws of the State, territory or country chartering such corporation in such manner as to secure equally all the contract holders of such company, then no deposit shall be required in this State as to said thirty-three and one-third per cent of the capital stock, but a certificate of such deposit under the hand and seal of the officer of such other State with whom the same has been made shall be filed with the Commissioner of Insurance and Banking. The reserves of such company, however, not organized under the laws of this State shall be invested in securities or property of the same classes as that in which home companies are required to invest their reserves and such reserves shall be deposited with the Commissioner of Insurance and Banking in the same manner as that of domestic companies. [Id., § 22.]

**Art. 1313 $\frac{1}{2}$ v. Power of attorney by foreign companies to accept service.**—Each such foreign company shall file with the Commissioner of Insurance and Banking of this State an irrevocable power of attorney, duly executed, constituting and appointing the Commissioner of Insurance and Banking of this State and his successors in office, or any officer or board which may hereafter be clothed with the powers and duties now devolving upon said commissioner, its duly authorized agent and attorney in fact for the purpose of accepting service for it or being served with citation in any suit brought against it in any court of this State, by any person, or by or to or for the use of the State of Texas, and consent-

ing that the service of any civil process upon him as its attorney for such purpose in any suit or proceeding shall be taken and held to be valid, waiving all claim and right to object to such service or to any error by reason of such service; and said appointment, agency and power of attorney shall by its terms and recitals provide that it shall continue and remain in force and effect so long as such company continues to do business in this State or to collect amounts due on its contracts from citizens in this State, and so long as it shall have outstanding contracts in this State and until all claims of every character held by citizens of this State or by the State of Texas against such company shall have been settled. Said power of attorney shall be signed by the president or vice president and the secretary of such company, whose signature shall be attested by the seal of the company and the officers signing the same shall acknowledge the same before some officer authorized to take acknowledgments; said power of attorney shall be embodied in and be approved and its execution authorized by resolution of the board of directors of such company and a copy of such resolution duly certified by the proper officers of such company shall be filed with the said power of attorney in the office of the Commissioner of Insurance and Banking in this State and shall be recorded by him in a book kept for that purpose there to remain a permanent record of said department. The provisions of Revised Civil Statutes, Article 4773 and Article 4774 shall apply to powers of attorney provided for herein, and the duties of the Commissioner shall be the same as they are provided for in said article of the statute with reference to foreign life insurance companies. [Id., § 23.]

**Art. 1313 $\frac{1}{2}$ w. Venue of suits; agents; bond; license.**—Suit on contracts may be instituted and prosecuted against any company issuing the same in the county where the home office of such company is located or where it may have an agent.

All agents of any company transacting business hereunder must be licensed by the Commissioner of Insurance and Banking and in order to obtain such license, it must be made to appear that such agent or agents are of good moral character and of good repute in their communities for honesty and fair dealing; and they must tender to the Commissioner of Insurance and Banking a bond in form to be furnished by him in any sum not less than one thousand nor more than five thousand dollars, payable to the State of Texas for the use and benefit of any person who may be aggrieved by the action and conduct of such agent in the sale of any contract for the company of which he is licensed as an agent. Such agents must be licensed annually in the same manner that life insurance agents are licensed and such bond must be given by them. Such bond may be sued upon by any person having cause of action against such agent in any court of competent jurisdiction without the necessity of making the State of Texas or the Commissioner of Insurance and Banking a party to the suit; and repeated suits may be brought thereon until the entire amount thereof has been exhausted. [Id., § 24.]

Sections 25 and 26 create offenses for violation of the act and are set forth in Vernon's Pen. Code 1916 as arts. 532c, 532d.

**Art. 1313 $\frac{1}{2}$ x. Forfeiture of charter for violation of act; penalties; acceptance of act.**—No person, firm, corporation, or association of persons or joint stock company shall hereafter engage in this State in the business provided for in this Act, except in compliance with this Act, and any corporation which does so engage shall have its charter forfeited by suit of the Attorney General and shall be liable to a penalty of not less than one hundred dollars a day nor greater than five hundred dollars a day for each day that it does so engage; all such suits to be brought as other penalty suits which the Attorney General is authorized to bring; \* \* \* provided, however, that existing corporations, individuals, associations and joint stock companies engaged in the business defined in this Act at the time this measure goes into effect shall have twelve

months thereafter to adjust their business affairs and bring their business under the terms of this Act; provided, however, that they must within sixty days after this Act goes into effect submit a statement of their business to the Commissioner of Insurance and Banking, together with the certificate of their intention to accept the provisions of this Act, and comply therewith. [Id., § 27.]

**Explanatory.**—The part omitted, as indicated by asterisks, creates an offense, and is set forth in Vernon's Pen. Code 1916 as art. 532e.

**Art. 1313 $\frac{1}{2}$ y. Bond investment and other companies to be governed by this act; unincorporated organizations to file certificate.**—All bond investment companies operating in this State under the terms and provisions of Chapter 25, of Title 25, Revised Civil Statutes of this State, 1911, and all corporations engaging in the business in this State defined in this Act, and all individuals, associations and joint stock companies unincorporated, shall be governed by this Act in the manner herein set forth. Individuals, joint stock associations and associations unincorporated shall instead of a charter file a certificate with the Commissioner of Insurance and Banking acknowledged by them by their officers accepting the provisions of this Act and specifying and setting apart the amount of capital stock to be used in their business. In all other respects they shall be governed by the terms and provisions thereof. [Id., § 28.]

**Art. 1313 $\frac{1}{2}$ z. Partial invalidity; operation of general laws.**—Should any section of this Act be held unconstitutional or void for any reason or as to any particular company, corporation, individual or association, such holding shall not affect the remainder of the Act. The general corporation laws of this State where not in conflict herewith shall govern corporations chartered or operating under this Act; and the general laws specifying charges which may be made by the Commissioner of Insurance and Banking shall apply to corporations chartered or operating hereunder. [Id., § 29.]

## CHAPTER TWENTY-FIVE C

### LOAN AND INVESTMENT COMPANIES

Art.

1313 $\frac{3}{4}$ . Term defined.

1313 $\frac{3}{4}$ a. Incorporation.

1313 $\frac{3}{4}$ b. Capital stock.

1313 $\frac{3}{4}$ c. Powers.

1313 $\frac{3}{4}$ d. Restrictions on loans and deposits.

Art.

1313 $\frac{3}{4}$ e. Borrowing of money.

1313 $\frac{3}{4}$ f. Supervision of commissioner of insurance and banking.

1313 $\frac{3}{4}$ g. Provisions of chapter 25 not to apply.

**Article 1313 $\frac{3}{4}$ . Term defined.**—The term "Loan and Investment Company" as used in this Act means any corporation formed under the provisions of this Act. [Act May 25, 1917, 1st C. S., ch. 37, § 1.]

Became a law May 25, 1917.

**Art. 1313 $\frac{3}{4}$ a. Incorporation.**—Corporations may be organized under and by virtue of this Act in the same manner as corporations for profit under and by virtue of Title 25 of the Revised Statutes, except as otherwise herein provided. [Id., § 2.]

**Art. 1313 $\frac{3}{4}$ b. Capital stock.**—The aggregate amount of the capital stock of a loan and investment company shall not be less than \$25,000.00 in any city having a population of less than 50,000 inhabitants, and shall not be less than \$50,000.00 in any city having 50,000 or more inhabitants and shall not be less than \$100,000.00 in any city having 150,000 inhabitants or more, according to the last official census. The capital stock of any such corporation shall be divided into shares of the par value of \$100.00 each. No corporation organized under this Act shall create more than one class of stock. [Id., § 3.]

**Art. 1313<sup>3</sup>/<sub>4</sub>c. Powers.**—Every loan and investment company, in addition to the powers conferred upon corporations by the general incorporation law, shall have the following powers:

(a) To lend money and to deduct interest therefor in advance at a rate not to exceed six per centum per annum, and in addition to require and to receive uniform weekly or monthly instalments on its certificates of indebtedness purchased by the borrower simultaneously with the said loan transaction, or otherwise, and pledged with the corporation as security for the said loan, with or without an allowance of interest on such instalments.

(b) To sell or negotiate bonds, notes, certificates of investment and choses in action for the payment of money at any time, either fixed or uncertain and to receive payments therefor in instalments or otherwise, with or without an allowance of interest upon such instalments.

(c) To charge for a loan made pursuant to this section one dollar for each fifty dollars or fraction thereof loaned for expenses, including any examination or investigation of the character and circumstances of the borrower, co-maker or surety and the drawing and taking acknowledgment of necessary papers or other expenses incurred in making the loan; no charge shall be collected unless a loan shall have been made as a result of such examination or investigation. [Id., § 4.]

**Art. 1313<sup>3</sup>/<sub>4</sub>d. Restrictions on loans and deposits.**—No loan and investment company shall:

(a) Hold at any one time the obligation of any one person, firm or corporation for more than two and one-half per cent, of the amount of capital and surplus of such loan and investment company.

(b) Make any loan under the provisions of this Act for a longer period than one year from the date thereof.

(c) Deposit any of its funds with any bank or trust company unless such bank or trust company has been designated as such depository by a vote of the majority of the directors or of the executive committee, exclusive of any director who is an officer, director or trustee of the depository so designated. [Id., § 5.]

**Art. 1313<sup>3</sup>/<sub>4</sub>e. Borrowing of money.**—Issuing certificates of investment and the like in the transaction of the business of corporations organized hereunder shall not be construed to be borrowed money within the meaning of Article 1162 of Title 25 of the Revised Statutes. [Id., § 6.]

**Art. 1313<sup>3</sup>/<sub>4</sub>f. Supervision of Commissioner of Insurance and Banking.**—The provisions of Articles five hundred and twenty-two to five hundred and twenty-five, inclusive, of the Revised Statutes relating to supervision by the Commissioner of Insurance and Banking, so far as applicable, together with any amendments thereof, shall apply to corporations incorporated under this Act. [Id., § 7.]

**Art. 1313<sup>3</sup>/<sub>4</sub>g. Provisions of Chapter 25 not to apply.**—The provisions of Chapter twenty-five, Title twenty-five, revised statutes, shall not apply to corporations organized under the provisions of this Act. [Id., § 8.]

## CHAPTER TWENTY-SIX

### FOREIGN CORPORATIONS

Art.  
1314. Permit to do business, etc., in state must be obtained and how; purposes; foreign corporations.  
1315. Permit to do business, affidavit as condition of issuance; requisites of.  
1316. Secretary of state to require proof in what case.

Art.  
1317. Rights under permit.  
1317a. Right to purchase, hold, sell, mortgage, etc., real and personal estate; provisos as to alienation.  
1318. No such corporation can maintain any suit, etc.

**Article 1314.** Permit to do business, etc., in state must be obtained, and how; limitation as to purposes; showing as to stock by foreign corporations.

Cited, *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611; *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

**Power of state to regulate.**—A foreign corporation's transaction of other than interstate business within the state is only a privilege which the state may extend or withhold, and as to which it may prescribe the terms or conditions upon which it extends the right. *Pierce Oil Corporation v. Weinert*, 106 Tex. 435, 167 S. W. 308.

**Interstate commerce.**—A contract entered into in Ohio for the consignment of rubber tires to a factor or agent in this state for sale, under which the tires were shipped from Ohio, involved interstate commerce, and this act is not applicable. *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.* (Civ. App.) 159 S. W. 1013.

The sale of goods by a citizen of one state to a citizen of another state which are to be shipped from one to the other is "interstate commerce," though the sale is made by the seller's agent in the buyer's state. *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394.

A contract with a foreign corporation for the sale of goods and their resale by the buyer in the state held to constitute interstate commerce, and this act did not apply to a suit thereon. *Dr. Koch Vegetable Tea Co. v. Malone* (Civ. App.) 163 S. W. 662.

A sale held to constitute interstate commerce notwithstanding the foreign seller agreed to send one of its men to assist the buyer in starting a contest in which the articles sold were to be prizes. *American Mfg. Co. v. Skidmore Drug & Furniture Co.* (Civ. App.) 170 S. W. 128.

That a foreign corporation sends its agents into the state to solicit orders does not cause sales made by such corporation, where consummated outside of the state, to lose their standing as interstate commerce. *Id.*

Though a foreign corporation violates this article, it may sue on a contract if its execution and performance constitute interstate commerce. *York Mfg. Co. v. Colley* (Civ. App.) 172 S. W. 206.

Sale of machinery and the installation of ice manufacturing plant in the state by a foreign corporation held local business not amounting to interstate commerce. *Id.*

A foreign corporation's sale of coffee held an interstate transaction, and the corporation could recover, though it had not complied with arts. 1314-1318. *Maury-Cole Co. v. Lockhart Grocery Co.* (Civ. App.) 173 S. W. 262.

A foreign corporation selling in a sister state machines to a resident need not comply with arts. 1314-1318, and may sue on bond taken as security for the price. *White Sewing Mach. Co. v. Sneed* (Civ. App.) 174 S. W. 950.

The state cannot control or regulate interstate commerce by requiring a foreign corporation engaged in such business to secure a permit to do business within the state. *W. B. Clarkson & Co. v. Gans S. S. Line* (Civ. App.) 187 S. W. 1106.

This act has no application to a corporation engaged in carrying interstate commerce. *Id.*

**Transaction of business within state.**—A sale by a foreign corporation of the material for an aerial tramway held not doing business within the state so as to prevent the corporation from maintaining an action thereon, even though it furnished a superintendent of construction. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

A contract with a foreign corporation for the sale of goods and their resale by the buyer in the state, held not a contract of agency, but a sale. *Dr. Koch Vegetable Tea Co. v. Malone* (Civ. App.) 163 S. W. 662.

Selling, in Texas, stock of a foreign corporation, and taking notes for the price, held not to constitute the doing of business in Texas. *Hughes v. Four States Life Ins. Co.* (Civ. App.) 164 S. W. 898.

A corporation contracting to furnish a transcript of the testimony at a hearing before the Interstate Commerce Commission is not transacting business in Texas where its work was performed in a sister state and transmitted to the other party to the contract in Texas. *Law Reporting Co. v. Texas Grain & Elevator Co.* (Civ. App.) 168 S. W. 1001.

A single transaction is sufficient to constitute the transaction of business in this state by a foreign corporation not having a permit to transact business in the state. And foreign corporation which sold and installed screen doors and window screens held transacting business in the state, and if without a permit not entitled to sue for the price. *Buhler v. E. T. Burrowes Co.* (Civ. App.) 171 S. W. 791.

A foreign corporation selling machinery for and installing an ice manufacturing plant held to be "doing business" in the state. *York Mfg. Co. v. Colley* (Civ. App.) 172 S. W. 206.

In an action by a foreign corporation, evidence held to show that plaintiff was not doing business within the state so as to be required to secure a permit. *Latham Co. v. Louer Bros.* (Civ. App.) 176 S. W. 920.

Arts. 1314, 1318, held not to prevent a foreign corporation which has not procured a permit from contracting to buy timber located in the state, in contemplation of doing business therein. *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 177 S. W. 226.

That a foreign railroad company maintained offices in the state where its managing officers transact the company's business which is executive and departmental constitutes "doing business in the state." *El Paso & S. W. Co. v. Chisholm* (Civ. App.) 180 S. W. 156.

Execution and mailing of letter of credit to foreign corporation held not to constitute "doing business" in Texas. *Tyler v. Consolidated Portrait Frame Co.* (Civ. App.) 191 S. W. 710.

**Foreign corporation unlawfully transacting business.**—A foreign corporation can incur liability on a contract of employment of an attorney made in the state, before it obtains a permit to do business in the state. *Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin* (Civ. App.) 179 S. W. 541.

— **Liability of shareholders as partners.**—As arts. 1314 and 1318 were intended solely to prevent foreign corporations from doing business in the state and did not render the shareholders of such corporations liable as copartners, shareholders in a foreign corporation doing business in the state without a license are not liable for its debts as copartners. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

**Art. 1315. Permit to do business, affidavit as condition of issuance; requisites of.**

Cited, *Peck-Hammond Co. v. Hamilton Independent School Dist.* (Civ. App.) 181 S. W. 697.

**Art. 1316. Secretary of state to require proof in what case.**

Cited, *Peck-Hammond Co. v. Hamilton Independent School Dist.* (Civ. App.) 181 S. W. 697; *Whaley v. McDonald* (Civ. App.) 194 S. W. 409.

**Art. 1317. Rights under permit.**

Cited, *Peck-Hammond Co. v. Hamilton Independent School Dist.* (Civ. App.) 181 S. W. 697.

**Art. 1317a. Right to purchase, hold, sell, mortgage, etc., real and personal estate; provisos as to alienation.**

**Right to hold property.**—Under articles of incorporation, cement company organized under laws of West Virginia held authorized to own property and carry out corporate purposes elsewhere than in El Paso, Tex., and that amended paragraph of charter authorized it to acquire and operate property in California. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

**Art. 1318. [746] No such corporation can maintain any suit, unless.**

Cited, *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394.

**Necessity of compliance with statute.**—See *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018; *White Sewing Mach. Co. v. Sneed* (Civ. App.) 174 S. W. 960; *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 177 S. W. 226; notes under Art. 1314.

Where plaintiff foreign corporation had failed to file articles of incorporation, it could not maintain action for price of heating plant erected for defendant school district because within the prohibition of this article. *Peck-Hammond Co. v. Hamilton Independent School Dist.* (Civ. App.) 181 S. W. 697.

Rev. St. 1911, art. 1318, providing that no foreign corporation can maintain suit unless it had filed articles of incorporation to procure permit to do business, had no application to case of German corporation suing resident of Mexico in courts of Texas on open account for goods shipped to defendant in Mexico from Berlin. *Russek v. Wind, Ems & Co.* (Civ. App.) 192 S. W. 584.

**Pleading and proof as to compliance with statute.**—A foreign corporation need not, in the absence of a plea raising the question, show a permit to do business in the state, where the petition does not show that it was engaged in business within the state. *Blackwell-Wielandy Book & Stationery Co. v. Perry* (Civ. App.) 174 S. W. 935.

Where a foreign corporation's petition and proof show that it was not doing business in the state, the burden is on the defendant to prove that plaintiff cannot maintain the action under this article. *Latham Co. v. Louer Bros.* (Civ. App.) 176 S. W. 920.

A foreign corporation, suing for the price of goods sold by it in the state, must not only allege, but prove, that at the time of the transaction it had a permit to do business in the state. *Rexall Drug Co. v. Butler Bros.* (Civ. App.) 185 S. W. 989.

In action by foreign corporation, where the petition does not show that corporation is transacting business in the state, it is not necessary that it allege that it has obtained license to transact business in state. *Crews & Williams v. Gullett Gin Co.* (Civ. App.) 189 S. W. 793.

It was not incumbent on plaintiff foreign corporation to plead and prove that cause of action did not arise in such manner as not to come within arts. 1314 and 1318, where record was silent as to whether indebtedness sued on arose out of transaction of business in Texas, etc. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

**Proper judgment is dismissal.**—Where a foreign corporation, which has not procured a license to do business in the state, sues upon a contract made within the state, the action must be dismissed. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

**Jurisdiction of action.**—Where foreign corporation under disability of this article sued on executed contract to furnish heating plant to school district, and added second count for goods sold, in amount not within jurisdiction of district court, there could be no recovery. *Peck-Hammond Co. v. Hamilton Independent School Dist.* (Civ. App.) 181 S. W. 697.



## TITLE 27

## COUNTER CLAIM

Art.	Art.
1325. Counter claim may be pleaded, when.	1329. Certain and uncertain damages not to be set off against each other.
1326. Requisites of the plea.	1330. Matters incident to plaintiff's demand may be set off.
1327. Judgment in defendant's favor, when.	
1328. Judgment for costs determined, how.	

**Article 1325. [750] [645] Counter claim may be pleaded, when.**

1. **In general.**—The rule that an equitable demand cannot be pleaded in a court of law in set-off against a legal demand has been abolished in this state. *Reeves v. White* (Civ. App.) 161 S. W. 43.

This article was enacted to avoid a multiplicity of suits and should be liberally construed. *Id.*

In an action on a note by his former partner, the defendant might set off a debt due from the plaintiff. *Id.*

There is no distinction between law and equity in Texas, and the courts in the same suit will administer whatever remedy a litigant is entitled to. *Georgetown Mercantile Co. v. First Nat. Bank* (Civ. App.) 165 S. W. 73.

Except where a debtor is insolvent, a debt must have matured to be available as a set-off. *Stockyards Nat. Bank v. Presnall* (Sup.) 194 S. W. 384.

3. **Set-off of judgments.**—Where a judgment creditor levies upon and sells exempt property, and the debtor recovers a judgment, the creditor cannot, as against such judgment, offset his own judgment. *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

8. **Subject-matter of counter claim in general.**—Where the principal stockholder and manager of a corporation advanced money to it with knowledge of the stockholders and other directors, he may, upon being held liable for an unpaid amount on his stock, set off his claim against that of the corporation's creditors; the money advanced having become part of the corporate assets. *Witt v. Nelson* (Civ. App.) 169 S. W. 381.

In action by seller of goods against purchaser and carrier, purchaser may, goods having been injured in transit, cross-complain against carrier; seller contending that title passed to purchaser on delivery to carrier. *Robert McLane Co. v. Swernemann & Schdake* (Civ. App.) 189 S. W. 282.

In action to recover usury on notes, cross-bill, alleging a conspiracy between plaintiff and others to destroy defendant's banking business, held sufficient to show a cause of action in reconvention or cross-action, and authorizing admission of evidence. *First Nat. Bank v. Herrell* (Civ. App.) 190 S. W. 797.

In an action upon a note, where defendants pleaded a cross-action asking cancellation of a mortgage to try title, and for a writ of possession, the cross-action being entirely foreign to the main action, and the court not having jurisdiction thereof, it was properly stricken. *Dawson v. Duffie* (Civ. App.) 191 S. W. 709.

10. **Parties to and mutuality of cross-demands in general.**—A buyer from an undisclosed agent can rely on set-off of a pre-existing account against the agent as payment. *Hudgins Produce Co. v. J. R. Beggs & Co.* (Civ. App.) 185 S. W. 339.

A plea of payment to an undisclosed agent does not authorize proof of set-off against the agent. *Id.*

12. **Joint and separate claims and liabilities.**—A surviving partner, at common law, might set off a debt due the partnership against an individual debt owing by him. *Amarillo Nat. Bank v. Harrell* (Civ. App.) 159 S. W. 858.

The rule that set-offs or counterclaims must be due in the same right and that a separate debt cannot be set off by a joint debt does not prevent the setting off of a separate individual debt from one of two partners to the other. *Reeves v. White* (Civ. App.) 161 S. W. 43.

Where plaintiff was individually indebted to defendant upon a claim not founded upon a tort or breach of covenant, defendant might set off such debt against his individual debt to the plaintiff, founded on a note, and it was immaterial that defendant's demand arose out of former partnership transactions. *Id.*

In an action against one lessee on a rental note, held, that defendant's counterclaim for damages from being deprived of option to purchase and of the leasehold was properly dismissed for nonjoinder of the other lessee. *Barlow v. Linss* (Civ. App.) 180 S. W. 652.

In a suit on a note a pleading in set-off and reconvention held subject to demurrer as being for a joint debt or liability against a separate debt. *Ray v. Cartwright* (Civ. App.) 180 S. W. 927.

Plaintiff's action involving a contract between it and defendant, it cannot urge against defendant's cross-action for breach thereof that the damages were suffered by a partnership, and that the other members are not parties; assignment of the contract not being shown. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

14. **Set-offs and counter claims against assigned causes of action.**—Where the owner of a building in course of construction has legal offsets against the claim of the contractor, such offset is superior to the claim of the contractor's assignee, but he has no claim to the money in his hands beyond the amount of the offset. *First Nat. Bank v. Smith* (Civ. App.) 160 S. W. 311.

**Art. 1326. [751] [646] Requisites of the plea.**

**Plea—Requisites and sufficiency.**—That the set-off and counterclaim pleaded by defendant did not distinctly state the nature of the counterclaim and the several items

thereof as required by arts. 1326 and 1907 cannot be reached by general demurrer, but must be reached by special exception. *Ajax-Grieb Rubber Co. v. Hubbard* (Civ. App.) 181 S. W. 568.

Under arts. 1325, 1326, and 1907, a plea of payment to an undisclosed agent does not authorize proof of set-off against the agent. *Hudgins Produce Co. v. J. R. Beggs & Co.* (Civ. App.) 185 S. W. 339.

**Art. 1327. [752] [647] Judgment over in defendant's favor, when.**

See *Northcutt v. Hume* (Civ. App.) 174 S. W. 974; note under art. 1328.  
Cited, *Bowles v. Belt* (Civ. App.) 159 S. W. 885.

**Art. 1328. [753] [648] Judgment for costs, how determined.**

Cited, *Bowles v. Belt* (Civ. App.) 159 S. W. 885.

**Ground for reversal.**—Under arts. 1327 and 1328, judgment held not to be reversed for error in denying nominal damages, as such damages would not have entitled plaintiff to costs. *Northcutt v. Hume* (Civ. App.) 174 S. W. 974.

**Art. 1329. [754] [649] Certain and uncertain damages not to be set off against each other.**

**In general.**—Under arts. 1325 and 1329 held that, in an action on a note by his former partner, the defendant might set off a debt due from the plaintiff. *Reeves v. White* (Civ. App.) 161 S. W. 43.

**Liquidated demand as set off in action on unliquidated claim.**—In action for wrongful attachment of goods, plaintiffs held entitled to plead judgment recovered by defendant in the attachment suit and ask that it be credited against plaintiffs' claim. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

Under arts. 1329 and 1330, an action on a note cannot be set off against an action for unliquidated damages founded on tort and breach of contract. *First Nat. Bank of Gorman v. Mangum* (Civ. App.) 176 S. W. 1197.

**Unliquidated demand as set off in action for unliquidated damages.**—In an action for the wrongful killing of a horse, the defendant cannot set off damages arising from trespass committed by the horse and his keep after former trespass, since the statute relating to set-off does not cover disconnected claims for damages arising in tort. *Dees v. Thompson* (Civ. App.) 166 S. W. 56.

In a tenant's action against his landlord for conversion of the proceeds of a check, held, that defendant could not set off a claim for damages for a tort arising out of the loss of a mule furnished plaintiff by defendant. *Sanchez v. Blumberg* (Civ. App.) 176 S. W. 904.

A husband who obtained money from plaintiff on fraudulent representations cannot set off, as against an action for that sum, injuries to his wife's property by plaintiff. *King v. Driver* (Civ. App.) 183 S. W. 87.

**Unliquidated claim as set off in action on certain demand.**—A cause of action in tort in favor of one and against his judgment creditor cannot be set off against the judgment so long as it is unliquidated. *Davidson v. Lee* (Civ. App.) 162 S. W. 414.

A cause of action in tort cannot be set off in an action upon contract. *J. C. Stewart Produce Co. v. Hamilton-Turner Grocery Co.* (Civ. App.) 163 S. W. 1000.

A counterclaim for commissions for procuring a sale of property was not an "unliquidated demand" so as not to be a proper counterclaim, under this article, though the parties did not agree upon the amount of commissions to be paid. *Shaw v. Faires* (Civ. App.) 165 S. W. 501.

Where plaintiff conveyed land to defendant, September 9, 1911, with covenant of warranty, and on October 21st following sold him personal property, for which notes were accepted on which plaintiff subsequently sued, defendant could not set up as a counterclaim a demand for unliquidated damages because of breach of plaintiff's covenant, consisting of the failure to deliver possession of the portion of the land, under arts. 1329 and 1330. *Avent v. Ormand* (Civ. App.) 173 S. W. 239.

Under arts. 1329 and 1330, held that, in action for the price of one consignment of coffee, defendants might counterclaim for plaintiff's breach of a covenant made with respect to that and other consignments. *Maurycy-Cole Co. v. Lockhart Grocery Co.* (Civ. App.) 173 S. W. 262.

Under this article defendant in a suit on a note could not set off a demand for unliquidated damages founded on breach of independent covenant. *Ray v. Cartwright* (Civ. App.) 180 S. W. 927.

**Art. 1330. [755] [650] Matters incident to plaintiff's cause of action may be set off.**

**In general.**—Under this article, in landlord's action for rent and compensation for the use of farming implements and mules, breach of warranty of horses which defendant bought from landlord in part consideration for the lease held a proper counterclaim. *Gillispie v. Ambrose* (Civ. App.) 161 S. W. 937.

The transferee of secured lien notes could in trespass to try title against himself and his transferor, who had conveyed to plaintiff's grantor, have in a cross-action the lien enforced for the attorney's fees stipulated for in the notes, and other sums due thereon. *Childs v. Juenger* (Civ. App.) 162 S. W. 474.

Where defendant was employed to sell plaintiff's property, insure it, collect rents, etc., and in the performance of such contract earned commissions for selling the property, his claim therefor was a proper counterclaim, in an action by plaintiff for money collected by defendant as rents, etc., being incident to the same transaction within this article. *Shaw v. Faires* (Civ. App.) 165 S. W. 501.

Defendant, in an action to cancel a deed on the ground of fraud, cannot plead plaintiff's fraud to defeat a recovery. Where defendant has paid out money by reason of

plaintiff's fraud he may plead that fact and have it adjudicated in case a rescission is decreed. *Paschal v. Hudson* (Civ. App.) 169 S. W. 911.

In action for possession of cotton seed allegations of answer by bank held sufficient to support a counterclaim within this article. *Guitar v. First State Bank of Hermleigh* (Civ. App.) 191 S. W. 860.

**Liquidated or unliquidated demands.**—In an action for the balance of the purchase price of a business, defendant was entitled to plead, in reconviction, damages suffered by the wrongful issuance of certain attachments and a garnishment by plaintiff arising out of the same transaction. *McLane v. Haydon* (Civ. App.) 160 S. W. 1146.

An owner damaged by breach of a contract to construct a building may either recover such damages in an independent action, or as a set-off or counterclaim in an action by the contractor. *Waco Cement Stone Works v. Smith* (Civ. App.) 162 S. W. 1158.

In an action on a note for money advanced to pay the expense of drilling a well and to foreclose a lien on a drilling outfit, securing the note, a claim by defendant for damages from plaintiff's refusal for a time to point out where the well was to be drilled, and for a certain amount for drilling the well, was a part of the same transaction as the note so as to be properly asserted in a cross-action under Rev. St. 1911, art. 1330. *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

Under this article, an action for wrongful attachment of a stock of goods, a judgment recovered by defendant in the attachment suit for the purchase price of the goods was a proper set-off. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

Where plaintiff conveyed land to defendant, September 9, 1911, with covenant of warranty, and on October 21st following sold him personal property, for which notes were accepted on which plaintiff subsequently sued, defendant could not set up as a counterclaim a demand for unliquidated damages because of breach of plaintiff's covenant consisting of the failure to deliver possession of the portion of the land, under arts. 1329 and 1330. *Avent v. Ormand* (Civ. App.) 173 S. W. 239.

Under arts. 1329 and 1330, held that, in action for the price of one consignment of coffee, defendants might counterclaim for plaintiff's breach of a covenant made with respect to that and other consignments. *Maury-Cole Co. v. Lockhart Grocery Co.* (Civ. App.) 173 S. W. 262.

Under arts. 1329 and 1330, an action on a note cannot be set off against an action for unliquidated damages founded on tort and breach of contract. *First Nat. Bank of Gorman v. Mangum* (Civ. App.) 176 S. W. 1197.

## TITLE 28

## COUNTIES AND COUNTY SEATS

Chap.

1. Creation of counties.
2. Organization of counties.
3. Corporate rights and powers.

Chap.

4. County lines.
5. County seats.
6. County boundaries.

## CHAPTER ONE

## CREATION OF COUNTIES

Art.

1335. Line of new county shall not approach nearer than twelve miles to an established county seat.

Art.

1339. New counties to pay pro rata of indebtedness.

**Article 1335. [760] [655] Line of new county shall not approach nearer than 12 miles to an established county seat.**

Distance, how measured.—Const. art. 9, § 1, subd. 2, providing that no new county shall be created so as to approach nearer than 12 miles to the county seat of the county from which it may be taken, means that the distance from the new county to the county seat of the mother county shall be measured in a straight line. *Woods v. Ball* (Civ. App.) 166 S. W. 4.

Validity of act creating new county.—Acts 33d Leg. (1st Called Sess.) c. 35, creating Dunn county out of a portion of Duval county, held unconstitutional, in violation of Const. art. 9, § 1, subd. 2, providing that no new county shall be created so as to approach nearer than 12 miles to the county seat of a county from which it may be, in whole or in part taken. *Woods v. Ball* (Civ. App.) 166 S. W. 4.

**Art. 1339. [764] New counties to pay pro rata of indebtedness.**

Note.—Act Feb. 27, 1917, c. 47, § 2a, fixes liabilities on change of boundaries of Duval and Jim Hogg counties. Act Feb. 16, 1917, c. 25, creates Hudspeth county out of El Paso county, and adjusts the liabilities of the counties.

## CHAPTER TWO

## ORGANIZATION OF COUNTIES

**Article 1360. [784] [671] Disorganized counties to be attached to other counties, until, etc.**

Special acts.—By Act Jan. 29, 1917, ch. 4, § 3, Act Feb. 12, 1917, ch. 12, § 3, and Act March 9, 1917, ch. 67, § 4, the unorganized county of Loving is attached to Reeves county, and the unorganized county of Crane is attached to Ector county.

By Act March 28, 1917, ch. 117, § 2, the unorganized county of Bailey is attached to Castro county "for judicial and all other purposes." See art. 30, paragraph 64, ante.

## CHAPTER THREE

## CORPORATE RIGHTS AND POWERS

Art.

1365. County a body corporate.
1366. Suits against.
1368. Execution shall not issue against county.

Art.

1370. Commissioner to sell real estate of.
1373. Agents to contract for county may be appointed.

**Article 1365. [789] [676] County a body corporate.**

County as corporation.—A county is by this article a body corporate and politic, and acts by the commissioners' court, and the acts of the court, made in good faith within the scope or apparent scope of its authority, are the acts of the county. *Comanche County v. Burks* (Civ. App.) 166 S. W. 470.

**Liability for torts.**—Where a county in its corporate capacity commits a wrong in relation to property in which others are interested, the county is liable. *Comanche County v. Burks* (Civ. App.) 166 S. W. 470.

**Contracts.**—Under this article the commissioners' court may ratify a sale of school land which it might originally have made. *King County v. Martin* (Civ. App.) 173 S. W. 960, judgment affirmed on rehearing 173 S. W. 1200.

#### Art. 1366. [790] [677] Suits against.

**Presentation of claim.**—This article does not apply to an action to enforce the trust imposed on a county to hold county school lands and the proceeds on a sale thereof in trust for the public schools. *Comanche County v. Burks* (Civ. App.) 166 S. W. 470.

Where the demand sued on was presented to the commissioners' court, but it refused to grant the relief, the mere failure of the clerk to enter the proceedings on his minutes did not prevent an action against the county on the demand, notwithstanding this article. *Id.*

This article held not to apply to action brought solely for purpose of binding the county as to the title to property bought by its contractor and mortgaged to plaintiff. *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

Under this article claim against county for publishing delinquent tax list could be allowed by commissioners' court, though presented before maturity, and paid at latter date so that rejection entitled claimant to sue before maturity. *Potter County v. Boesen* (Civ. App.) 191 S. W. 787.

**Limitations.**—Despite this article, county treasurer cannot recover commissions accruing for a period more than two years before institution of the suit, for he might sue within a reasonable time after presentation of claim. *Smith v. Wise County* (Civ. App.) 187 S. W. 705.

**Pleading.**—Under this article a petition, showing claim made to commissioners' court to have been larger than amount due, held to sufficiently show on general demurrer, that identical claim sued for was presented to commissioners' court for allowance before suit. *Dromgoole v. Karnes County* (Civ. App.) 189 S. W. 975.

#### Art. 1368. [792] [679] Execution shall not issue against county.

**Finality of judgment.**—A judgment directing the payment of the amount by a county out of any funds of a contractor, without disposing of the issue as to the existence of such funds raised by the pleading, is not final so as to be payable under this article, and cannot be enforced by mandamus. *Culberson County v. Groves Lumber Co.* (Civ. App.) 191 S. W. 165.

#### Art. 1370. [794] [681] Commissioners to sell real estate of.

**Conveyance by commissioners.**—A deed of county land by a county judge was invalid where it did not appear that he had been appointed by the county court to sell the land, or that the sale was made at public auction as required by this article. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

#### Art. 1373. [797] [684] Agents to contract for county may be appointed.

**Ratification of acts of person acting as agent.**—A county, through the only agency by which it can act, that is, its commissioners' court, may ratify the act of one assuming without authority to be its agent, but the sheriff's use of disinfectants purchased by him without authority, over the protest of the court, was not a ratification. *Germo Mfg. Co. v. Coleman County* (Civ. App.) 184 S. W. 1063.

**Sheriff as agent.**—The commissioners' court may act through an agent appointed by them, and a sheriff not appointed by them to purchase for the county was not their agent by virtue of his office. *Germo Mfg. Co. v. Coleman County* (Civ. App.) 184 S. W. 1063.

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## CHAPTER FOUR

### COUNTY LINES

#### Article 1378. [802] Notice to other counties.

Cited, *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

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## CHAPTER FIVE

### COUNTY SEATS

#### Article 1389. [811] Election for removal of, when.

Cited, *Woods v. Ball* (Civ. App.) 166 S. W. 4.

**Rejection of vote.**—Where from practical considerations a voter had changed his mind as to his vote on the question of change of the county seat, his vote will not be rejected because of subsequent attempts to coerce him to vote as he did. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

**CHAPTER SIX**  
**COUNTY BOUNDARIES**

**Article 1400. [822] Boundaries as established, adopted, and acts creating continued in force.**

**Validity.**—A presumption of validity of enactment of Rev. St. 1895, art. 822, adopting county boundaries then recognized and established, arises from its presence therein. *Hale County v. Lubbock County* (Civ. App.) 194 S. W. 678.

**Application and operation.**—This article is not limited to those counties whose boundaries have been established in accordance with statute. *Hale County v. Lubbock County* (Civ. App.) 194 S. W. 678.

Confusion in abstract records as to what county certain surveys are in not being referable to location of a county line did not interfere with operation of this article. *Id.*

Evidence held to bring a boundary line between counties run and marked by a state surveyor within this article. *Id.*

**New counties.**—Hudspeth county is created by Act Feb. 16, 1917, ch. 25, p. 39.

**Boundaries defined.**—Between Willacy and Kleberg counties. Act Jan. 30, 1917, c. 7, p. 8.

Act Feb. 27, 1917, c. 47, p. 81, amends the former law defining the boundaries of Duval and Jim Hogg counties.

## TITLE 29

## COUNTY FINANCES

Chap.

1. General provisions.

Chap.

2. County auditor.

## CHAPTER ONE

## GENERAL PROVISIONS

<p>Art. 1401. Duty of commissioners' court to procure ledger, etc.</p> <p>1402. Duty of county clerk to keep accounts.</p> <p>1409. How the collector may discharge his indebtedness.</p> <p>1416. County clerk shall make two reports of licenses issued at end of each month.</p> <p>1421. Clerks and justices of the peace shall report fines, judgments and jury fees, monthly.</p>	<p>Art. 1423. Fines imposed and judgments rendered by justices shall be charged against them, etc.</p> <p>1433. Claims shall be classified.</p> <p>1438. Classification of county funds.</p> <p>1440. Said court may transfer one class of funds to another, except, etc.</p> <p>1453. District judge shall appoint committee to examine into finances of county.</p> <p>1459. Warrants issued against county by judge or court shall be attested by clerk, etc.</p>
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**Article 1401. [823] [934] Duty of commissioners' court to procure ledger, etc.**

Cited, *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

**Art. 1402. [824] [935] Duty of county clerk to keep accounts.**

**Public inspection.**—The common-law right of a citizen to inspect county records to discover a misapplication of funds held not affected by this article or arts. 1160, 6030, 6041, 6042. Where county officers appeared to be in arrears for several years, an audit by the county commissioners of one year is no ground for denying a citizen the right to examine the books for preceding years. Where plaintiffs expected an inspection of county records would disclose that their assessments were too high, they had a personal interest entitling them to examine the records. *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

**Art. 1409. [828] [939] How the collector may discharge his indebtedness.**

**Liability for assessor's fees.**—Where a tax collector had funds in his hands sufficient to meet an order of the state comptroller for the assessor's fees, but the order was not presented to him before the fees became delinquent, he is not liable to the county for the fee claimed by the assessor for the collection of such delinquent fees. *Dallas County v. Bolton* (Civ. App.) 158 S. W. 1152.

**Art. 1416. [835] [946] County clerk shall make two reports of licenses issued at end of each month.**

Cited, *Roberts v. Munroe* (Civ. App.) 193 S. W. 734.

**Art. 1421. [840] [951] Clerks, etc., shall report fines, judgments and jury fees monthly.**

Cited, *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334.

**Art. 1423. [842] [953] Fines imposed and judgments rendered by justices shall be charged against them, etc.**

Cited, *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334.

**Art. 1433. [852] [962] Claims shall be classified.**

**Payment according to classification.**—See *Broussard v. Wilson* (Civ. App.) 183 S. W. 814.

In view of arts. 1433 and 1438, Const. art. 11, § 5, does not apply to a fee due a publisher by a county for publishing the county delinquent tax lists. *Boesen v. Potter County* (Civ. App.) 173 S. W. 462.

**Art. 1438. [857] [967] Classification of county funds.**

Cited, *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334; *Broussard v. Wilson* (Civ. App.) 183 S. W. 814.

**Application.**—In view of arts. 1433 and 1438, Const. art. 11, § 5, does not apply to a fee due a publisher by a county for publishing the county delinquent tax lists. *Boesen v. Potter County* (Civ. App.) 173 S. W. 462.

**Art. 1440. [859] [969]** Said court may transfer one class of funds to another, except, etc.

**Transfer of funds.**—This article permits transfer so long as the augmented fund is not thereby rendered in excess of the maximum expenditure and levy for the various county purposes under Const. art. 8, § 9. *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

In view of Const. art. 8, § 9, setting the limits of levies for various county purposes, this article does not authorize the commissioners' court to transfer into the road and bridge fund such amounts as to make possible an expenditure for roads and bridges in excess of the constitutional limit. *Id.*

This article authorizes transfer of the general fund, jury fund, contingent fund, and depository fund, to the road fund. *Broussard v. Wilson* (Civ. App.) 183 S. W. 814.

**Art. 1453. [870] [980]** District judge shall appoint committee to examine into the finances of county.

Cited, *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

**Art. 1459. [876] [986]** Warrants issued against county by judge or court shall be attested by clerk, etc.

Cited, *Myers v. Colquitt* (Civ. App.) 173 S. W. 993.

**Liability of indorser of void warrant.**—Where a holder of a void county warrant indorsed it and received the amount thereof from a bank, he must refund the amount to the bank, and cannot escape liability on the theory that he sold the warrant to the bank. *Toole v. First Nat. Bank of Hemphill* (Civ. App.) 168 S. W. 423.

**Rights of assignee of void county warrant.**—Assignment of a county warrant given for payment of lots, invalid under Const. art. 11, § 7, gives the assignee no right of the assignor to have title to the lots divested out of the county. *Rogers Nat. Bank v. Marion County* (Civ. App.) 181 S. W. 884.

**Liability of person receiving county money under invalid order.**—A sheriff who received county moneys under orders of the commissioners' court upon claims which under no circumstances he could lawfully collect from the county was liable to refund such moneys on an implied contract as for money unlawfully had and received. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

CHAPTER TWO  
COUNTY AUDITOR

Art.	1. APPOINTMENT, QUALIFICATIONS, BOND	Art.	1476. Forms for collection, mode of keeping, etc., accounts; time for reports, shall prescribe.
1460.	County auditor appointed in what counties; title; term; salary.	1477.	Regulations for collecting, accounting, etc., may adopt and enforce.
1460a.	Auditors for other counties where public necessity therefor exists; discontinuance of office.	1478.	Deposits in treasury to be made, how.
1461.	Appointment to be made by judges of district court; majority vote; in case of failure to elect governor to call in another district judge; record of action.	1480.	Bids for supplies, etc.
1462.	Qualifications.	1481.	Claims, etc., to be filed in what time; not to be paid until, etc.
	2. ASSISTANT AND CLERICAL HELP	1484.	Restrictions and requirements in audit and approval of claims, requisition, etc., bids for supplies, etc.
1464.	May appoint assistant, with consent of county judge.	1492.	Estimate, shall prepare for commissioners; who shall prepare budget.
1465.	May appoint clerical help, with consent of county judge.	1494a.	Control of finances in counties expending funds for improvements.
	4. DUTIES AND POWERS OF AUDITOR	1494b.	Purchase of supplies and materials without submission to competition; requisition.
1467.	General duties of auditor.	1494c.	Audit of bills for supplies, etc.; warrants.
1467a.	School ledger; school bond ledger; interest and sinking fund account.	1494d.	Forms; expense of printing; accounts; countersigning warrants for investments.
1468.	Access to and right to examine accounts, etc., of commissioners' court and trustees of common school districts.	1494e.	Checking reports; reports to commissioners court; keeping books; receipts; inspection of books.
1473.	Law, see to enforcement of.	1494f.	Compensation of auditor.
		1494g.	Assistants and stenographers; pay; oath.
		1494h.	Repeal.
		1494i.	Emergency.

1. APPOINTMENT, QUALIFICATIONS, BOND

**Article 1460. County auditor appointed in what counties; title; term; salary.**—In any county of this State having a population of forty



thousand inhabitants or over, according to the last United States census, or having a tax valuation of fifteen million dollars, or over, according to the last approved tax rolls, there shall be appointed an auditor of accounts and finances, the title of said officer to be county auditor, who shall hold his office for two years and until his successor is appointed and qualified; and who shall receive, as compensation for his services, the sum of one hundred (\$100.00) dollars, for each million dollars, or major portion thereof, of the assessed tax valuation, the annual salary to be computed from the last approved tax roll preceding his appointment, said annual salary shall not exceed twenty-four hundred (\$2400.00) dollars, to be paid monthly out of the general fund of the county upon an order of the commissioners' court. [Acts 1905, p. 381; Acts 1907, p. 315; Act March 30, 1915, ch. 131, § 1; Act March 29, 1917, ch. 134, § 1.]

**Explanatory.**—The act amends art. 1460, ch. 2, title 29, Rev. Civ. St. 1911, and amended by the 34th Legislature, page 203. Took effect 90 days after March 21, 1917, date of adjournment.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 1460a. Auditors for other counties where public necessity therefor exists; discontinuance of office.**—When the commissioners' court of a county, not mentioned and enumerated in Article 1460, shall determine that an auditor is a public necessity in the dispatch of the county business and shall enter an order upon the minutes of said court, fully setting out the reasons and necessity of an auditor, and shall cause said order to be certified to the judge, or judges, of the district court, or courts, having jurisdiction in the county, said judge or judges, shall, if such reason of the commissioners' court, be considered good and sufficient, appoint a county auditor, as provided in Article 1461, who shall qualify and perform all the duties required of county auditors by the laws of this State; provided said judge or judges, shall have the power to discontinue the office of county auditor at any time after the expiration of one year; when it is clearly shown that such auditor is not a public necessity and his services are not commensurate with his salary received. [Id., § 2.]

**Explanatory.**—Ch. 2, tit. 29, Rev. Civ. St. 1911, is amended by adding art. 1460a to read as above.

**Art. 1461. Appointment to be made by judges of district court; majority vote; in case of failure to elect governor to call in another district judge; record of action.**—The judge or judges of the district court or courts, having jurisdiction in the county, shall appoint the auditor provided for in this Act, at a special meeting held for that purpose, a majority ruling; provided, that in the event there is more than one district judge, and such judges fail to agree upon the selection of some person as auditor, or a majority of said judges fail to agree, then either of said judges shall certify such fact to the Governor of the State, who shall thereupon designate and appoint some other district judge of the State to act and vote with the aforesaid judges in the selection of such auditor. The action shall then be recorded in the minutes of the district court of the county and the clerk thereof shall certify the same to the commissioners' court, which shall cause the same to be recorded in its minutes, together with an order directing the payments of the auditor's salary. [Acts 1905, p. 381, § 2; Act March 22, 1915, ch. 120, § 1; Act March 29, 1917, ch. 134, § 3.]

**Explanatory.**—The act amends art. 1461, ch. 2, tit. 29, Rev. Civ. St. of 1911, and amended by the 34th Legislature, page 182.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 1462. Qualifications.**—The auditor to be appointed shall be a citizen of the county of at least two years residence, and must be a man of unquestionable good moral character and intelligence, thoroughly competent in public business details; he must be a competent accountant, who has had at least two years experience in auditing and account-

ing. The judges empowered with this appointment must carefully investigate and consider the qualifications of said person, before appointment; provided, that in the event no citizen of the county can be procured, who is qualified under the provisions of this Article, the said judge or judges may appoint a qualified citizen from another county of this State. [Acts 1905, p. 381, sec. 3; Act March 29, 1917, ch. 134, § 4.]

**Explanatory.**—The act amends art. 1462, ch. 2, tit. 29, Rev. Civ. St. of 1911.

## 2. ASSISTANT AND CLERICAL HELP

### Art. 1464. May appoint assistant, with consent of county judge.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

### Art. 1465. May appoint clerical help, with consent of county judge.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

## 4. DUTIES AND POWERS OF AUDITOR

### Art. 1467. General duties of auditor.

**Supervision over school funds.**—Under this article a county auditor has no supervision over the funds of a common school district of the county. *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

**Art. 1467a. School ledger; school bond ledger; interest and sinking fund account.**—It shall be the duty of the auditor to install in his office, a school ledger and keep in this ledger an accurate account of all funds received and all funds disbursed by the common school districts of his county. He shall also install in his office, a bond register showing all the school bonds issued by the common schools of his county, the rate of interest they bear, the date they were issued, the date they are to be paid, and he shall also keep an interest and sinking fund account of school bonds of each common school district of his county. [Act March 29, 1917, ch. 134, § 5.]

**Explanatory.**—The act amends ch. 2, tit. 29, Rev. Civ. St. of 1911, by adding art. 1467a.

**Art. 1468. Access to and right to examine accounts, etc., of commissioners' court and trustees of common school districts.**—He shall have continual access to and shall examine all the books, accounts, reports, vouchers and other records of any of the officers, the orders of the commissioners' court, relating to finances of the county and also to examine all vouchers given by the trustee of all common school districts of the county and to inquire into the correctness of same. [Acts 1905, p. 381, sec. 6; Act March 29, 1917, ch. 134, § 6.]

**Explanatory.**—Sec. 6 provides that art. 1468 "be added" to ch. 2, tit. 29, Rev. Civ. St. of 1911, to read as above. The title purports "to amend" said article. Took effect 90 days after March 21, 1917, date of adjournment.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

### Art. 1473. Law, see to enforcement of.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

**Art. 1476. Forms for collection, mode of keeping, etc., accounts; time for reports, shall prescribe.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

**Art. 1477. Regulation for collecting, accounting, etc., may adopt and enforce.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

### Art. 1478. Deposits in treasury to be made how.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

**Art. 1480. Bids for supplies, etc.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 1481. Claims, etc., to be filed in what time; not to be paid until, etc.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 1484. Restrictions and requirements in audit and approval of claims, requisition, etc., bids for supplies, etc.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 1492. Estimate, shall prepare for commissioners; who shall prepare budget.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 1494a. Control of finances in counties expending funds for improvements.**—That in all counties having a County Auditor, and containing a population of 110,000 or more, as shown by the United States census of 1910, on which the office of County Auditor may hereafter be created, in which there now exists, or in which there may be hereafter created any improvement, navigation, drainage, road or irrigation district, or any other character of district having for its purpose the expenditure of public funds for improvement purposes, whether derived from the issuance of bonds or through any character of special assessment, the County Auditor shall exercise such control over the finances of said districts as is hereinafter provided; provided, that this Act shall include any and all districts now in existence or that may hereafter be legally created, whether specifically named herein or not, providing that said district or districts shall have the purpose or object of expending district funds for improvements of any kind. [Act Feb. 16, 1915, ch. 11, § 1.]

**Explanatory.**—The title of this act recites that its purpose is to amend chapter 2 of title 29 of the Revised Statutes of 1911, by adding thereto articles 1494a, 1494b, 1494c, 1494d, 1494e, 1494f, 1494g, 1494h, and 1494i. The legislature in formulating the act, however, did not number the sections of the act as indicated, but designated by numbers from 1 to 9, inclusive.

**Art. 1494b. Purchase of supplies and materials without submission to competition; requisition.**—All purchases for supplies and materials, and all contracts for labor on behalf of any of such districts shall be made in accordance with the law governing such districts, provided, that the commissioners or other governing body shall be authorized, without the taking of bids in cases of emergency to make purchases or contracts not to exceed the sum of fifty dollars, upon requisition signed by at least two members of the governing body of such district. A requisition shall be issued therefor, executed in triplicate, one copy to be delivered to the person or corporation from whom the purchase is made, one to be delivered to the County Auditor, and one to remain on file with the governing body of such district before any purchase shall be made. [Id., § 2.]

**Art. 1494c. Audit of bills for supplies, etc.; warrants.**—All bills for supplies, materials, labor, work or anything necessary to the carrying out of the purposes of any such district shall be contracted in accordance with the law creating and governing such district that may now be in existence or that may be hereafter enacted, except as may be otherwise provided herein. It shall be the duty of the proper officers of said districts to file all bills with the County Auditor before payment, and it shall be his duty to audit and approve the same, provided said bills have been contracted in accordance with law and are found by him to be correct, and no bill shall be paid until the same has been audited and approved by the County Auditor as provided by this section. All warrants in payment of bills of any such districts shall be drawn and signed in accordance with the law governing the issuance of warrants of such dis-

tricts, and shall be countersigned by the County Auditor, and no treasurer or other depository of any of such districts shall pay out any money except upon warrants so duly countersigned. [Id., § 3.]

**Art. 1494d. Forms; expense of printing; accounts; countersigning warrants for investments.**—It shall be the duty of the County Auditor from time to time to prescribe and prepare all necessary forms for the use of any of such districts in the payment of bills, collection and disbursement of money, keeping of accounts, and the making of reports; the expense of necessary printing and stationery used therefor shall be paid by the district. He shall keep an accurate account of all balances on hand in the various funds of said districts, and he shall countersign warrants for the investment of any of the funds of said district only when invested in the manner authorized by law. [Id., § 4.]

**Art. 1494e. Checking reports; reports to Commissioners Court; keeping books; receipts; inspection of books.**—It shall be the duty of the County Auditor to check all reports required by law to be filed by any district officer, and within thirty days after the filing thereof to make a detailed report to the Commissioners Court showing his finding thereon and the condition of such district as shown by said report, and as shown by the records of his office. He shall keep a general set of books, showing all receipts and expenditures of the funds of such districts. It shall not be lawful for the treasurer or other depository to receive money for said district without executing proper receipts upon forms to be provided by the County Auditor. All books, accounts, records, bills and warrants in the possession of any officer of any such district, or in the possession of any other person legally charged with their custody, shall at all times be subject to the inspection of the County Auditor. [Id., § 5.]

**Art. 1494f. Compensation of Auditor.**—The County Auditor shall receive for his services in auditing the affairs of such navigation, drainage, road, improvement or other districts, such compensation as the Commissioners Court may prescribe, which shall be paid by the county out of the general fund and repaid to the county by such districts by warrants drawn upon the proper funds of such district; provided, that in counties having a population of one hundred ten thousand or more, as shown by the United States census of 1910, in which there may now exist, or in which there may be hereafter created as many as five such districts, the compensation allowed the County Auditor for his services on behalf of such districts shall be not less than the sum of twelve hundred dollars per annum, to be prorated among the districts in such proportion as the commissioners court may determine. [Id., § 6.]

**Art. 1494g. Assistants and stenographer; pay; oath.**—In all counties having a population of 110,000 or more, as shown by the last United States census, or which may hereafter have a population of 110,000 or more, as shown by the last preceding United States census, the County Auditor may appoint two assistants. He may also appoint a stenographer. The rate of pay for said assistants and stenographers shall be the same as fixed by general law for the payment of deputies or assistants to other officers. In addition to the assistants provided for in this section, the County Auditor may appoint, by and with the consent of the County Judge or of the Commissioners Court, such additional assistants as may be necessary to the proper conduct of his office. All of said assistants shall take the usual oath of office, and shall be paid out of the general fund of the county upon the order of the Commissioners Court. [Id., § 7.]

**Art. 1494h. Repeal.**—Any and all laws and parts of laws in conflict with any of the provisions of this Act shall be and the same are hereby repealed. [Id., § 8.]

**Art. 1494i. Emergency.**—The fact that the present laws are weak and inadequate with respect to the manner of making and checking purchases in such districts; that bills, accounts and reports are not required to be audited, and this bill seeks to extend to all of said districts the benefit of the auditor's law as applied to counties creates an emergency and imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this Act take effect from and after its passage, and it is so enacted. [Id., § 9.]

**TITLE 29 A**  
**COUNTY HOSPITAL**

Art. 1498l. Hospital in connection with poor house.	Art. 1498m. More than one hospital.
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**Article 1498l. Hospital in connection with poor house.**

**Appointment of officers.**—This article held not to require appointment by county commissioners of a board to take charge of a building constructed for, but never used as, a hospital, and abandoned as unfit therefor, or the appointment of managers to take charge of pesthouses used only occasionally to treat cases of smallpox. A hospital operated by a city and county jointly under article 1498n is not a county hospital, within this article as to appointment of a manager therefor. *Glasscock v. Wells* (Civ. App.) 171 S. W. 782.

**Art. 1498m. More than one hospital.**

**City and county hospital.**—A hospital operated by a city and county jointly under this article is not a county hospital, within article 1498l, requiring the appointment of a manager therefor. *Glasscock v. Wells* (Civ. App.) 171 S. W. 782.

## TITLE 29 B

## COUNTY PARKS

Art.

1498 $\frac{1}{4}$ . Tax levy for parks; election.1498 $\frac{1}{4}$ a. Number of parks; location.1498 $\frac{1}{4}$ b. Control of parks; tax for maintenance.

Art.

1498 $\frac{1}{4}$ c. Area of parks.1498 $\frac{1}{4}$ d. Improvement of parks.1498 $\frac{1}{4}$ e. Regulations as to use of parks.

**Article 1498 $\frac{1}{4}$ . Tax levy for parks; election.**—That the commissioners court of any county in this State is hereby authorized to levy and collect a tax not to exceed five (5) cents on each \$100 of assessed valuation of the county for the purchase and improvement of lands for use as county parks; provided, that no such tax shall be levied and collected until the proposition is submitted to and ratified by the property tax-paying voters of the county at a general election or a special election called for other purposes, provided, a two-thirds majority of the property taxpaying voters of such county, at an election held for that purpose, shall determine in favor of said tax. [Act March 15, 1915, ch. 53, § 1.]

This act took effect 90 days after adjournment of legislature on March 20, 1915.

**Art. 1498 $\frac{1}{4}$ a. Number of parks; location.**—The county parks provided for in this Act shall not exceed four in number in any one county; and it is further provided that where the commissioners court of any county desires to establish two or more of such county parks it shall be their duty to locate such parks in widely separated portions of the county so as to place them as near as practicable within the convenient reach of all the citizens of the county. [Id., § 2.]

**Art. 1498 $\frac{1}{4}$ b. Control of parks; tax for maintenance.**—Said commissioners court shall have full power and control over any and all county parks as provided for in this Act, and they shall have the right to levy and collect an annual tax sufficient in their judgment to properly maintain such parks. [Id., § 3.]

**Art. 1498 $\frac{1}{4}$ c. Area of parks.**—County parks, as contemplated by the provisions of this Act, shall consist of not more than one hundred acres. [Id., § 4.]

**Art. 1498 $\frac{1}{4}$ d. Improvement of parks.**—The improvement of lands for use as county parks, as provided for in Section 1 of this Act [Art. 1498 $\frac{1}{4}$ ] authorizes the commissioners court to build and construct pavilions and such other buildings as they may deem necessary to lay out and open driveways and walks, to pave the same or any part thereof, in such manner and of such material as said commissioners court may deem advisable; to set out trees and shrubbery, construct ditches or lakes, and to make such other improvements as they may deem proper and necessary. [Id., § 5.]

**Art. 1498 $\frac{1}{4}$ e. Regulations as to use of parks.**—County parks established under the provisions of this Act shall remain open for the free use of the public under such reasonable rules and regulations as the commissioners court may prescribe. But no person, firm or association of persons shall have the right to offer for sale or barter, exhibit anything or conduct any place of amusement where a fee is charged within said parks without first obtaining the consent of the commissioners court or its duly authorized agent or agents, paying for such privilege or concession such sum as may be agreed upon by the person, firm or association of persons and the commissioners court or its duly authorized agent or agents; and provided further, that all revenue derived from the sale of such rights, privileges or concessions shall go into a fund for the maintenance of said parks. [Id., § 6.]

## TITLE 29 C

## COUNTY LIBRARIES

Art.	Art.
1498 $\frac{1}{2}$ . Commissioners court may establish free libraries; joint libraries.	1498 $\frac{1}{2}$ i. Levy of tax.
1498 $\frac{1}{2}$ a. Election for establishment of library; ballot; frequency of elections.	1498 $\frac{1}{2}$ k. Donations; title to property.
1498 $\frac{1}{2}$ b. Location at county seat; service to all parts of county.	1498 $\frac{1}{2}$ l. Collection of taxes; library fund; claims.
1498 $\frac{1}{2}$ c. Appointment of librarian; qualifications.	1498 $\frac{1}{2}$ m. White persons to have use of library; separate branches for negroes.
1498 $\frac{1}{2}$ d. Board of library examiners; terms of members; compensation; expenses; meetings; examination of librarians.	1498 $\frac{1}{2}$ n. Farmers' county libraries to continue; merger.
1498 $\frac{1}{2}$ e. Salaries of librarians and assistants.	1498 $\frac{1}{2}$ o. Cities or towns may receive benefits of county library; discontinuance of connection.
1498 $\frac{1}{2}$ f. Reports by librarians.	1498 $\frac{1}{2}$ p. Counties may contract with cities or towns maintaining libraries.
1498 $\frac{1}{2}$ g. Supervision; rules and regulations.	1498 $\frac{1}{2}$ q. Contracts between counties; tax; termination of contract.
1498 $\frac{1}{2}$ h. Supervision by state librarian; visitation.	1498 $\frac{1}{2}$ r. Contract for service of established library; election; termination.
1498 $\frac{1}{2}$ i. Oath and bond of librarian; duties; expenses.	1498 $\frac{1}{2}$ s. Joint county libraries.
	1498 $\frac{1}{2}$ t. Discontinuance of library; election.
	1498 $\frac{1}{2}$ u. Partial invalidity.

**Article 1498 $\frac{1}{2}$ . Commissioners' Court may establish free libraries; joint libraries.**—The county commissioners' court of the several counties shall have power and authority to establish, maintain, and operate within their respective counties county free libraries, in the manner and with the functions prescribed in this Act. The said commissioners' court shall also have the power and authority to establish in co-operation with another county or counties, a joint free county library for the benefit of the co-operating counties. [Act March 23, 1915, ch. 117, § 1; Act March 5, 1917, ch. 57, § 2.]

**Explanatory.**—The act amends chapter 117 of laws of Reg. Sess., 34th Leg. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1498 $\frac{1}{2}$ a. Election for establishment of library; ballot; frequency of elections.**—The commissioners' court of any county may establish county free libraries for that part of such county lying outside of incorporated cities and towns already maintaining free public libraries, and for such additional parts of such counties as may elect to become a part of or to participate in such county free library system, as hereafter provided in this Act. On their own initiative, or when petitioned to do so by one hundred or more voters of that part of the county to be affected by this Act, the commissioners' court shall order an election to be held in said portion of the county to determine whether or not it is the will of a majority of the voters of such portion of the county to establish a county free library. This election must be held not earlier than fifteen nor later than sixty days from date or the order, and such election shall be governed by the regulations and laws governing local option elections. The ballot shall have printed upon them, "For a county free library" and "Against a county free library," as the court may order. Returns of said election shall be made at the first session of the commissioners' court following the election. If a majority of the votes cast are for a county free library or against a county free library, an order shall be made upon the minutes of said court declaring the result, and this order shall be prima facie evidence of the legality of all proceedings prior thereto. If a majority of the votes cast in this election favor the establishment of a county free library, the commissioners' court shall proceed to establish and provide for the maintenance of such library according to the further provisions of this Act. No other election shall be held on



this subject until the lapse of two years. [Act March 23, 1915, ch. 117, § 2; Act March 5, 1917, ch. 57, § 3.]

**Art. 1498 $\frac{1}{2}$ b. Location at county seat; service to all parts of county.**—The county library shall be located at the county seat, in the court house, unless more suitable quarters are available. The librarian shall endeavor to give an equal and complete service to all parts of the county through branch libraries and deposit stations in schools and other locations where suitable quarters may be obtained, thus distributing books and other printed matter as quickly as circumstances will permit. [Act March 23, 1915, ch. 117, § 2; Act March 5, 1917, ch. 57, § 4.]

**Art. 1498 $\frac{1}{2}$ c. Appointment of librarian; qualifications.**—Upon the establishment of a county free library the commissioners' court shall appoint a county librarian who shall hold office for the term of two years subject to prior removal for cause after a hearing by said court. No person shall be eligible to the office of county librarian unless prior to his appointment he has received from the State Board of Library Examiners, a certificate of qualification for the office. [Act March 23, 1915, ch. 117, §§ 3, 10; Act March 5, 1917, ch. 57, § 5.]

**Art. 1498 $\frac{1}{2}$ d. Board of library examiners; terms of members; compensation; expenses; meetings; examination of librarians.**—A commissioner is hereby created to be known as the State board of library examiners, consisting of the State librarians, who shall be ex-officio chairman of the board, the librarian of the State University, and three other well trained librarians of the State, who shall at first be selected by the State librarian and the librarians of the State University. The term of each shall be for six years, one retiring every two years. His successor shall be chosen by the remaining members of the board in executive session. The members of said board shall receive no compensation for their services except actual necessary traveling expenses paid out of the State library fund. Said board shall arrange for an annual meeting and for such other meetings as may be necessary in the pursuance of its duties. Said board shall pass upon the qualifications of all persons desiring to become county librarians in the State of Texas and may in writing adopt rules and regulations not inconsistent with the law for its government and for the carrying out of the purpose of this Act. [Act March 23, 1915, ch. 117, §§ 3, 13; Act March 5, 1917, ch. 57, § 6.]

**Art. 1498 $\frac{1}{2}$ e. Salaries of librarians and assistants.**—The county commissioners' court shall fix the salary of the librarian and assistants at the same time they fix the salary of the other appointive county officers. [Act March 23, 1915, ch. 117, § 5; Act March 5, 1917, ch. 57, § 7.]

**Art. 1498 $\frac{1}{2}$ f. Reports by librarians.**—The librarian of all county libraries shall on or before the first day of October in each year report to the commissioners' court and to the State librarian the operation of the county library during the year ending August 31 preceding. Such report shall be made out on blank furnished by the State library and shall contain a statement of the condition of the library, its operation during the year, and such financial and book statistics as are kept in well regulated libraries. [Act March 23, 1915, ch. 117, § 14; Act March 5, 1917, ch. 57, § 8.]

**Art. 1498 $\frac{1}{2}$ g. Supervision; rules and regulations.**—The county library shall be under the general supervision of the commissioners' court. The county librarian shall have the power to make rules and regulations for the county free library, to establish branches and stations throughout the county to determine the number and kind of employees of such library, and with the approval of the commissioners' court, to appoint and dismiss such employees. [Act March 23, 1915, ch. 117, § 11; Act March 5, 1917, ch. 57, § 9.]

**Art. 1498½h. Supervision by State Librarian; visitation.**—The county free libraries of the State shall also be under the general supervision of the State librarian, who shall from time to time either personally or by one of his assistants, visit the county free libraries and inquire into their conditions, advising with the librarians and commissioners' court, and rendering such assistance in all matters as the State library may be able to give. [Id., § 10.]

**Art. 1498½i. Oath and bond of librarian; duties; expenses.**—The county librarians shall, prior to entering upon the duties of his office, file with the county clerk the usual oath of office and a bond conditioned upon the faithful performance of his duties with sufficient sureties approved by a judge of the county court of which the librarian is to be the librarian in such sum as may be determined upon by the commissioners' court. The county librarian shall, subject to the general rules adopted by the commissioners' court, build up and manage according to accepted rules of library management a library for the people of the county and shall determine what books and other library equipments shall be purchased. The county librarian and assistants shall be allowed actual and necessary traveling expenses incurred in the business of the library. [Id., § 11.]

**Art. 1498½j. Levy of tax.**—After a county free library has been established, the commissioners' court shall annually levy in the same manner and at the same time, as all other taxes are levied, a tax not to exceed five cents on the one hundred dollars valuation on all property in such county outside of all incorporated cities and towns already supporting a free public library, and upon all property within all incorporated cities and towns already supporting a free public library which have elected to become a part of such county free library systems provided in this Act for the purpose of maintaining county free libraries and purchasing property therefor. [Act March 23, 1915, ch. 117, § 15; Act March 5, 1917, ch. 57, § 12.]

**Art. 1498½k. Donations; title to property.**—The commissioners' court is authorized and empowered to receive on behalf of the county any gift, bequest or devise for the county free library or for any branch or subdivision thereof. The title to all property belonging to the county free library shall be vested in the county, but where gifts or bequests shall be made for the benefit of any branch or branches of the county free library, such gifts or bequests shall be administered as designated by the donor. [Id., § 13.]

**Art. 1498½l. Collection of taxes; library fund; claims.**—All laws applicable to the collection of county taxes shall apply to the collection of the taxes herein provided. All funds of the county free library, whether derived from taxation or otherwise, shall be in the custody of the county treasurer or other official who may discharge the duties commonly delegated to the county treasurer. They shall constitute a separate fund to be known as the "county free library fund" and shall not be used for any other purpose except those of a county free library. Each claim against the county free library fund shall be authorized and approved by the county librarian, or in his absence from the county, by his assistant. It shall then be acted upon in the same manner as are all other claims against the county. [Id., § 14.]

**Art. 1498½m. White persons to have use of library; separate branches for negroes.**—Any white person of such county may use the county free library under the rules and regulations prescribed by the county commissioners' court and may be entitled to all the privileges thereof; provided, said court shall make proper provisions for the negroes of said county to be served through a separate branch or branches of the county free library which shall be administered by custodians of

the negro race under the supervision of the county librarian. [Act March 23, 1915, ch. 117, § 9; Act March 5, 1917, ch. 57, § 15.]

**Art. 1498 $\frac{1}{2}$ n. Farmers' county libraries to continue; merger.**—In any county where a farmers' county library has been established as provided in Chapter 122 of the Acts of the Regular Session of the Thirty-third Legislature, the same shall continue to operate as a farmers' county library unless by vote of the electors of said county it is decided to establish a county free library, in which case the former shall merge with and become part of the latter. [Act March 23, 1915, ch. 117, § 16; Act March 5, 1917, ch. 57, § 16.]

See Vernon's Sayles' Civ. St. 1914, arts. 14xx-14z, for provisions relating to farmers' county libraries.

**Art. 1498 $\frac{1}{2}$ o. Cities or towns may receive benefits of county library; discontinuance of connection.**—After the establishment of a county free library as provided in this Act, the board of commissioners, common council or other legislative body of any incorporated city or town in the county maintaining a free public library, may notify the commissioners' court that such a city or town desires to become a part of the county free library system and thereafter such city or town shall be a part thereof and its inhabitants shall be entitled to the benefits of such county free library and the property within such city or town shall be liable for taxes levied for county free library purposes. But the board of commissioners, common council or other legislative body of such incorporated city or town may at any time after two years notify the commissioners' court that such city or town no longer desires to be a part of the county free library system, and thereafter such city or town shall cease to participate in the benefits of such county free library system and the property situated in such city or town shall no longer be liable to taxation for county free library purposes; provided, however, that the board of commissioners, common council or other legislative body of such incorporated city or town give the commissioners' court six months notice and publish at least once a week for six successive weeks prior to either giving or withdrawing such notice in a county newspaper designated by said board of commissioners, common council or other legislative body and circulated throughout such city or town notice of such contemplated action, giving date and place of meeting at which such contemplated action is proposed to be taken. [Act March 23, 1915, ch. 117; § 4; Act March 5, 1917, ch. 57, § 17.]

**Art. 1498 $\frac{1}{2}$ p. Counties may contract with cities or towns maintaining libraries.**—The county commissioners' court wherein a county free library has been established under the provisions of this Act shall have full power and authority to enter into contracts with any incorporated city or town maintaining a free public library, and such incorporated city or town shall through its board of commissioners, common council or other legislative body, have full power to enter into contracts with such county to secure to the residents of such incorporated city or town, the same privileges of the county free library as are enjoyed by the residents of such county outside of such incorporated city or town, or such privileges as may be agreed upon in such contract, upon such consideration to be named in the contract as may be agreed upon, the same to be paid into the county library fund, and thereupon the residents of such incorporated city or town shall have the same privileges with regard to said county free library as are had by the resident of such county outside such incorporated city or town, or such privileges as may be agreed upon by contract. [Act March 23, 1915, ch. 117, § 6; Act March 5, 1917, ch. 57, § 18.]

**Art. 1498 $\frac{1}{2}$ q. Contracts between counties; tax; termination of contract.**—The commissioners' court of any county wherein a county free library has been established under the provisions of this Act, shall

have full power and authority to enter into contracts or agreements with the commissioners' court of any other county to secure to the residents of such other county such privileges of such county free library as may, by such contract, be agreed upon, and upon such consideration as may, in said contract, be agreed upon, the same to be paid into the county free library fund, and thereupon the inhabitants of such other county shall have such privileges of such county free library as may by such contract be agreed upon; and the commissioners' court of such county shall have full power and authority to enter into a contract with the commissioners' court of another county wherein a county free library has been established under the provisions of this Act, and shall have power to levy a library tax, as provided in this Act, for the purpose of carrying out such contract. But the making of such contract shall not bar the commissioners' court of such county from establishing a county free library therein, and upon the establishment of such county free library such contract may be terminated upon such terms as may be agreed upon by the parties thereto, or may continue for the term thereof. [Act March 23, 1915, ch. 117, § 8; Act March 5, 1917, ch. 57, § 19.]

**Art. 1498½r. Contract for service of established library; election; termination.**—Instead of establishing a separate county free library, upon petition of 100 or more voters of the county, the commissioners' court shall order an election to determine whether library privileges shall be obtained from an established library. Said election shall be held as provided in Section 3 of this Act [Art. 1498½a]. If a majority of the votes cast in this election favor the obtaining of library privileges by contract, the commissioners' court shall enter into a contract with the governing board of such established library to secure to the residents of the county adequate library privileges. Such contract shall provide that said established library shall assume the functions of a county free library within the county with which the contract is made, including incorporated cities and towns therein. Such contract shall also provide that the librarian of such established library shall hold, or secure, a county librarian's certificate from the State board of library examiners. The commissioners' court may contract to pay annually into the library fund of said established library such sum as may be agreed upon. Said sum shall be paid out of the county library fund provided for in Section 12 of this Act [Art. 1498½j]. Either party to such contract may terminate the same by giving six months' notice of intention to do so. Property acquired under such contract shall be subject to division at the termination of contract upon such terms as specified in such contract. [Act March 23, 1915, ch. 117, § 19; Act March 5, 1917, ch. 57, § 20.]

**Art. 1498½s. Joint county libraries.**—Where found to be more practicable, two or more adjacent counties may join for the purpose of this Act and establish and maintain a free library under the terms and provisions above set forth for the establishment and maintenance of a county free library. In such cases the combined counties shall have the same powers and be subject to the same liabilities as a single county as provided in this Act. The commissioners' court of the counties which have combined for the establishment and maintenance of a free library shall operate jointly in the same manner as does the commissioners' court of a single county in carrying out the provisions of this Act. Should any county desire to withdraw from such combination it shall be entitled to a division of property in such proportion as agreed upon in the terms of combination at the time such joint action was taken. [Id., § 21.]

**Art. 1498½t. Discontinuance of library; election.**—After a county free library has been established it may be dis-established in the following manner: Upon petition of five hundred or more of the qualified voters of that part of the county voting to establish a county free library, the commissioners' court shall call and hold an election for the purpose

of and in the same manner as prescribed in this Act for calling and holding an election to establish a county free library to determine if it is the will of the county or part of said county to dis-establish the county free library. Should a majority of the votes cast in such an election favor the dis-establishment of the county free library it shall become the duty of the commissioners' court upon the termination of existing contracts, to call in all books and movable property of the defunct county free library and to have the same sorted, inventoried and stored under lock and seal in some dry and suitable place in the county court house. [Act March 23, 1915, ch. 117, § 18; Act March 5, 1917, ch. 57, § 22.]

**Art. 1498 $\frac{1}{2}$ u. Partial invalidity.**—In case any section of this Act, or any proviso therein is found unconstitutional or invalid for any reason the same shall in no wise affect the remaining sections of this Act. [Id., § 23.]

## TITLE 30

## COUNTY TREASURER

- |   |   |
|---|---|
| <p>Art.<br/>1500. Oath and bond of.<br/>1506. Shall keep true accounts and super-<br/>intend collection of moneys, etc.</p> | <p>Art.<br/>1507. Shall report to commissioners' court.</p> |
|---|---|

**Article 1500. [920] [988] Oath and bond of.**

**Liability on bond.**—In a suit on a county treasurer's bond for an alleged shortage of funds, it is a defense to show that the shortage occurred during the term of his predecessor. Sureties on bond of county treasurer are responsible for no funds save those coming into his possession by virtue of his office, and are not responsible for trust funds which the treasurer deposited in county depository as county funds without beneficiary's consent. *Burttschell v. Colorado County* (Civ. App.) 183 S. W. 1183.

**Art. 1506. [927] [995] Shall keep true accounts and superintend collection of money, etc.**

Cited, *Moody v. Chesser* (Civ. App.) 173 S. W. 917.

**Art. 1507. [928] [996] Shall report to commissioners' court.**

**Conclusiveness of approval of account.**—Where a county treasurer improperly deposited trust funds as county funds, and his report was approved by the county commissioners, such approval is not conclusive on the sureties on his bond that the funds were county funds. *Burttschell v. Colorado County* (Civ. App.) 183 S. W. 1183.

## TITLE 31

## COURT—SUPREME

Chap.		Chap.	
3.	Jurisdiction of the Supreme Court.	8.	Hearing causes.
5.	Stenographer.	9.	Judgment of the court.
6.	The writ of error; proceedings to obtain, etc.	10.	Rehearing.
7.	Proceedings in cases in the Supreme Court.	11.	Execution of judgment.

## CHAPTER THREE

## JURISDICTION OF THE SUPREME COURT

Art.		Art.	
1521.	Appellate jurisdiction.	1523.	Court to make rules, etc.
1522.	Writs of error; certification of questions.	1524.	To prescribe rules of practice.
1522a.	When act takes effect; pending proceedings.	1526.	May issue writs.
		1529.	May issue writs of habeas corpus when, and admit to bail.

**Article 1521. Appellate jurisdiction of supreme court.**—The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, which shall extend to all questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction in the following cases when same have been brought to the Courts of Civil Appeals by writ of error or appeal from final judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.
2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own or of another Court of Civil Appeals, or of the Supreme Court upon any such question of law.
3. Those involving the construction or the validity of statutes.
4. Those involving the revenue laws of the State.
5. Those in which the Railroad Commission is a party.
6. # In any other case in which it is made to appear that an error of law has been committed by the Court of Civil Appeals of such importance to the jurisprudence of the State, as in the opinion of the Supreme Court requires correction, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by Statute. Upon the showing of such an error the Supreme Court may, in its discretion, grant a writ of error for the purpose of revising the decision upon such question alone, and of conforming its judgment to the decision thereof made by it. Until otherwise provided by rule of the Supreme Court the application for writ of error in such a case shall immediately after the title of the cause and the address to the court, concisely state the question decided by the Court of Civil Appeals in which error is asserted, in order that the Supreme Court may at once see that such a question is presented as is contemplated by this provision. This shall be followed by only such brief and general statement as may be necessary to show that the question was involved in the cause and in the decision of the Court of Civil Appeals. More than one question may be presented in the same application, all being stated in order as above stated. [Act 1913, p. 107, § 1; Act March 15, 1917, ch. 75, § 1.]

**Explanatory.**—The act amends articles 1521, 1522, 1543, 1544, and 1526 of the Revised Civil Statutes of 1911, as amended by Act, regular session, 33rd Legislature, approved March 28, 1913.

Cited, *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (dissenting opinion); *Marshall & E. T. Ry. Co. v. Petty* (Sup.) 180 S. W. 105; *First State Bank of Amarillo v. Jones* (Sup.) 183 S. W. 874.

**Improper uniting of causes.**—Improper uniting of two separate causes does not give the Supreme Court jurisdiction on writ of error, where it has no jurisdiction of either

case. *Hunt v. Johnson*, 106 Tex. 509, 171 S. W. 1125, dismissing appeal (Civ. App.) 141 S. W. 1060.

**Cases involving interlocutory injunctions.**—Arts. 4644–4646, conferring upon the Supreme Court jurisdiction of appeals and writs of error in cases involving interlocutory injunctions, held not in conflict with this article. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Erroneous declaration of substantive law.**—Where the Court of Civil Appeals merely affirmed the overruling of a general demurrer to a petition, which only raised the issue as to what, under a proper construction of the petition, were the facts pleaded, there was no question of substantive law presented so as to give the Supreme Court jurisdiction. *Fink v. San Augustine Grocery Co.* (Civ. App.) 167 S. W. 35.

Error in receiving a verdict in which the jurors concurred on different grounds, is an error in a ruling upon substantive law which can be reviewed by the Supreme Court. *Trinity & B. V. Ry. Co. v. Geary* (Sup.) 172 S. W. 545, reversing judgment (Civ. App.) 169 S. W. 201.

Mere refusal of Court of Civil Appeals to consider an assignment for reasons deemed sufficient does not present question of substantive law necessary to jurisdiction of Supreme Court under subd. 6, as amended by Acts 33rd Leg. c. 55. Where charge of trial court on material issue was prejudicially erroneous, and Court of Civil Appeals has improperly refused to consider assignment touching it, a question of substantive law is presented to Supreme Court, and, where jurisdiction of Court of Civil Appeals is not final, it is entitled to review on writ of error. *Gulf, T. & W. Ry. Co. v. Dickey* (Sup.) 187 S. W. 184.

**Cause originating in county court.**—See notes under Art. 1591.

**Mode of review.**—See *First State Bank of Archer City v. Power*, 106 Tex. 210, 163 S. W. 581; *Groce v. West Lumber Co.*, 106 Tex. 265, 163 S. W. 581; *Williams v. Abilene Independent Telephone & Telegraph Co.* (Civ. App.) 168 S. W. 402; *Cole v. State*, 170 S. W. 1036, 106 Tex. 472, dismissing petition for writ of error (Civ. App.) 163 S. W. 353; *Beene v. Waples* (Sup.) 187 S. W. 191.

**Art. 1522. Writ of error; certification of questions.**—All causes mentioned in Article 1521 may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals, as elsewhere provided, but the Court of Civil Appeals may certify any question of law arising in any of the above cases at any time they may choose so to do, whether before or after decision of the case in said court. [Acts 1913, p. 107, sec. 1; Act March 15, 1917, ch. 75, § 1.]

See note under Art. 1521.

Cited, *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (dissenting opinion); *Coultriss v. City of San Antonio* (Sup.) 179 S. W. 515; *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Mode of review in general.**—Where a remittitur is filed by plaintiff in a suit for personal injuries in accordance with the judgment of the Court of Civil Appeals, such judgment may be appealed from to the Supreme Court by defendant by petition for writ of error. *Wilson v. Freeman* (Sup.) 185 S. W. 993.

**Questions which may be certified.**—In cases in which the Supreme Court has jurisdiction on a writ of error, the Court of Civil Appeals will decline to certify a question to the Supreme Court. *Bruce v. City of Gainesville* (Civ. App.) 183 S. W. 41; *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987; *Day v. Mercer* (Civ. App.) 175 S. W. 764; *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 179 S. W. 671.

Under arts. 1521, 1522, as amended by Acts 33d Leg. c. 55, the Supreme Court has no jurisdiction of an action brought up on certified questions, relating to substantive law, which do not fall within one of the first five subdivisions of article 1521. *First State Bank of Archer City v. Power*, 106 Tex. 210, 163 S. W. 581; *Williams v. Abilene Independent Telephone & Telegraph Co.* (Civ. App.) 168 S. W. 402; *Beene v. Waples* (Sup.) 187 S. W. 191. See, also, notes under Art. 1619 et seq.

**Art. 1591 not repealed.**—See *Cole v. State*, 170 S. W. 1036, 106 Tex. 472, dismissing petition for writ of error (Civ. App.) 163 S. W. 353.

**Art. 1522a. When act takes effect; pending proceedings.**—Be it further enacted that this Act shall take effect on the first day of July, 1917, and that it shall not affect any business which may be before the Supreme Court at that time, either as to the cases in which application for writs of error have been granted or as to applications for writs of error theretofore filed, or as to matters then pending or thereafter filed with reference to any of such business; provided that if a judgment of the Court of Civil Appeals shall be reversed and the cause remanded such case shall thereafter proceed under the provisions of this Act. [Id., § 2.]

**Art. 1523. [944] [1011d] Court to make rules, etc.**

**Conflict with statute.**—Under Const. art. 5, § 25, and this article, rules of the Supreme Court, though entitled to the force of law, are void when in contravention of an express statute. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

**Rule 5.**—See *Tyler Building & Loan Ass'n v. Biard & Scales*, 106 Tex. 554, 171 S. W. 1122, reversing judgment (Civ. App.) 165 S. W. 542. Rehearing denied 106 Tex. 554, 171 S. W. 1200; notes under Art. 1542a.



**Art. 1524. [947] [1014]. To prescribe rules of practice.**

**Power to make rules.**—This article confers on the Supreme Court power to change the practice and procedure, and to require a motion for new trial in all cases except where the statute does not require it. *Cooney v. Dandridge* (Civ. App.) 158 S. W. 177.

The Constitution and laws authorize the Supreme Court to adopt rules for the government of all the courts of the state, and such rules govern when not in conflict with statute. *Vinson v. State* (Cr. App.) 179 S. W. 574.

**Construction and operation of rules in general.**—The Court of Civil Appeals will enforce the rules of court whenever insisted on, and will, on its own motion, enforce them when satisfied that the changes made by the Supreme Court in January, 1912, have become generally known. *Tinsley v. Bottom* (Civ. App.) 155 S. W. 1053.

Under this article court rules adopted by that tribunal have the force and effect of statutes. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

Rules of practice are more liberally construed than statutes. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

Statutes and rules as to the form and sufficiency of assignments of error should be liberally construed so as not to cut off the approach of parties in good faith seeking relief for prejudicial error. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

**Conflict with statute.**—When a rule prescribed by the Supreme Court conflicts with the statute, the rule must yield. *Conn v. Rosamond* (Civ. App.) 161 S. W. 73; *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied 106 Tex. 160, 160 S. W. 471; *St. Louis, I. M. & S. Ry. Co. v. West Bros.* (Civ. App.) 159 S. W. 142; *Lingo Lumber Co. v. Garvin* (Civ. App.) 181 S. W. 561. See *Tyler v. Sowders* (Civ. App.) 172 S. W. 205.

**Civil and criminal proceedings.**—An appeal from a judgment for the state in a suit on a forfeited bail bond will be dismissed, where briefs have not been filed in the trial court and in the Court of Criminal Appeals in compliance with the rules governing civil cases. *Heiman v. State*, 70 Cr. R. 480, 158 S. W. 276.

**RULES FOR COURT OF CRIMINAL APPEALS**

**Rules 1 and 2.**—See *Fowler v. State*, 71 Cr. R. 1, 158 S. W. 1117; notes under art. 845, Code Cr. Proc.

**RULES FOR COURTS OF CIVIL APPEALS**

**Rule 1.**—See *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965; and notes under heading "Record and Proceedings Not in Record," following art. 2117.

**Rule 2.**—See notes under art. 1608.

**Rules 3-6.**—See notes under arts. 1610, 1611.

**Rule 7.**—See notes under arts. 2073, 6401.

**Rule 7b.**—See *Robson v. Moore* (Civ. App.) 166 S. W. 908; note under art. 1608.

**Rule 8.**—See *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 159 S. W. 453; *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290; *Zimmerman v. Baugh* (Civ. App.) 160 S. W. 593; *Conn v. Houston Oil Co. of Texas* (Civ. App.) 171 S. W. 520; *Neville v. Miller* (Civ. App.) 171 S. W. 1109; *Tyler v. Sowders* (Civ. App.) 172 S. W. 205; *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004; *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 455; *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922; *Holmes v. Coalson* (Civ. App.) 178 S. W. 628; *McLane v. Haydon* (Civ. App.) 178 S. W. 1197; *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002; *Hamlet v. Leicht* (Civ. App.) 187 S. W. 1004; notes under arts. 1592, 1626, 2065, 2068, 2073, 2104, 2117.

**Rule 9.**—See *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290; *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

**Rule 10.**—See notes under arts. 1525, 1593.

**Rule 11.**—See *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290; *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739; *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004; *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 178 S. W. 615; notes under art. 1592.

**Rule 11a.**—See *Bird v. Lester* (Civ. App.) 163 S. W. 658; *Mott v. Scurlock* (Civ. App.) 185 S. W. 1016; notes under art. 1610.

**Rule 15a.**—See *Perry Bros. v. McNeill* (Civ. App.) 189 S. W. 120; notes under art. 1612.

**Rule 22.**—See *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739; *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657; *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965; *Huling v. Moore* (Civ. App.) 194 S. W. 188; notes under arts. 1592, 1617, 1641, 2109, 2117.

**Rule 23.**—See *Lloyd v. American Nat. Bank*, 158 S. W. 785; *Chicago, R. I. & G. Ry. Co. v. Pemberton*, 106 Tex. 463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652, rehearing denied (Sup.) 168 S. W. 126; *Overton v. Colored Knights of Pythias* (Civ. App.) 163 S. W. 1053; *Coons v. Lain* (Civ. App.) 168 S. W. 981; *E. G. Rall Grain Co. v. Burks-Simmons Co.* (Civ. App.) 171 S. W. 1043; *Zmek v. Dryer* (Civ. App.) 174 S. W. 659; *Rector v. Continental Bank & Trust Co.* (Civ. App.) 180 S. W. 309; notes under art. 1612.

**Rule 24.**—See notes under arts. 1612, 1614, 1991, 2019, 2061, 2062, 2086, citing, among others, the following cases: *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied 106 Tex. 160, 160 S. W. 471; *Cooney v. Dandridge* (Civ. App.) 158 S. W. 177; *Lloyd v. American Nat. Bank* (Civ. App.) 158 S. W. 785; *Brewer v. A. M. Blythe & Co.* (Civ. App.) 158 S. W. 786; *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427; *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452; *Moore v. Moore* (Civ. App.) 159 S. W. 896; *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290; *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438; *Chicago, R. I. & G. Ry. Co. v. Pemberton*, 106 Tex.

463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652, rehearing denied (Sup.) 168 S. W. 126; Adams v. Burrell (Civ. App.) 161 S. W. 51; Conn v. Rosamond (Civ. App.) 161 S. W. 73; Houston Oil Co. of Texas v. Drumwright (Civ. App.) 162 S. W. 1011; Sallaway v. Grand Lodge, A. O. U. W. (Civ. App.) 164 S. W. 1041; Kilgore v. Savage (Civ. App.) 164 S. W. 1081; Burrow v. Brown (Civ. App.) 167 S. W. 254; Taylor v. Butler (Civ. App.) 168 S. W. 1004; St. Louis & S. F. Ry. Co. v. Stapp (Civ. App.) 171 S. W. 1080; Browder v. Memphis Independent School Dist. (Civ. App.) 172 S. W. 152, judgment affirmed (Sup.) 180 S. W. 1077; San Antonio, U. & G. Ry. Co. v. Storey (Civ. App.) 172 S. W. 188; Zmek v. Dryer (Civ. App.) 174 S. W. 659; American Nat. Life Ins. Co. v. Rowell (Civ. App.) 175 S. W. 170; Dunn v. Epperson (Civ. App.) 175 S. W. 837; Craver v. Greer (Civ. App.) 178 S. W. 699, certified questions answered (Sup.) 179 S. W. 362, answer to certified questions conformed to (Civ. App.) 182 S. W. 368; Jefferson v. McFaddin (Civ. App.) 178 S. W. 714; Thurber Brick Co. v. Matthews (Civ. App.) 180 S. W. 1189; Orand v. Whitmore (Civ. App.) 185 S. W. 347; Jackson v. Houston Hot Well Co. (Civ. App.) 186 S. W. 247; Perry Bros. v. McNeill (Civ. App.) 189 S. W. 120; Grant v. Grant (Civ. App.) 190 S. W. 229; Morris v. Galveston Electric Co. (Civ. App.) 194 S. W. 490; Hale County v. Lubbock County (Civ. App.) 194 S. W. 678.

Rule 25.—See notes under arts. 1612, 1614, citing, among others, the following cases: Irving v. Texas & P. Ry. Co. (Civ. App.) 157 S. W. 752, judgment affirmed on rehearing 164 S. W. 910; Rio Grande & E. P. R. Co. v. Kinkel (Civ. App.) 158 S. W. 214; Greene Gold-Silver Co. v. Silbert (Civ. App.) 158 S. W. 803; Cooney v. Dandridge (Civ. App.) 158 S. W. 177; Order of United Commercial Travelers of America v. Roth (Civ. App.) 159 S. W. 176; Douthitt v. Farrar (Civ. App.) 159 S. W. 182; Magee v. Paul (Civ. App.) 159 S. W. 325; Sargent v. Barnes (Civ. App.) 159 S. W. 366; Missouri Pac. Ry. Co. v. Cheek (Civ. App.) 159 S. W. 427; Gutheridge v. Gutheridge (Civ. App.) 159 S. W. 452; Moore v. Moore (Civ. App.) 159 S. W. 896; Chicago, R. I. & G. Ry. Co. v. Pemberton, 106 Tex. 463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652, rehearing denied (Sup.) 168 S. W. 126; Conn v. Rosamond (Civ. App.) 161 S. W. 73; Childress v. Robinson (Civ. App.) 161 S. W. 78; Western Union Telegraph Co. v. Hill (Civ. App.) 162 S. W. 382; Atchison, T. & S. F. Ry. Co. v. Bryant (Civ. App.) 162 S. W. 400; Sallaway v. Grand Lodge, A. O. U. W. (Civ. App.) 164 S. W. 1041; Kilgore v. Savage (Civ. App.) 164 S. W. 1081; Gulf Refining Co. v. Pegues Mercantile Co. (Civ. App.) 164 S. W. 1113; Texas-Mexican Ry. Co. v. Reed (Civ. App.) 165 S. W. 4; Burrow v. Brown (Civ. App.) 167 S. W. 254; Taylor v. Butler (Civ. App.) 168 S. W. 1004; Browder v. Memphis Independent School Dist. (Civ. App.) 172 S. W. 152, judgment affirmed (Sup.) 180 S. W. 1077; San Antonio, U. & G. Ry. Co. v. Storey (Civ. App.) 172 S. W. 188; Jefferson v. McFaddin (Civ. App.) 178 S. W. 714; J. B. Farthing Lumber Co. v. Illig (Civ. App.) 179 S. W. 1092; Thurber Brick Co. v. Matthews (Civ. App.) 180 S. W. 1189; Jackson v. Houston Hot Well Co. (Civ. App.) 186 S. W. 247; Wichita Falls Traction Co. v. Berry (Civ. App.) 187 S. W. 415; Perry Bros. v. McNeill (Civ. App.) 189 S. W. 120; Caffarelli Bros. v. Bell (Civ. App.) 190 S. W. 223; Morris v. Galveston Electric Co. (Civ. App.) 194 S. W. 490.

Rule 26.—See notes under art. 1612, citing, among others, the following cases: Texas-Mexican Ry. Co. v. Reed (Civ. App.) 165 S. W. 4; San Antonio, U. & G. Ry. Co. v. Storey (Civ. App.) 172 S. W. 188; Wichita Falls Traction Co. v. Berry (Civ. App.) 187 S. W. 415; Morris v. Galveston Electric Co. (Civ. App.) 194 S. W. 490.

Rule 27.—See notes under arts. 1612, 1614, citing, among others, the following cases: Iowa Mfg. Co. v. Walcovich (Civ. App.) 163 S. W. 1054; Texas-Mexican Ry. Co. v. Reed (Civ. App.) 165 S. W. 4.

Rule 28.—See notes under art. 1612, citing, among others, the following case: Texas-Mexican Ry. Co. v. Reed (Civ. App.) 165 S. W. 4.

Rule 29.—See notes under arts. 1612, 1614, 2115, citing among others, the following cases: Greene Gold-Silver Co. v. Silbert (Civ. App.) 158 S. W. 803; Ft. Worth Belt Ry. Co. v. Perryman (Civ. App.) 158 S. W. 1181; Banks v. McMahon (Civ. App.) 162 S. W. 366; St. Louis, I. M. & S. Ry. Co. v. West Bros. (Civ. App.) 159 S. W. 142; Douthitt v. Farrar (Civ. App.) 159 S. W. 182; Morgan v. Lomas (Civ. App.) 159 S. W. 869; Texas Cent. R. Co. v. Neill (Civ. App.) 159 S. W. 1180; Standard Milling Co. v. Imperial Rice Co. (Civ. App.) 160 S. W. 637; General Accident Fire & Life Assur. Corporation v. Ellison (Civ. App.) 160 S. W. 1141; Stockwell v. Glaspey (Civ. App.) 160 S. W. 1151; J. M. Radford Grocery Co. v. Owens (Civ. App.) 161 S. W. 911; Rushing v. Citizens' Nat. Bank of Plainview (Civ. App.) 162 S. W. 460; Loftus v. Zier (Civ. App.) 162 S. W. 476; Burnet Fuel Co. v. Ellis (Civ. App.) 162 S. W. 911; Stevens v. Haile (Civ. App.) 162 S. W. 1025; St. Louis & S. F. R. Co. v. Finley (Civ. App.) 163 S. W. 104; Williams v. McComb (Civ. App.) 163 S. W. 654; Sallaway v. Grand Lodge, A. O. U. W. (Civ. App.) 164 S. W. 1041; Grisham v. Connell Lumber Co. (Civ. App.) 164 S. W. 1107; Texas-Mexican Ry. Co. v. Reed (Civ. App.) 165 S. W. 4; Smith v. Bogle (Civ. App.) 165 S. W. 35; Coons v. Lain (Civ. App.) 168 S. W. 981; Taylor v. Butler (Civ. App.) 168 S. W. 1004; E. G. Rall Grain Co. v. Burks-Simmons Co. (Civ. App.) 171 S. W. 1043; Texas & P. Ry. Co. v. Cave (Civ. App.) 173 S. W. 988, 1201; Ennis & Dale v. Cator (Civ. App.) 174 S. W. 947; Hermann v. Schroeder (Civ. App.) 175 S. W. 788; Chicago, B. & Q. R. Co. v. Wilson (Civ. App.) 176 S. W. 619; William D. Cleveland & Sons v. First State Bank of Floydada (Civ. App.) 176 S. W. 663; Dallam County v. S. H. Supply Co. (Civ. App.) 176 S. W. 798; Jefferson v. McFaddin (Civ. App.) 178 S. W. 714; Rector v. Continental Bank & Trust Co. (Civ. App.) 180 S. W. 309; Shipp v. Cartwright (Civ. App.) 182 S. W. 70; Tennegkelt v. Galveston Electric Co. (Civ. App.) 182 S. W. 72; Progressive Oil Co. v. Crawford (Civ. App.) 184 S. W. 728; St. Louis, I. M. & S. Ry. Co. v. Landa & Storey (Civ. App.) 187 S. W. 358; Galveston Electric Co. v. Hanson (Civ. App.) 187 S. W. 533; Perry Bros. v. McNeill (Civ. App.) 189 S. W. 120; Morris v. Galveston Electric Co. (Civ. App.) 194 S. W. 490.

Rule 30.—See notes under arts. 1612, 1614, citing, among others, the following cases: Greene Gold-Silver Co. v. Silbert (Civ. App.) 158 S. W. 803; Willett v. Herrin (Civ. App.) 161 S. W. 26; Randals v. Pecos Valley State Bank (Civ. App.) 162 S. W. 1190; Vickrey v. Dockray (Civ. App.) 158 S. W. 1160; Childress v. Robinson (Civ. App.) 161 S. W. 78; Mitchell v. Robinson (Civ. App.) 162 S. W. 443, rehearing denied Childress v. Same, 162 S. W. 1172; St. Louis & S. F. R. Co. v. Finley (Civ. App.) 163 S. W. 104;

Times Pub. Co. v. Rood (Civ. App.) 163 S. W. 1037; Sallaway v. Grand Lodge, A. O. U. W. (Civ. App.) 164 S. W. 1041; Texas-Mexican Ry. Co. v. Reed (Civ. App.) 165 S. W. 4; United Benevolent Ass'n of Texas v. Lawson (Civ. App.) 166 S. W. 713; Tomson v. Simmons (Civ. App.) 180 S. W. 1141; Thurber Brick Co. v. Matthews (Civ. App.) 180 S. W. 1189; Texas Grain & Elevator Co. v. Dyer (Civ. App.) 184 S. W. 1049; Galveston Electric Co. v. Hanson (Civ. App.) 187 S. W. 533; Grant v. Grant (Civ. App.) 190 S. W. 229.

**Rule 31.**—See notes under arts. 1612, 1614, 2061, citing, among others, the following cases: Kansas City, M. & O. Ry. Co. of Texas v. State (Civ. App.) 155 S. W. 561, judgment modified (Sup.) 163 S. W. 582; Martin v. Gray (Civ. App.) 159 S. W. 118; Douthitt v. Farrar (Civ. App.) 159 S. W. 182; Stephenson v. Luttrell (Civ. App.) 160 S. W. 666; St. Louis Southwestern Ry. Co. of Texas v. Martin (Civ. App.) 161 S. W. 405; Houston Oil Co. of Texas v. Drumwright (Civ. App.) 162 S. W. 1011; Generes v. Security Life Ins. Co. of America (Civ. App.) 163 S. W. 386; Bond v. Hancock (Civ. App.) 163 S. W. 660; Glover v. Houston Belt & Terminal Ry. Co. (Civ. App.) 163 S. W. 1063; Ferguson v. Fain (Civ. App.) 164 S. W. 1040; Coleman v. Garvin (Civ. App.) 158 S. W. 185; Wauhop v. Sauvage's Heirs (Civ. App.) 159 S. W. 185; Gutheridge v. Gutheridge (Civ. App.) 159 S. W. 452; General Accident, Fire & Life Assur. Corp. v. Ellison (Civ. App.) 160 S. W. 1141; Chicago, R. I. & G. Ry. Co. v. Pemberton, 106 Tex. 463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652. Rehearing denied (Sup.) 168 S. W. 126; Childress v. Robinson (Civ. App.) 161 S. W. 78; Mitchell v. Robinson (Civ. App.) 162 S. W. 443, rehearing denied Childress v. Robinson (Civ. App.) 162 S. W. 1172; Hein v. Consumers' Ice & Fuel Co. (Civ. App.) 162 S. W. 1023; Edwards v. Youngblood (Civ. App.) 162 S. W. 1164; Grand Lodge, F. & A. M. of Texas, v. Dillard (Civ. App.) 162 S. W. 1173; Texas-Mexican Ry. Co. v. Reed (Civ. App.) 165 S. W. 4; Burrow v. Brown (Civ. App.) 167 S. W. 254; Coons v. Lain (Civ. App.) 168 S. W. 981; Ft. Worth & D. C. Ry. Co. v. Abbott (Civ. App.) 170 S. W. 117; Pollard v. Allen & Sims (Civ. App.) 171 S. W. 302; National Live Stock Ins. Co. v. Gomillion (Civ. App.) 174 S. W. 330; Olds Motor Works v. Churchill (Civ. App.) 175 S. W. 785; Dolsons v. Sheridan Stove Mfg. Co. (Civ. App.) 178 S. W. 663; Allen v. Reed (Civ. App.) 179 S. W. 544; Tomson v. Simmons (Civ. App.) 180 S. W. 1141; Thurber Brick Co. v. Matthews (Civ. App.) 180 S. W. 1189; Galveston, H. & S. A. Ry. Co. v. Brune (Civ. App.) 181 S. W. 547; Peck v. Murphy & Bolanz (Civ. App.) 184 S. W. 542; Texas Grain & Elevator Co. v. Dyer (Civ. App.) 184 S. W. 1049; Galveston Electric Co. v. Hanson (Civ. App.) 187 S. W. 533; Perry Bros. v. McNeill (Civ. App.) 189 S. W. 120; Houston Chronicle Pub. Co. v. Lemmon (Civ. App.) 193 S. W. 347.

**Rule 32.**—See Tannehill v. Tannehill (Civ. App.) 171 S. W. 1050.

**Rules 33-36.**—See notes under art. 1612.

**Rule 37.**—See Waterman Lumber & Supply Co. v. Holmes (Civ. App.) 161 S. W. 70; Hall v. Shoemaker (Civ. App.) 178 S. W. 803.

**Rule 38.**—See Greene Gold-Silver Co. v. Silbert (Civ. App.) 158 S. W. 803; Glover v. Houston Belt & Terminal Ry. Co. (Civ. App.) 163 S. W. 1063; notes under art. 1614.

**Rule 39.**—See notes under arts. 1614, 2059, 2115, citing, among others, the following cases: American Express Co. v. Parcarello (Civ. App.) 162 S. W. 926; Overton v. Colored Knights of Pythias (Civ. App.) 163 S. W. 1053; State Fair of Texas v. Cowart (Civ. App.) 165 S. W. 1197; Pagach v. First Nat. Bank of Rosebud (Civ. App.) 166 S. W. 50; Dolsons v. Sheridan Stove Mfg. Co. (Civ. App.) 178 S. W. 663; Harwood-Barley Mfg. Co. v. McCulloch (Civ. App.) 188 S. W. 263; Alderete v. Mosley (Civ. App.) 189 S. W. 1083; Hensley v. Pena (Civ. App.) 190 S. W. 247; Sheppard v. Evans (Civ. App.) 194 S. W. 483.

**Rule 40.**—See Southern Gas & Gasoline Engine Co. v. Adams & Peters (Civ. App.) 169 S. W. 1143; Davis v. Watertown Nat. Bank (Civ. App.) 178 S. W. 593; Occident Fire Ins. Co. v. Linn (Civ. App.) 179 S. W. 523; Hawks v. Longbotham (Civ. App.) 188 S. W. 734.

**Rule 41.**—See American Express Co. v. Parcarello (Civ. App.) 162 S. W. 926; Texas & P. Ry. Co. v. Cauble (Civ. App.) 168 S. W. 369; Eldridge v. Citizens' Ry. Co. (Civ. App.) 169 S. W. 375; Southern Gas & Gasoline Engine Co. v. Adams & Peters (Civ. App.) 169 S. W. 1143; Davis v. Watertown Nat. Bank (Civ. App.) 178 S. W. 593; Mutual Film Corp. v. Morris & Daniel (Civ. App.) 184 S. W. 1060; Kansas City, M. & O. Ry. Co. of Texas v. Corn (Civ. App.) 186 S. W. 807; Hawks v. Longbotham (Civ. App.) 188 S. W. 734.

**Rule 42.**—See Record Co. v. Popplewell (Civ. App.) 161 S. W. 930; Cooper Mfg. Co. v. Golding (Civ. App.) 163 S. W. 103; Shuttlesworth v. Armour & Co. (Civ. App.) 168 S. W. 439; Mangum v. Thurman (Civ. App.) 186 S. W. 227; Southwestern Oil & Gas Co. v. Denny (Civ. App.) 187 S. W. 973.

**Rule 43.**—See First Texas State Ins. Co. v. Pipe (Civ. App.) 184 S. W. 278; Southwestern Oil & Gas Co. v. Denny (Civ. App.) 187 S. W. 973; notes under art. 1629.

**Rule 45.**—See notes under art. 1614.

**Rule 46.**—See State Fair of Texas v. Cowart (Civ. App.) 165 S. W. 1197; Lingo Lumber Co. v. Garvin (Civ. App.) 181 S. W. 561; notes under arts. 2112, 2166.

**Rule 53.**—See Ilseng v. Carter (Civ. App.) 158 S. W. 1163.

**Rule 62a.**—See notes under arts. 1626, 1628.

**Rules 63-67.**—See notes under art. 1641.

#### RULES FOR DISTRICT AND COUNTY COURTS

**Rule 7.**—See Howard's Unknown Heirs v. Skolant (Civ. App.) 162 S. W. 978; Houston & T. C. R. Co. v. Walker (Civ. App.) 167 S. W. 199, judgment reversed (Sup.) 173 S. W. 208, motion to retax costs granted (Sup.) 177 S. W. 954; notes under arts. 1882, 1902.

**Rule 10.**—See Merchants' & Bankers' Fire Underwriters v. Williams (Civ. App.) 181 S. W. 859; note under art. 1824.

**Rule 13.**—See Smith v. Tipps (Civ. App.) 171 S. W. 816; note under art. 1824.

**Rule 14.**—See Smith v. Tipps (Civ. App.) 171 S. W. 816.

- Rule 16.**—See *Vaden v. Buck* (Civ. App.) 184 S. W. 318; note under art. 1824.
- Rule 17.**—See *Brown v. Davis* (Civ. App.) 178 S. W. 842; *Johnson v. Atlas Supply Co.* (Civ. App.) 183 S. W. 31; notes under arts. 1826, 1910.
- Rule 18.**—See *Vickrey v. Dockray* (Civ. App.) 158 S. W. 1160; note under art. 1826.
- Rule 19.**—See *City of Paris v. Bray* (Sup.) 175 S. W. 432, reversing judgment (Civ. App.) 142 S. W. 927; note under art. 1827.
- Rule 24.**—See *Garner v. Jamison* (Civ. App.) 162 S. W. 940; *Edwards v. Youngblood* (Civ. App.) 162 S. W. 1164; *Smith v. First Nat. Bank of Waco* (Civ. App.) 187 S. W. 233; notes under arts. 1849, 1910.
- Rule 27.**—See *Texas 'Co. v. Earles* (Civ. App.) 164 S. W. 28; *Cooney v. Eastman* (Civ. App.) 183 S. W. 96; notes under arts. 1824, 1825.
- Rule 31.**—See *Caldwell v. Auto Sales & Supply Co.* (Civ. App.) 158 S. W. 1030; *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295; *J. W. Carter Music Co. v. Bailey* (Civ. App.) 179 S. W. 547; *J. I. Case Threshing Mach. Co. v. Webb* (Civ. App.) 181 S. W. 853; *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819; *Houston & T. C. R. Co. v. Montgomery* (Civ. App.) 185 S. W. 633; notes under arts. 1951, 1953.
- Rule 37.**—See *Cooper v. Marek* (Civ. App.) 166 S. W. 58; note under art. 1953.
- Rule 53.**—See *Crowell Independent School Dist. v. First Nat. Bank* (Civ. App.) 163 S. W. 339; *Holmes v. Coalson* (Civ. App.) 178 S. W. 628; *Dixon v. Cooper* (Civ. App.) 178 S. W. 695; notes under arts. 2058 et seq.
- Rule 54.**—See *Weatherford, M. W. & N. W. Ry. Co. v. Smith* (Civ. App.) 170 S. W. 133; note under art. 2058.
- Rule 55.**—See *Darby v. White* (Civ. App.) 165 S. W. 481; *Weatherford, M. W. & N. W. Ry. Co. v. Smith* (Civ. App.) 170 S. W. 133; *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739; *Holmes v. Coalson* (Civ. App.) 178 S. W. 628; *Dixon v. Cooper* (Civ. App.) 178 S. W. 695; *Texas City Terminal Co. v. Thomas* (Civ. App.) 178 S. W. 707; *M. Piowaty & Sons v. Wyche* (Civ. App.) 193 S. W. 1146; notes under art. 2058 et seq.
- Rule 57.**—See *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290; notes under art. 3687, note 173.
- Rule 61.**—See *Ellerd v. Campfield* (Civ. App.) 161 S. W. 392; notes under arts. 1970, 1971, 1984a, 1985.
- Rule 68.**—See *Alexander v. Louisiana & Texas Lumber Co.* (Civ. App.) 154 S. W. 235; *Harlingen Land & Water Co. v. Houston Motor Co.* (Civ. App.) 160 S. W. 628; *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188; notes under arts. 1612, 2020.
- Rule 69.**—*Craver v. Greer* (Civ. App.) 178 S. W. 699, certified questions answered (Sup.) 179 S. W. 862, answer to certified questions conformed to (Civ. App.) 182 S. W. 368; notes under art. 2020.
- Rule 70.**—See *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465; notes under art. 2058.
- Rule 71a.**—See *Cooney v. Dandridge* (Civ. App.) 158 S. W. 177; *Head v. Altman* (Civ. App.) 159 S. W. 135; *Moore v. Moore* (Civ. App.) 159 S. W. 896; *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188; *Wilkerson v. Stansney & Holub* (Civ. App.) 179 S. W. 669; *Craver v. Greer* (Sup.) 179 S. W. 862, answering certified questions (Civ. App.) 178 S. W. 699, and answer conformed to (Civ. App.) 182 S. W. 368; *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611; *Hale County v. Lubbock County* (Civ. App.) 194 S. W. 678; notes under arts. 1612, 1986, 1990, 1991, 2019, 2023.
- Rule 72.**—See *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925; *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276; notes under arts. 2068, 2070.
- Rule 73.**—See *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925; *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.
- Rule 74.**—See *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925; *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.
- Rule 75.**—See *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.
- Rule 76.**—See *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.
- Rule 84.**—See *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 158 S. W. 564; notes under arts. 2109, 2111, 2113.
- Rule 85.**—See *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 158 S. W. 564; note under arts. 2109, 2111, 2113.
- Rule 94.**—See *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 159 S. W. 453; notes under arts. 2109, 2114.
- Rule 101.**—See *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427; *Guaranty State Bank of Carthage v. Hull* (Civ. App.) 165 S. W. 104; *Moody v. Bonham* (Civ. App.) 178 S. W. 1020; *Id.*, 179 S. W. 670; *Yates v. Watson* (Civ. App.) 187 S. W. 548; *Hume v. Carpenter* (Civ. App.) 188 S. W. 707; *Perry Bros. v. McNeill* (Civ. App.) 189 S. W. 120; *Ross v. Moore* (Civ. App.) 191 S. W. 853; *Goodman v. W. S. Peck & Co.* (Civ. App.) 192 S. W. 785; notes under arts. 1612, 1639, 2075, 2113.
- Rule 101a.**—See *Cornelius v. Harris* (Civ. App.) 163 S. W. 346; *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798; *Vinson v. State* (Cr. App.) 179 S. W. 574; *Tennegkeit v. Galveston Electric Co.* (Civ. App.) 182 S. W. 72; notes under arts. 1612, 1614.
- Rule 102.**—See *Knight v. Simons* (Civ. App.) 168 S. W. 1018; notes under arts. 1614, 2115.
- Rule 110.**—See *Serrato v. State*, 171 S. W. 1133, 74 Tex. Cr. R. 413; notes under Code Cr. Proc. arts. 232, 630.
- Rule 116.**—See *McElroy v. State*, 76 Cr. R. 78, 172 S. W. 1144; notes under arts. 930, 931, Code Cr. Proc.

**Art. 1526. May issue certain writs.**—The Supreme Court, or any justice thereof, shall have power to issue writ of habeas corpus as may be prescribed by law, and the said court, or any justice thereof, may issue writs of mandamus, procedendo, certiorari and all writs necessary to enforce the jurisdiction of said court, and said court may issue writs of quo warranto or mandamus, agreeable to the principles of law, regulating such writs against any district judge or Court of Civil Appeals or Judge of the Court of Civil Appeals, or officer of the State Government, except the Governor of the State. [Act March 15, 1917, ch. 75, § 1.]

See note under art. 1521.

Cited, *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Jurisdiction of district court.**—Cited, *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (dissenting opinion).

In view of this article, as revised by Acts 33d Leg. c. 55, the district court retains jurisdiction to issue an injunction against a state comptroller to restrain him from issuing warrants on the state treasurer covering expenditures made by the government. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

**Art. 1591 not repealed.**—See *Cole v. State*, 170 S. W. 1036, 106 Tex. 472, dismissing petition for writ of error (Civ. App.) 163 S. W. 353.

**Mandamus.**—Where decision of Court of Civil Appeals in case in which its jurisdiction is final, is in conflict with decision of Court of Civil Appeals of another district, mandamus will issue from Supreme Court to require certification of questions as required by art. 1623. *Warren v. Willson* (Sup.) 192 S. W. 529.

— **Issues of fact.**—Where respondent denies under oath the material allegations in the application for mandamus, the Supreme Court cannot try the issues of fact raised, but must dismiss the application. *Maldonado v. Lane*, 106 Tex. 350, 167 S. W. 216.

**Prohibition.**—Authority of the Supreme Court to issue a writ of prohibition is limited to the enforcement of its own jurisdiction, and it cannot issue the writ to restrain the prosecution of a suit because the subject-matter is concluded by a prior judgment of the Supreme Court. *Milam County Oil Mill Co. v. Bass*, 106 Tex. 260, 163 S. W. 577.

**Art. 1529. May issue writs of habeas corpus when, and admit to bail.**

Cited, *Ex parte Duncan* (Cr. App.) 182 S. W. 313.

**Appellate jurisdiction.**—Where relator was committed for refusal to answer interrogatories in proceedings to perpetuate testimony in a civil case, and a writ of habeas corpus was dismissed by the district judge, an appeal lay to the Supreme Court under this article, and not to the Court of Criminal Appeals. *Ex parte Cummings*, 75 Cr. R. 70, 170 S. W. 153.

**Civil suit.**—Court of Criminal Appeals held to have no jurisdiction of application for habeas corpus by person committed to jail, for violation of temporary injunction, though the act sought to be enjoined was a crime, especially in view of this article. *Ex parte Zuccaro*, 72 Cr. R. 214, 162 S. W. 844.

Under Const. art. 5, §§ 3, 5, as amended in 1891, and this article, taking away the jurisdiction of the Court of Criminal Appeals in civil matters, and giving the Supreme Court jurisdiction upon habeas corpus, held that an application for a writ to discharge relator on final hearing, in an action to enjoin a theater or show on Sunday, was in a "civil suit," and would be refused. *Ex parte Mussett*, 72 Cr. R. 487, 162 S. W. 846.

A court of equity could not enjoin a grand jury from returning an indictment, if the grand jury saw proper to do so, and the Supreme Court could not release on habeas corpus if they did do so, because their authority to issue a writ is limited by the Constitution, and to restraint in a civil cause. *State v. Clark* (Cr. App.) 187 S. W. 760; *Same v. Nabers* (Cr. App.) 187 S. W. 783, 784.

## CHAPTER FIVE

### STENOGRAPHER

**Article 1539. [952] [1019] Court stenographers and salaries.**—The Supreme Court may appoint from time to time for said court as many stenographers as there then may be members of that court. The salary of each stenographer shall be fixed by the court at an amount not exceeding \$150.00 per month. Not more than three stenographers shall be appointed. [Acts 1892, p. 22; Act March 22, 1915, ch. 68, § 1.]

Took effect 90 days after March 20, 1915, the date of the adjournment of the legislature.

## CHAPTER SIX

## THE WRIT OF ERROR—PROCEEDINGS TO OBTAIN, ETC.

<p>Art. 1541. Filing; time of, etc. 1542a. Notice to defendant in error; copy of application to be delivered, etc. 1543. Referring case back to court of appeals for findings of fact. 1544. Grant of writ of error on answer of questions. 1545a. Good cause to be shown for award of writ of error. 1545b. Designation of three justices of the courts of civil appeals.</p>	<p>Art. 1545c. Justice designated to act on applications for writs of error. 1545d. Effect of granting or denying writ; rehearing; precedents; qualifications of justices. 1545e. Supreme court may also act on applications; must act on certain applications. 1545f. Powers incidental to offices of judges. 1545g. Expenses of designated justices.</p>
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**Article 1541. [942] [1011b] Filing, time of, etc.**

**Time of filing petition.**—It is essential to the jurisdiction of the Supreme Court that the petition for a writ of error be filed in the Court of Civil Appeals within 30 days from the overruling of a motion for a rehearing. *Vinson v. W. T. Carter & Bro.*, 106 Tex. 273, 166 S. W. 363, denying writ of error (Civ. App.) 161 S. W. 49.

**Action of lower court on motion for rehearing.**—The Supreme Court will not refuse a petition for a writ of error because of the failure of the Court of Civil Appeals to act directly upon the motion for the rehearing, which was not filed in time, where the Supreme Court has jurisdiction and it is sufficiently shown that the failure to file a motion for a rehearing was due to accident or some cause other than the negligence of the applicant. *Vinson v. W. T. Carter & Bro.*, 106 Tex. 273, 166 S. W. 363, denying writ of error (Civ. App.) 161 S. W. 49.

The overruling by the Court of Civil Appeals of a motion for leave to file a motion for rehearing, which was not filed within the time specified, is equivalent to an overruling of the motion for rehearing, and fixes the time from which the period for filing the petition and writ of error begins to run. *Id.*

**Art. 1542a. Notice to defendant in error; copy of application to be delivered, etc.**

**Filing answer without reservation.**—Where defendant in error filed an answer, as authorized by Supreme Court rule 5 (142 S. W. viii), based on arts. 1542a–1542c, without reserving a right to be heard, the court will at once dispose of the case. *Tyler Building & Loan Ass'n v. Biard & Scales*, 106 Tex. 554, 171 S. W. 1122, reversing judgment (Civ. App.) 165 S. W. 542. Rehearing denied 106 Tex. 554, 171 S. W. 1200.

**Art. 1543. Referring case back to Court of Civil Appeals for findings of fact.**—If upon inspection of the petition for writ of error and the record of the cause it shall appear that a Court of Civil Appeals has failed to file conclusions of fact, or has not complied with the requirements of the law in filing such conclusions, and that such conclusions are necessary to enable the Supreme Court properly to determine the rights of the parties, the court may suspend action on the petition for writ of error and return the record to the Court of Civil Appeals with instructions to make and return conclusions of fact upon the points indicated by the Supreme Court. [Acts 1913, p. 107, § 1; Act March 15, 1917, ch. 75, § 1.]

See note under art. 1521. See art. 1522a, ante.

Cited, *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (dissenting opinion); *Spence v. Fenchler* (Sup.) 180 S. W. 597; *Moore v. State* (Sup.) 181 S. W. 438.

**Art. 1591 not repealed.**—See *Cole v. State*, 170 S. W. 1036, 106 Tex. 472, dismissing petition for writ of error (Civ. App.) 163 S. W. 353.

**Art. 1544. Grant of writ of error or answer of questions.**—If, upon examination of the petition for writ of error the Supreme Court shall find the case to be one of which it may take jurisdiction, the court shall grant or refuse the writ of error or answer the questions certified by the Court of Civil Appeals, as the case may be. [Acts 1913, p. 107, § 1; Act March 15, 1917, ch. 75, § 1.]

See note under art. 1521. See art. 1522a.

Cited, *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (dissenting opinion); *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Granting writ for purpose of remand of cause.**—In an action on a life policy, where, after judgments for the beneficiary in the district court and Court of Civil Appeals, the insured is discovered to be alive, plaintiff's and defendant's motion in the Supreme Court that the petition for writ of error be granted and the cause remanded for dis-

missal will be granted. *Knights of the Maccabees of the World v. Parsons* (Sup.) 182 S. W. 672.

**Art. 1591 not repealed.**—See *Cole v. State*, 170 S. W. 1036, 106 Tex. 472, dismissing petition for writ of error (Civ. App.) 163 S. W. 353.

**Art. 1545a. Good cause to be shown for award of writ of error.**—It is made a condition of obtaining a review upon writ of error, by the Supreme Court, of any final judgment of any Court of Civil Appeals, that good cause therefor first be shown in an application for such writ, as heretofore required, the sufficiency of such cause to be determined as herein provided. [Act March 15, 1917, ch. 76, § 1.]

Became a law March 15, 1917.

See *San Antonio & A. P. Ry. Co. v. Blair* (Sup.) 196 S. W. 502.

**Art. 1545b. Designation of three justices of the Courts of Civil Appeals.**—Provided the Chief Justice of the Supreme Court or any two of the Justices thereof are empowered, as soon as this Act shall become a law, by a writing to be recorded in the minutes of the Supreme Court, to designate three of the Justices of the Courts of Civil Appeals to act as hereinafter provided. The powers given to the Chief Justice, or Associate Justices, of the Supreme Court, may be exercised from time to time as long as reason therefor may exist, and the personnel of the designated Justices of the Courts of Civil Appeals may be changed as often as may be found advisable, by relieving one, or more, and designating another, or others, in order to interfere as little as possible with the work of the Courts of Civil Appeals, such action to be in writing and recorded, as before; and not more than one Justice shall be designated to serve at any one time from any one of these courts. [Id., § 2.]

**Art. 1545c. Justices designated to act on applications for writs of error.**—It shall be the duty of the Justices of the Courts of Civil Appeals so designated, upon receiving notice thereof, to assemble together at the Capitol of the State and to take up, consider and act upon such applications for writs of error, whether then pending or afterwards filed as may be referred to them by Supreme Court or any two justices thereof, by granting, refusing or dismissing the same in accordance with the practice of the Supreme Court heretofore prevailing; and such designated Justices may make such orders and give such directions, incidental to the consideration and disposition of applications, as are sanctioned by such practice. [Id., § 3.]

**Art. 1545d. Effect of granting or denying writ; rehearing; precedents; qualifications of justices.**—The granting of an application shall admit the cause into the Supreme Court to be proceeded with by that court as heretofore provided by law. The refusal or dismissal of an application shall have the effect of denying the admission of the cause into the Supreme Court, except that motions for rehearing may be made to such designated justices in the same way as such motions to the Supreme Court have been heretofore allowed; provided, that the refusal or dismissal of any application shall not be regarded as a precedent or authority in any other cause; and, provided, that no one of such justices shall participate in acting upon an application in a cause decided during his incumbency by the court of which he is a member. [Id., § 4.]

**Art. 1545e. Supreme Court may also act on applications; must act on certain applications.**—The Supreme Court shall still have power to act upon applications for writs of error, when deemed expedient, and the same power is hereby conferred upon the Justices of that court, action by any two of whom shall be sufficient. And in any cause in which the Judges of the Courts of Civil Appeals shall have disagreed, or which the Court of Civil Appeals shall have held differently upon the same question of law the holding of another Court of Civil Appeals or of the Supreme Court, or shall have declared void a Statute of the State, the application for writ of error shall be passed upon by the Supreme Court. [Id., § 5.]

**Art. 1545f. Powers incidental to offices of judges.**—The powers herein conferred upon the Chief Justice and Associate Justices of the Supreme Court and of the Courts of Civil Appeals are declared to be incidental to the offices held by them respectively. [Id., § 6.]

**Art. 1545g. Expenses of designated justices.**—Justices of the Courts of Civil Appeals shall be entitled to have their actual and necessary expenses incurred in going to, remaining at and returning from the Capitol in the discharge of the additional duties hereby imposed upon them, paid out of the State Treasury from warrants drawn by the Comptroller, based upon itemized accounts of such expenses, verified by the certified or affidavit of the claimant. [Id., § 7.]

## CHAPTER SEVEN

### PROCEEDINGS IN CASES IN THE SUPREME COURT

#### Article 1546. [967] [1033] Trial to be on questions of law only.

**Questions that can be considered.**—A fact not disclosed by the statements and opinions of the Court of Civil Appeals certifying a question to the Supreme Court cannot be considered by the Supreme Court as a basis for its answer. *American Bonding Co. of Baltimore v. Logan*, 106 Tex. 306, 166 S. W. 1132.

The Supreme Court, on certified questions from the Court of Civil Appeals will confine its answers to issues of law presented in the certificate, and will not answer abstract questions of law. *San Antonio & A. P. Ry. Co. v. Houston Packing Co.*, 106 Tex. 383, 167 S. W. 228.

In answering a question certified from the Court of Civil Appeals the Supreme Court will predicate the answer solely upon the statement of the case as contained in the certificate. *Watkins v. Minter* (Sup.) 180 S. W. 227.

Where a question is certified by the Court of Civil Appeals, the Supreme Court will ordinarily look only to the certificate to determine the essential facts on which the question is predicated, and not to the statement of facts, though it accompanies the certificate. *Moore v. State* (Sup.) 181 S. W. 438.

Where disposition by the Court of Civil Appeals of cross-assignments by parties who did not appeal to such court was not made the subject of a writ of error, the Supreme Court need not consider it. *Cain v. Bonner* (Sup.) 194 S. W. 1098.

**Assignments of error.**—An assignment of error that the court erred in overruling a motion for new trial because the verdict was clearly excessive is too general to be considered. *Gaiveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678, judgment reversed 106 Tex. 190, 163 S. W. 13.

Error of the trial court in attempting to cancel a deed to land located in a foreign country, when apparent of record, is fundamental, and the form of the assignment of error is unimportant. *Holt v. Guerguin*, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136, reversing judgment (Civ. App.) 156 S. W. 581.

On writ of error to the Court of Civil Appeals, assignments relating to the denial of a continuance and admission of evidence do not present questions of substantive law, and therefore cannot be determined. *Browder v. Memphis Independent School Dist.* (Sup.) 180 S. W. 1077, affirming judgment (Civ. App.) 172 S. W. 152.

**Issues of fact.**—On certificate from the Court of Civil Appeals, the Supreme Court cannot find the facts, but is limited to those found by the Court of Civil Appeals as presented in the certificate. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

The question whether an absolute deed was a deed or mortgage, on conflicting evidence, being one of fact for the judge, his decision, when approved by the Court of Civil Appeals, is beyond disturbance by the Supreme Court. *Cochrane v. Wilson*, 106 Tex. 180, 160 S. W. 593.

Where the Court of Civil Appeals certifies to the Supreme Court the question whether the evidence sustains a judgment for plaintiff, only the evidence which tends to prove plaintiff's case can be considered. *Carsey v. Hawkins*, 106 Tex. 247, 163 S. W. 586.

On writ of error to review a judgment of the Court of Civil Appeals affirming a judgment of the trial court, the verdict, supported by sufficient evidence, will not be disturbed. *Pecos & N. T. Ry. Co. v. Thompson*, 106 Tex. 456, 167 S. W. 801, reversing judgment (Civ. App.) 140 S. W. 1148.

After verdict for plaintiff, the Supreme Court, passing on a question of fact, must reject all evidence favorable to defendant, and consider only that sustaining the verdict. *Cartwright v. Canode*, 106 Tex. 502, 171 S. W. 696, affirming judgment (Civ. App.) 138 S. W. 792.

On review after a verdict on conflicting evidence, the court will assume that the facts were as found. *Diamond v. Duncan* (Sup.) 172 S. W. 1100, affirming judgment (Civ. App.) 138 S. W. 429. Rehearing denied (Sup.) 177 S. W. 955.

On error to action of Court of Civil Appeals in reversing judgment for plaintiff and rendering judgment for defendant, the Supreme Court must give to the evidence that plaintiff was guilty of negligence the construction most favorable to him. *Mitchum v. Chicago, R. I. & G. Ry. Co.* (Sup.) 173 S. W. 878, reversing judgment *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 140 S. W. 811.



A finding of fact of the trial court, not disturbed by the Court of Civil Appeals when reversing the judgment on a question of law, is conclusive on the Supreme Court. *Cook v. Smith* (Sup.) 174 S. W. 1094, reversing judgment (Civ. App.) *Smith v. Cook*, 142 S. W. 26.

On writ of error from the decision of the appellate court, reversing the judgment of the trial court and rendering judgment for the opposite party, the Supreme Court must consider the evidence in the light most favorable to the successful party in the trial court. *Manning v. Beaumont, S. L. & W. Ry. Co.* (Sup.) 181 S. W. 687.

The Supreme Court is confined in its jurisdiction to questions of law, so that that court cannot, except upon uncontroverted evidence, reverse a finding on a question of fact in the court below. *Goodwin v. Gunter* (Sup.) 185 S. W. 295.

It was a question of fact for the trial court whether the efforts of a broker's agent produced the ultimate purchaser of the property. *Id.*

On error to review the judgment of a Court of Civil Appeals, on appeal in an action against a railroad by its employé for personal injuries, the Supreme Court cannot hold the verdict not excessive, the sole cause for which the Court of Appeals reversed, and affirm the judgment of the trial court for the full amount as that would involve the determination of a question of fact. *Wilson v. Freeman* (Sup.) 185 S. W. 993.

The Supreme Court on writ of error to the Court of Appeals cannot pass on the weight of the evidence. *Gulf, C. & S. F. Ry. Co. v. Nelson* (Sup.) 192 S. W. 1056.

**Questions of law.**—Where Court of Civil Appeals, on appeal from judgment for plaintiff in suit for personal injuries, held that there was no evidence to sustain the verdict, a law question is presented on error to review such judgment in the Supreme Court, but not where it found the evidence insufficient to sustain the judgment. *Wilson v. Freeman* (Sup.) 185 S. W. 993.

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## CHAPTER EIGHT

### HEARING CAUSES

#### Article 1548. [971] [1042] Order of trial of causes.

**Advancement of causes.**—A confession of error after the granting of a writ of error does not justify the advancement and hearing of the case in the Supreme Court out of its regular order upon the docket. *Galveston, H. & S. A. Ry. Co. v. Dickens* (Sup.) 182 S. W. 288.

Where, after defendant in error confessed error in the charge to secure an advancement on the docket, he filed, in good faith, and with the sanction of the court, a written argument citing authorities in support of the charge to afford the court the benefit thereof, the action was not sufficient basis for granting of plaintiff in error's motion to vacate the advancement of the case. *Id.*

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## CHAPTER NINE

### JUDGMENT OF THE COURT

Art. 1550. Judgments in open court; opinions in writing.	Art. 1553. No reversal or dismissal for want of form.
1552. If judgment reversed, may remand to court of civil appeals or district court.	1559. No mandate to be taken out after twelve months, in case of reversal and remand; certificate and dismissal.

#### Article 1550. [974] [1047] Judgments in open court; opinions in writing.

**Stare decisis.**—The individual views of the member of a court delivering an opinion is not binding as stare decisis upon any other court. *Bridgewater v. Hooks* (Civ. App.) 159 S. W. 1004.

While all courts may change their decisions, the court, in determining the law of a foreign state, must presume that an authoritative announcement of the law will not be changed. *Stamp v. Eastern Ry. Co. of New Mexico* (Civ. App.) 161 S. W. 450.

Where an appellate court withdraws an opinion, it should, in deference to the court's wishes, be treated as if never rendered. *Mixon v. Wallis* (Civ. App.) 161 S. W. 907.

The doctrine of stare decisis has but little weight where no property rights are involved, and the only question is the policy of the state. *Ex parte Francis*, 72 Cr. R. 304, 165 S. W. 147.

In the construction of the Constitution of another state, the construction placed thereon by the courts of that state should govern. *Id.*

Where the statutes of another state are pleaded and proved, the courts will refer for their construction to the reported decisions of such state. *Ogg v. Ogg* (Civ. App.) 165 S. W. 912.

Because court adopts a rule established by line of decisions upon given question, it does not necessarily follow that it must carry such rule to its logical results where par-

ties occupy different relations to subject and to each other. *Thompson v. First State Bank of Amarillo* (Civ. App.) 189 S. W. 116.

The weight of precedents establishing a certain rule of evidence is not lessened by the fact that such precedents have changed the ordinary rule as to evidence and applied a more strict rule without any legislative enactment. *Pierce-Fordyce Oil Ass'n v. Staley* (Civ. App.) 190 S. W. 814.

Ordinarily, where courts have passed on constitutionality of a statute, they will not in a subsequent case reopen discussion. *Lyle v. State* (Cr. App.) 193 S. W. 680.

Where a rule has once been deliberately adopted and declared by courts, it should not be disturbed unless by a court of appeal or review, and never by same court except for very urgent reasons and upon clear manifestation of error. *Id.*

The rule that, when a statute has been construed by the highest court having jurisdiction to pass on it; such construction is as much a part of the statute as if plainly written into it originally, applies to the construction of Constitutions. *Id.*

— **Following decisions of Supreme Court and Court of Criminal Appeals.**—Regardless of the inclination of the members of the Court of Civil Appeals, that court will follow a decision of the Supreme Court, the effect of which has not been destroyed or weakened by later decisions, although vigorously criticised by text-writers and out of harmony with the decisions of other states. *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132.

The Courts of Civil Appeals must follow the decisions of the Supreme Court. *Campbell v. Honaker's Heirs* (Civ. App.) 166 S. W. 74.

Where the decisions of the Supreme Court are conflicting, the Court of Civil Appeals is bound by the last one. *Texas Bitulithic Co. v. Abilene St. Ry. Co.* (Civ. App.) 166 S. W. 433.

While the construction of the civil statutes by the Supreme Court will be followed by the Court of Criminal Appeals, that court, in enforcing the criminal laws, must follow its own judgment, though contrary to the decisions of the Supreme Court. *Barnes v. State*, 75 Cr. R. 188, 170 S. W. 548, L. R. A. 1915C, 101.

The decisions of the Supreme Court and of the Court of Criminal Appeals on matters of criminal law are binding upon the Court of Civil Appeals. *State v. Country Club*. (Civ. App.) 173 S. W. 570.

Where the assignments of error raise only the constitutionality of an act which the Supreme Court has held constitutional, the Court of Civil Appeals will affirm. *El Paso Sash & Door Co. v. Carraway* (Civ. App.) 186 S. W. 363.

Under Const. art. 5, § 3, where a law imposes a penalty by prosecution for its violation and not a remedy by civil recovery, the opinion of the Supreme Court against its validity is not binding on the Court of Criminal Appeals, which may proceed to enforce the statute. *State v. Clark* (Cr. App.) 187 S. W. 760; *Same v. Nabers* (Cr. App.) 187 S. W. 783, 784.

In so far as principle of *stare decisis* is concerned, decisions of Supreme Court of Texas rendered before its criminal jurisdiction was transferred to the Court of Criminal Appeals are in effect decisions by Court of Criminal Appeals. *Lyle v. State* (Cr. App.) 193 S. W. 680.

— **Decisions of federal courts.**—The question of the privilege of a foreign corporation to be sued in a particular county within the state is a state question on which the decisions of the state Supreme Court are controlling, though contrary to those of the federal courts. *Atchison, T. & S. F. Ry. Co. v. Stevens* (Civ. App.) 192 S. W. 304; *Atchison, T. & S. F. Ry. Co. v. Ayers* (Civ. App.) 192 S. W. 310.

The decisions of the federal Supreme Court on the questions of the construction and validity of contracts for interstate shipments are controlling on the state courts. *St. Louis, I. M. & S. Ry. Co. v. West Bros.* (Civ. App.) 159 S. W. 142.

The binding effect of decisions of the Supreme Court upon the territory of New Mexico was not changed by act of Congress of March 3, 1911, providing that the amount in controversy, upon which the right to appeal to the federal Supreme Court depended, should be ascertained under oath; that being a mere matter of pleading and procedure. *Stamp v. Eastern Ry. Co. of New Mexico* (Civ. App.) 161 S. W. 450.

A decision of the United States Circuit Court of Appeals of the Eighth circuit, which is the appellate court of the territory of New Mexico, that there can be no recovery of damages for mental anguish for delay in the delivery of a message is the law of the territory of New Mexico on that point, but the decision does not cover a case where plaintiff also seeks to recover the price paid for transmitting the message. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

That a mutual benefit society was chartered by a special act of Congress authorizing it to amend its constitution at pleasure did not make the question whether an unreasonable raise in rates constituted a breach of existing contracts one of exclusive federal jurisprudence, so as to render decisions of the United States court binding precedents. *Supreme Lodge K. P. v. Mims* (Civ. App.) 167 S. W. 835.

The states having delegated their authority over matters of extradition to the federal government, the decisions of the federal courts are conclusive on the state courts as to such subject. *Ex parte Lewis*, 75 Cr. R. 320, 170 S. W. 1098.

The construction of a federal statute by the federal Supreme Court is binding on the state courts. *Gulf, C. & S. F. Ry. Co. v. Vasbinder* (Civ. App.) 172 S. W. 763.

In a shipper's action for damages to an interstate shipment of live stock, shipped under a written contract, the decisions of the federal courts are controlling. *Chicago, R. I. & G. Ry. Co. v. Dalton* (Civ. App.) 177 S. W. 556.

Decisions of federal Supreme Court construing the Interstate Commerce Act are binding on the state courts. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Civ. App.) 178 S. W. 810.

The decision of the United States Supreme Court in another case of the same controlling facts will be followed. *Supreme Lodge, K. P., v. Cooper* (Civ. App.) 188 S. W. 943.

The holdings of state courts that injuries received before voyage began do not fall under the term "transportation" or the contract of shipment are not controlling in case

of an interstate shipment, in view of provision including such injuries in term "transportation" in Interstate Commerce Act, § 1. *Chicago, R. I. & G. Ry. Co. v. Whaley* (Civ. App.) 190 S. W. 833.

The question whether a tax upon an interstate carrier measured by its gross earnings, is one upon interstate commerce, so as to be beyond the power of the state to impose, is controlled by the decisions of the United States Supreme Court. *Houston Belt & Terminal Ry. Co. v. State* (Sup.) 192 S. W. 1054.

Decision of United States Supreme Court construing Carmack Amendment to apply to damages caused by delay in transportation is controlling on state courts. *Gulf, C. & S. F. Ry. Co. v. Nelson* (Sup.) 192 S. W. 1056.

— **Dictum.**—Although the contract under discussion by the Supreme Court was clearly void on another ground, its opinion, placing the real emphasis on the ground that a stipulation as to the time within which action should be brought was invalid under the statute, was not dictum. *Texas & P. Ry. Co. v. Langbehn* (Civ. App.) 158 S. W. 244, denying second rehearing, 150 S. W. 1188.

The Supreme Court's construction of a rule of court, expressed without equivocation and with emphatic language, and called for by the questions certified, is not obiter dictum, but is binding upon the Court of Civil Appeals. *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438.

A decision of a question not necessary to a disposition of the case, and to which the court did not give that investigation it would otherwise have felt called upon to give, is obiter dictum. *Ex parte Francis* (Civ. App.) 165 S. W. 147.

A determination by the Supreme Court that a bona fide club selling intoxicating liquors only to its members is not engaged in the business of selling such liquors held dictum, in view of the questions certified under art. 1619. *State v. Country Club* (Civ. App.) 173 S. W. 570.

The court's discussion of a question which is not involved is not binding on it, nor a precedent for later cases. *Roswell v. Pannell* (Sup.) 180 S. W. 593.

Whatever part of the language of an opinion is not necessary to the decision of a case is dicta. *Southern Union Life Ins. Co. v. White* (Civ. App.) 188 S. W. 266.

Statement in decision of Supreme Court that suit to enjoin execution on judgment was direct attack thereon is not binding decision; case in which the statement was made not being an injunction suit. *Texas Cent. R. Co. v. Hoffman* (Civ. App.) 193 S. W. 1140.

### **Art. 1552. [975] [1049] If judgment reversed, may remand to court of civil appeals or district court.**

**Remand of cause in general.**—Where judgment in defendant's favor was reversed except as to a small tract of which he had actual possession for the statutory period, though his pleading and evidence furnished no field notes or other description of this tract, held that he would be given an opportunity to furnish such description instead of rendering judgment for plaintiff. *Combes v. Stringer*, 106 Tex. 427, 167 S. W. 217, reversing judgment (Civ. App.) 142 S. W. 668.

Where the court reverses the judgment on the weight of evidence, if the evidence, when considered in the light most favorable to the successful party, would sustain the judgment, it must remand the case. *Logue v. Southern Kansas Ry. Co. of Texas*, 106 Tex. 445, 167 S. W. 805, affirming judgment *Southern Kansas Ry. Co. of Texas v. Logue* (Civ. App.) 139 S. W. 11.

A judgment for employé will not on appeal be reversed without remand on account of his contributory negligence, if the evidence was such that the jury might have found him free from negligence. *Bogue v. Texas Traction Co.* (Sup.) 173 S. W. 875, affirming judgment *Texas Traction Co. v. Bogue* (Civ. App.) 139 S. W. 1042. Rehearing denied *Bogue v. Texas Traction Co.* (Sup.) 177 S. W. 954.

### **Art. 1553. [972] [1043] No reversal or dismissal for want of form.**

**Rendering judgment.**—Where a case was fully developed, and turned on a question of law on reversal, judgment will be finally rendered. *Wiseman v. Watters* (Sup.) 174 S. W. 815, reversing judgment (Civ. App.) 142 S. W. 134.

Where the Court of Civil Appeals erroneously reversed a case because of plaintiff's contributory negligence as a matter of law, and remanded it for new trial, the Supreme Court cannot render judgment for the plaintiff, but must affirm the remand. *Tweed v. Western Union Telegraph Co.* (Sup.) 177 S. W. 957, denying rehearing (Sup.) 166 S. W. 696.

**Reversal.**—Where the court gives two contradictory instructions, one of which is erroneous, and it cannot be told on which the jury based its verdict, the judgment must be reversed. *J. T. Burgher & Co. v. Floore* (Sup.) 174 S. W. 819, affirming judgment (Civ. App.) *Floore v. J. T. Burgher & Co.*, 142 S. W. 939.

**Harmless error.**—Evidence. *Houston & T. C. Ry. Co. v. Fox*, 106 Tex. 317, 166 S. W. 693, reversing judgment (Civ. App.) 156 S. W. 922.

**Instructions.** *Southwestern Telegraph & Telephone Co. v. Sanders* (Sup.) 173 S. W. 865, affirming judgment (Civ. App.) 138 S. W. 1181; *Texas & P. Ry. Co. v. Matkin* (Sup.) 174 S. W. 1098, affirming judgment (Civ. App.) 142 S. W. 604; *Carpenter v. Trinity & B. V. Ry. Co.* (Sup.) 184 S. W. 186.

Where judgment of the Court of Civil Appeals seems correct, it should be affirmed on writ of error to the Supreme Court, though insufficient reasons are assigned therefor. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

### **Art. 1559. No mandate to be taken out after twelve months, in case of reversal and remand; certificate and dismissal.**

**Affirmance on certificate.**—Defendant, who did not appear and who did not prosecute writ of error, cannot defeat affirmance of the judgment on certificate by showing prior suit by him to cancel the note. *Blassingame v. Cattlemen's Trust Co.* (Civ. App.) 174 S. W. 900.

**Dismissal by lower court.**—Where a cause was reversed and remanded by a Court of Civil Appeals, and no mandate issued within a year, the district court properly dismissed the cause and refused to reinstate it. *Pevito v. Southern Gas & Gasoline Engine Co.* (Civ. App.) 187 S. W. 1009.

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## CHAPTER TEN

### REHEARING

#### **Article 1561. [977] [1051] Motion for, when and how made.**

**Rehearing to correct entry.**—The Supreme Court will grant a rehearing to make a proper entry refusing a petition for writ of error which was erroneously marked, "Dismissed for want of jurisdiction." *Walker v. Ward* (Sup.) 183 S. W. 1144.

**Application.**—On motion for rehearing in mandamus to require a Court of Civil Appeals to certify a decision under art. 1623, on ground of conflict with decision of another court, Supreme Court will not consider any decision not mentioned in petition. *Coultress v. City of San Antonio* (Sup.) 187 S. W. 194.

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## CHAPTER ELEVEN

### EXECUTION OF JUDGMENT

#### **Article 1567. [983] [1057] Judgment enforced, how.**

**Power of Supreme Court exclusive.**—Where Supreme Court judgment authorized state superintendent of public buildings to enter upon and improve certain property in the custody of a patriotic organization, held, that district court would be prohibited from entertaining suit in which the superintendent was required to answer interrogatories as to his plans and expenditures; the enforcement of such judgment belonging exclusively to the Supreme Court. *Conley v. Anderson* (Sup.) 164 S. W. 985.

## TITLE 32

## COURTS OF CIVIL APPEALS

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| Chap.   |  | Chap.  |
| 1. Judges of the courts of civil appeals.               |  | 7. Hearing causes.                                   |
| 2. Terms of the courts of civil appeals.                |  | 8. Certification of questions to Supreme Court, etc. |
| 3. Jurisdiction of the courts of civil appeals.         |  | 9. Judgment of the court.                            |
| 5. Stenographers.                                       |  | 10. Conclusions of fact and law.                     |
| 6. Proceedings in cases in the courts of civil appeals. |  | 11. Rehearing.                                       |

## CHAPTER ONE

## JUDGES OF THE COURTS OF CIVIL APPEALS

**Article 1584. [1021] Disqualification of judges.**

**Interest as taxpayer.**—Under Const. art. 5, § 11, taxpayers of the city of Dallas held disqualified to sit in the Court of Civil Appeals in review of a judgment holding that an ordinance for the issuance of bonds submitted to the electors under Dallas Charter, art. 8, had not been adopted. *Holland v. Cranfill* (Civ. App.) 167 S. W. 308.

**Effect of appointment of special associate justice.**—Under Const. art. 5, § 11, as amended September 22, 1891, where single justice of Court of Civil Appeals was recused, a special associate justice properly was appointed by the Governor to sit, and the court so composed was legally constituted, despite this article. *Boynton Lumber Co. v. Houston Oil Co. of Texas* (Civ. App.) 189 S. W. 749.

## CHAPTER TWO

## TERMS OF THE COURTS OF CIVIL APPEALS

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|---|--|---------------------------|
| Art.  |  | Art.                      |
| 1586. Places where courts of civil appeals shall be held. |  | 1587. Transfer of causes. |

**Article 1586. [993] Places where courts of civil appeals shall be held.**

7. The Court of Civil Appeals for the Seventh Supreme Judicial District shall hold its sessions in the city of Amarillo, in the county of Potter, and its terms shall commence on the first Monday of October, of each year, and shall continue in session until the first Monday in July of each succeeding year. [Act March 22, 1915, ch. 70, § 4.]

8. The Court of Civil Appeals of the Eighth Supreme Judicial District shall hold its sessions in the city of El Paso, in the county of El Paso, and its terms shall commence on the first Monday of October of each year and shall continue in session until the first Monday of July in each succeeding year. [Id., § 5.]

9. The Court of Civil Appeals for the Ninth Supreme Judicial District shall hold its sessions in the city of Beaumont, in the county of Jefferson, and its terms shall commence on the first Monday in October of each year, and shall continue in session until the first Monday in July of each succeeding year, provided, however, said court may commence its first session immediately upon the appointment and qualification of the judges thereof, and the organization of the court, and provided further, that if said court is located at Beaumont, the citizens thereof will furnish, provide and equip suitable room or rooms for said court and the members thereof without cost or expense to the State. [Id., § 3.]

**Explanatory.**—This act took effect 90 days after March 20, 1915, the date of the adjournment of the legislature. The act amends "Chapter 120 of the acts of the Regular Session of the Thirty-second Legislature," etc.

**Art. 1587. [994a] Transfer of causes.**

**Transfer of causes in general.**—Under this article, which was enacted pursuant to Const. art. 5, § 6, providing for the jurisdiction of cases transferred from one district to another, held, that the Court of Civil Appeals for the Third district had the same jurisdiction over a case arising in Navarro county in the Fifth district as it would have had had the case been originally appealed from a county within the Third district. *Witherspoon v. Daviss* (Civ. App.) 163 S. W. 700.

In trespass to try title in district court of Sabine county appeal to First Court of Civil Appeals was proper, whence it would have taken its course, under order of the Supreme Court transferring cases, from the First Court of Civil Appeals to the subsequently organized Ninth Court of Civil Appeals. *Mott v. Scurlock* (Civ. App.) 185 S. W. 1016.

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## CHAPTER THREE

### JURISDICTION OF THE COURTS OF CIVIL APPEALS

Art.		Art.	
1589.	Jurisdiction defined.	1592.	Issue writs of mandamus, etc.
1590.	Judgment conclusive, when	1593.	Inquire into facts of jurisdiction.
1591.	Same subject.	1595.	May mandamus district courts.

**Article 1589. [996] Jurisdiction defined.**

Cited, *Turnbow v. J. E. Bryant Co.* (Civ. App.) 159 S. W. 605; *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (dissenting opinion).

**Jurisdiction in general.**—The Courts of Civil Appeals have no jurisdiction by reason of their general jurisdiction in civil cases of an appeal in a proceeding to contest the nomination for congressman at large. *Lane v. McLemore* (Civ. App.) 169 S. W. 1073.

**Appeals from district courts.**—Under Const. art. 5, § 6, a Court of Civil Appeals of the appropriate district has jurisdiction of an appeal from a determination of the district judge establishing a claim against the state in accordance with the authority conferred by Acts 31st Leg. (2d Called Sess.) c. 28. *State v. Haldeman* (Civ. App.) 163 S. W. 1020.

**Appeals from county courts—Amount in controversy.**—A suit in the county court for mandamus to compel a justice of the peace rendering judgment for \$79.65 to allow an appeal and to make a transcript to the county court, if treated, as it must be, as involving the appellate jurisdiction of the county court, is within this article. *Knight v. Armstrong* (Civ. App.) 162 S. W. 448.

The Court of Civil Appeals, under this article, has no jurisdiction of a judgment of the circuit court dismissing an appeal from a justice, when less than \$100 was involved. *Underwood v. Watson* (Civ. App.) 162 S. W. 1015.

A judgment on a note for \$75, and for foreclosure of a mortgage securing it on cattle, alleged to be worth \$100, is not appealable. *Ford v. Johnston* (Civ. App.) 164 S. W. 424.

A counterclaim for more than \$100 in a suit for a less amount confers jurisdiction. *Id.*

The Court of Civil Appeals held to have jurisdiction of an appeal from the county court from a judgment in an action before a justice against appellants, in which they were claimed to have converted cotton mortgaged to secure notes, where the value of the cotton was in excess of \$100, even if the debt was less than that amount. *A. J. Birdsong & Son v. Allen* (Civ. App.) 165 S. W. 46.

A Court of Civil Appeals has no jurisdiction, under subd. 3, of an appeal from a judgment of the county court, rendered on appeal from a justice's court, where the amount in controversy and the judgment of the county court are for less than \$100. *Western Union Telegraph Co. v. Fricke & Boyd* (Civ. App.) 167 S. W. 6.

Under this article and article 4973, judgment of county court, on appeal from a justice in action to recover unpaid balance of bank deposit amounting to \$100, held not appealable to the Court of Civil Appeals, though the petition also prayed damages in the sum of \$25. *Ft. Worth State Bank v. Little* (Civ. App.) 168 S. W. 55.

Attorney fees recoverable under art. 2178, held, part of the amount in controversy. *Wichita Valley Ry. Co. v. Leatherwood* (Civ. App.) 170 S. W. 262.

Under this article, court held to have no jurisdiction of appeal in action commenced in justice court on note for \$100, with no stipulation for attorneys' fees. *Kelley v. Audra Lodge No. 438, Fraternal Union of America* (Civ. App.) 176 S. W. 784.

Under art. 2182, where three suits were consolidated, held that jurisdiction of Court of Civil Appeals was determinable according to the sum of the amounts involved in the three suits. *Rust v. Texas & P. Ry. Co.* (Sup.) 180 S. W. 95.

Under this article, held that an appeal by plaintiff from a judgment of the county court for a party claiming an attached bale of cotton worth \$48 was unauthorized, though judgment for \$124 was sought in the action, which was brought against claimant's husband. *Spaulding Mfg. Co. v. Trammel* (Civ. App.) 180 S. W. 910.

Where, on appeal to county court, actions were consolidated by agreement and carried on in appellee's name, held, that a third person, interested as plaintiff in one of them, would be presumed to have assigned his interest, and the amount involved in the two will be considered as determinative of the jurisdiction of the Court of Civil Appeals. *Kansas City, M. & O. Ry. Co. of Texas v. Adams* (Civ. App.) 182 S. W. 365.

In determining the amount in controversy in any given case, the court will look to the averments in the body of the petition, and not alone to the prayer for relief. *Wells Fargo & Co. Express v. Crittenden* (Civ. App.) 189 S. W. 296.

Where interest is allowed upon the claims for damages, it is treated as a part of the

damages, and not interest, within the meaning of the statute fixing the jurisdictional limits of the courts. *Id.*

On petition in action for damages in the amount of \$100, costs of suit, and general relief, without asking for interest, the amount in controversy did not exceed \$100, and judgment of county court on appeal from justice court was final, and not appealable. *Id.*

#### Art. 1590. [996] Judgment conclusive, when.

Cited, *Marshall & E. T. Ry. Co. v. Petty* (Sup.) 180 S. W. 105 (dissenting opinion).

#### Art. 1591. [996] Same subject.

Cited, *Scurlock v. Fairchilds* (Civ. App.) 159 S. W. 1000; *Cole v. State* (Civ. App.) 163 S. W. 353; *Spence v. Fenchler* (Sup.) 180 S. W. 597; *Camp v. National Equitable Soc. of Belton* (Sup.) 191 S. W. 699.

**Repeal.**—This article is not impliedly repealed by Laws 1913, c. 55 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1521, 1522, 1526, 1543, 1544). *Cole v. State*, 170 S. W. 1036, 106 Tex. 472, dismissing petition for writ of error (Civ. App.) 163 S. W. 353.

**What constitutes judgment of Court of Civil Appeals.**—Under this article a judgment of affirmance, with damages for delay, held a judgment of the Court of Civil Appeals, and not of the district court; hence prohibition to preclude the judgment being enjoined will issue. *Cattlemen's Trust Co. of Ft. Worth v. Willis* (Civ. App.) 179 S. W. 1115.

**Cases within county court's jurisdiction.**—Decision of the Court of Civil Appeals on appeal in a case cognizable by the county court is final, and a certificate to the Supreme Court does not lie. *Day v. Mercer* (Civ. App.) 175 S. W. 764.

The decision of the Court of Civil Appeals on appeal from the county court is final, and a certificate to the Supreme Court does not lie. *Chicago, R. I. & G. Ry. Co. v. Dalton* (Civ. App.) 177 S. W. 556.

An action in the district court laying damages at \$1,000, and interest, made the amount in controversy more than \$1,000 and a case of which the county court would not have had jurisdiction, so that the jurisdiction of the Court of Civil Appeals was not final. *Moose v. Missouri, K. & T. Ry. Co. of Texas*, 180 S. W. 225, (Sup.) granting writ of error (Civ. App.) 179 S. W. 75.

Where, in an action in district court to foreclose a vendor's lien, a separate controversy between prior owners was adjudicated, the recovery being for an amount within the jurisdiction of the county court, held that the Court of Civil Appeals' determination of an appeal from that judgment was final, and could not be reviewed by the Supreme Court. *Carter v. Brown* (Sup.) 181 S. W. 685.

Under arts. 1521, 1522, as amended by Acts 33d Leg. c. 55, in view of this article, a cause originating in the county court cannot, on disagreement in the Court of Civil Appeals, be certified to the Supreme Court. *Lindsay v. Collings* (Civ. App.) 182 S. W. 879.

**Cases of boundary.**—The test for determining whether a case is one of boundary, in which event the jurisdiction of the Court of Civil Appeals is final, is whether there would have been any case if there had been no question of boundary. *Schiele v. Kimball* (Sup.) 194 S. W. 944.

**Interlocutory orders.**—A determination of the Court of Civil Appeals on appeal from the grant of a temporary injunction being made conclusive by this article, the Supreme Court is not authorized by Acts 30th Leg. c. 107, as amended by Acts 31st Leg. 1st Extra Sess. c. 34, art. 4644, post, to review such determination on writ of error. *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645, dismissing writ of error *Hammond v. McFarland* (Civ. App.) 161 S. W. 47.

#### Art. 1592. [997] May issue writs of mandamus, etc.

Cited, *Quannah, A. & P. Ry. Co. v. Leckie* (Civ. App.) 176 S. W. 662.

**Prohibition.**—Under Const. art. 5, § 6, and this article, the Court of Civil Appeals has power to issue a writ of prohibition to protect its jurisdiction. And the Court of Civil Appeals of one district may issue a writ of prohibition against a district court of another district and parties residing in another district to prevent interference with its judgment. *Cattlemen's Trust Co. of Ft. Worth v. Willis* (Civ. App.) 179 S. W. 1115.

Under art. 1591, a judgment of affirmance, with damages for delay, held a judgment of the Court of Civil Appeals, and not of the district court; hence prohibition to preclude the judgment being enjoined will issue. *Id.*

Where it was sought to enjoin, in a district court outside of the supreme judicial district, a judgment affirmed by the Court of Civil Appeals, held, the Court of Civil Appeals had power to issue prohibition against the district judge and the defendant. *Id.*

Prohibition to prevent one district court from enjoining a judgment of another, affirmed by the Court of Civil Appeals, will not, in view of arts. 4643 and 4653, be denied, because the court hearing the injunction should properly administer the law on the facts. *Id.*

A writ of prohibition will issue to a lower court to prevent a second writ of injunction on a petition alleging only such facts as were averred or should have been averred on the first application. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

**Writs in aid of jurisdiction in general.**—An appellate court to protect its jurisdiction and enforce its mandates may resort to mandamus, prohibition, or any other appropriate writ. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

**Mandamus.**—Court of Civil Appeals held to have power, under this article, to order official stenographer of district or county court to prepare transcript for pauper appellant as required by Acts 32d Leg. c. 119, art. 2071, post. *Rice v. Roberts* (Civ. App.) 177 S. W. 149; *Otto v. Wren* (Civ. App.) 184 S. W. 350.

Under this article, where a case is reversed, with directions to enter a particular judgment, and the trial court enters a judgment materially different from the one directed, the remedy of the dissatisfied litigant is by mandamus to compel entry of the proper judgment. *Witherspoon v. Daviss* (Civ. App.) 163 S. W. 700.

On an application to the Court of Civil Appeals for a peremptory mandamus against a district judge to compel him to obey a mandate, the fact that the judge in his answer

does not state what course he will pursue when the matter of enforcing the mandate is properly brought before him will not be regarded as evidence against him. *Id.*

Where a trial judge refuses to obey a mandate of the Court of Civil Appeals, such court will adopt such means as may be proper to enforce its mandate, even though an application for a peremptory mandamus to compel obedience has been previously denied, because at the time of the denial there had been no disobedience. *Id.*

Allegations, in an application to the Court of Civil Appeals for a peremptory mandamus against a district judge, that such judge has threatened to disregard a mandate will not justify the Court of Civil Appeals in resorting to summary measures, especially where the judge in his answer denies making such threats. *Id.*

Const. art. 5, § 6, and arts. 1592 and 1595, held to extend the jurisdiction of the Courts of Civil Appeals in cases of mandamus to compel district courts to proceed to trial and to direct rulings to be there made. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

However false the minutes of a district court may be, they cannot be corrected by mandamus from a Court of Civil Appeals, but only by direct proceedings in the court in question. *Id.*

After jurisdiction of a case has been given the Court of Civil Appeals, on appeal from or writ of error to a district court, the appellate court can compel the restoration of papers to the files of the lower court by mandamus. *Id.*

Where the trial court made final an order enjoining a sale of land on execution, mandamus to compel the sheriff to levy execution will not be issued until the order is set aside. *Wilson v. Dearborn* (Civ. App.) 179 S. W. 1102, denying rehearing 174 S. W. 296.

A special stenographer in a county court appointed under Acts 32d Leg. c. 119, art. 1932, to act in a single case, who did so for three days, receiving his pay of \$15, could be compelled thereafter by mandamus to prepare a transcript for the plaintiff, a pauper, free of charge. *Otto v. Wren* (Civ. App.) 184 S. W. 350. See, also, art. 1595, and notes.

**Injunction.**—The Court of Civil Appeals has no jurisdiction to issue injunctions except in aid of its own jurisdiction, under this article. And where, pending suit to compel a city to order an election to determine whether a commission should be chosen to frame a new charter, amendments to the existing charter, were proposed, but no application was made to restrain the election on the amendments, complainant, after denial of mandamus and an appeal, was not entitled to an injunction from the Court of Civil Appeals restraining such election. *Boynton v. Brown* (Civ. App.) 163 S. W. 599.

Whenever it is necessary, to protect or enforce the jurisdiction of the Court of Civil Appeals, to preserve the status quo of the parties, such courts have jurisdiction to grant an injunction. *Gibbons v. Ross* (Civ. App.) 167 S. W. 17.

In view of art. 4644, and of the fact that the jurisdiction of the Court of Civil Appeals is appellate only, such court has no jurisdiction to issue an original writ of injunction to protect the parties from damage pending an appeal. *Tipton v. Railway Postal Clerks Inv. Ass'n* (Civ. App.) 170 S. W. 113.

Where property rights are involved in attempted enforcement of criminal ordinances, Court of Civil Appeals held authorized to inquire into validity of ordinances and grant relief by injunction if they are invalid. *Auto Transit Co. v. City of Ft. Worth* (Civ. App.) 182 S. W. 685.

**Certiorari to bring up or correct record.**—Under Rules 11, 22, for Courts of Civil Appeals (142 S. W. xi, xii) appellant, whose bill of exceptions presenting objection to charge was duly filed in the court below and omitted from record, held not entitled to certiorari to perfect record. *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739.

Where the transcript of record does not contain the findings of fact and conclusions of law, the appellee is entitled to a writ of certiorari to the clerk of the lower court to secure a supplemental transcript. *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452.

Under arts. 2157–2163, a motion to substitute lost papers and for certiorari to perfect record will not lie where the papers were missing in court below. *Browne Grain Co. v. Farmers' & Merchants' Nat. Bank of Abilene* (Civ. App.) 173 S. W. 942.

Under Courts of Civil Appeals Rule 8 (142 S. W. xi) motion for certiorari to send up copy of original citation, filed nearly 11 months after filing of transcript, comes too late. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 455.

Under rules for Courts of Civil Appeals, Nos. 8, 11 (142 S. W. xi, xii), plaintiff's motion for certiorari to perfect record, not presented until day of submission of case, came too late. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 178 S. W. 615.

The refusal by the appellate court of a writ of certiorari to include in the record findings of fact not material to any material issue in the case, as well as conclusions of law based thereon, is not an abuse of discretion, as such findings were wholly immaterial. *Spence v. Fenclier* (Sup.) 180 S. W. 597.

Assignment of error in motion for rehearing, asking permission to apply to the trial court to correct a deficiency in the record, overruled, as in effect a request for a writ to go out and make a record and then bring it up. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

Motions to strike on grounds that findings were not prepared as findings and had been expunged by trial court held to be overruled, as such matter should be brought before the court by certiorari. *Price v. J. B. Faircloth & Co.* (Civ. App.) 181 S. W. 707.

The Court of Appeals cannot issue certiorari to correct the return as made by the constable showing the value of the property attached in order to make it conform to his intentions. *Fuller, Hanna & Co. v. Rogers* (Civ. App.) 184 S. W. 322.

Certiorari is not the proper method to perfect a record on appeal, which fails to show jurisdiction of the county. *Rhodes v. Coleman-Fulton Pasture Co.* (Civ. App.) 185 S. W. 355.

### Art. 1593. [998] May inquire into facts touching jurisdiction.

Cited, *Marshall v. Smith* (Civ. App.) 158 S. W. 1047; *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

**Facts touching jurisdiction.**—Under this article the Court of Appeals, on an application by sureties on a supersedeas bond to quash the same, has power to hear proof de-



hors the record as to the validity of the bond. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 160 S. W. 337.

In passing upon matters antecedent to the judgment, the Courts of Civil Appeals are confined to the record as made by the trial court, except as to matters affecting the jurisdiction of the Court of Civil Appeals, and, where the record is silent as to the appointment of an official court stenographer, the question cannot be raised by affidavits. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 160 S. W. 108.

The verity of the record filed cannot be controverted by affidavits. *Dennis v. Kendrick* (Civ. App.) 163 S. W. 693.

Where the notation of the pleadings of an action begun in justice court made on the docket in accordance with art. 2326, did not show whether the amount in controversy would give jurisdiction on an appeal from the county court, the Court of Civil Appeals may, under this article, inquire into the facts to ascertain whether it has jurisdiction. *A. J. Birdsong & Son v. Allen* (Civ. App.) 165 S. W. 46.

A stipulation to waive the filing of briefs cannot be established by affidavits. *Texas & P. Ry. Co. v. Cave* (Civ. App.) 173 S. W. 988, 1201.

A Court of Civil Appeals cannot correct the record of a case by hearing testimony, nor inquire into acts occurring subsequent to the judgment, and not made a part of the record, unless it is a matter affecting jurisdiction within Rev. St. art. 998. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

Under this article the Court of Civil Appeals has power to ascertain by affidavit or otherwise such matters of fact as may be necessary to the proper exercise of its jurisdiction. *Webster v. International & G. N. Ry. Co.* (Civ. App.) 184 S. W. 295.

### Art. 1595. [1000] May mandamus district courts.

See notes under art. 1592.

**Extent of power conferred.**—Const. art. 5, § 6, and statutes thereunder, Rev. St. arts. 1592 and 1595, held to extend the jurisdiction of the Courts of Civil Appeals in cases of mandamus to compel district courts to proceed to trial and to direct rulings to be there made, and a district court may be compelled by mandamus, upon petition to a Court of Civil Appeals before expiration of the term of the district court in which the judgment was entered, to hear and act upon a motion for a new trial. Under art. 2025, such court has no authority or jurisdiction to require the hearing of such motion after the term of court in which judgment was entered has expired. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

Abuses of discretion on part of trial court held not open to correction by mandamus where the defendant had an adequate remedy by appeal or writ of error. *Id.*

Under this article Court of Civil Appeals has jurisdiction only to issue mandamus to require judge of district court to proceed to trial and judgment in a cause, but not to dictate judgment. *Roberts v. Munroe* (Civ. App.) 193 S. W. 734.

Under this article Court of Civil Appeals may issue a writ of mandamus compelling district judge to proceed with application for mandamus and award jury trial notwithstanding he had improperly issued writ without jury trial during vacation. *Id.*

**Existence of other remedy.**—Action of district court in striking answers and motions from its record held not controllable by original mandamus from the Court of Civil Appeals, but by appeal or writ of error and mandamus and certiorari thereunder. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

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## CHAPTER FIVE

### STENOGRAPHER

**Article 1606. [1012] Appointment; oath; salary; bond.**—Each Court of Civil Appeals shall be authorized to appoint one stenographer, who shall be a typewriter, who shall discharge such duties as may be required by the court, shall be sworn to keep secret all matters which may come to his knowledge as such stenographer and typewriter, and who shall receive a salary of twelve hundred dollars per annum, and shall give bond with two or more sureties in the sum of two thousand dollars, to be approved by the presiding judge of said court, payable to the state of Texas, conditioned for the faithful performance of his duties as such stenographer and typewriter. [Acts 1893, p. 165; Acts 1895, p. 79; Acts 1899, p. 115; Acts 1905, p. 19; Act March 22, 1915, ch. 81, § 1.]

**Explanatory.**—Sec. 2 repeals all laws in conflict. The act took effect 90 days after March 20, 1915, the date of adjournment of the legislature.

## CHAPTER SIX

## PROCEEDINGS IN CASES IN THE COURTS OF CIVIL APPEALS

Art.	Art.
1607. Cases, how brought before the courts for trial.	after affirmance on certificate, when.
1608. Transcript filed, when.	1612. Assignments of error, requisite of.
1609. New appeal bond allowed, when.	1613. Docket of causes and disposition of same.
1610. Certificate of affirmance, proceedings.	1614. Appearance by brief, etc.
1611. Transcript filed, and cause heard	

**Article 1607. [1014] Case, how brought before the court for trial.**

Cited, *Conn v. Houston Oil Co. of Texas* (Civ. App.) 171 S. W. 520; *Consolidated Kansas City Smelting & Refining Co. v. Schulte* (Civ. App.) 176 S. W. 94; *Chicago, B. & Q. R. Co. v. Wilson* (Civ. App.) 176 S. W. 619; *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965.

**Errors apparent on face of record, and fundamental error.**—Under arts. 1607, 1612, 2113, held, that a transcript not containing copy of assignment of errors and not disclosing reversible error on its face required an affirmance. *English v. Allen* (Civ. App.) 173 S. W. 1172.

Under arts. 1607, 1612, and Court of Civil Appeals rules 23, 24 (142 S. W. xii), appellant, filing a motion for new trial, held confined to the assignments therein on appeal, except for error of law apparent upon the record. Errors are not "apparent upon the record" where their determination required consideration of the pleadings and evidence. *Zmek v. Dryer* (Civ. App.) 174 S. W. 659.

Where a codefendant was not cited as to a cross-action and did not appear thereto, the question of jurisdiction was fundamental, and might be considered on appeal, though not raised below. *Ivey v. Davis* (Civ. App.) 178 S. W. 972.

An erroneous construction of the law applicable to the facts found is error apparent on the face of the record. *Carroll v. Evansville Brewing Ass'n* (Civ. App.) 179 S. W. 1099.

Whether a petition is subject to general demurrer is a question of fundamental error, so that it is immaterial that exceptions to the overruling of such demurrer do not appear in the transcript. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

Where a party failed, on rendition of a verdict by 11 jurors, to object to their failure to sign the verdict, it could not, for the first time on appeal, complain thereof, if it was error. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Where plaintiff, seeking to reinstate his liquor license, alleged that his place was not kept open after 9:30 p. m., the question whether standard time controlled was reviewable on appeal, though not raised by the pleadings. *Walker v. Terrell* (Civ. App.) 189 S. W. 75.

Insufficiency of evidence to sustain a judgment is not error apparent on the face of the record, or fundamental error, which under this article can be considered on appeal without assignment of error. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 194 S. W. 218. See, also, notes under Art. 1612.

**Reference to transcript, etc.**—See notes under Art. 1612.

Under this article, where an assignment of error assembles in the brief a group of facts verifiable by reference to the transcript and the statement of facts pointed out in the assignment, the whole of such assignment must be considered. *Texarkana & Ft. S. Ry. Co. v. Brass* (Civ. App.) 175 S. W. 778.

**Art. 1608. [1015] Transcript filed, when.**

**Time for filing transcript.**—The 90 days from the time of giving notice of appeal, within which the transcript must be filed, should be computed from the giving of the notice of appeal recited in the order overruling the motion for new trial, instead of from the notice recited in the judgment theretofore entered. *Robson v. Moore* (Civ. App.) 166 S. W. 908.

Where plaintiff in error failed to file the record within three months after the filing of an irregular citation in error, which he believed to be regular, there was such laches as to require a dismissal. *First Nat. Bank of Knox City v. Lester* (Civ. App.) 179 S. W. 684.

Under this article court cannot consider an exception to charge when the part of the transcript containing the purported bill of exceptions was inserted by the clerk after the transcript had been filed in the Court of Civil Appeals and more than 90 days after the appeal bond had been perfected. *White v. Barrow* (Civ. App.) 182 S. W. 1154.

Under art. 2079, providing for appeals from interlocutory orders appointing receivers, and this article, held, that the defendant had 90 days from the time the appeal was perfected from an order appointing a receiver to file a transcript of the record, in view of the history of legislation as shown by articles 2084, 2099, 2105, 2108, 4644, 6401 and chapter 20 of title 37. *Simpson v. Alexander* (Civ. App.) 183 S. W. 852.

An appeal will be dismissed where brought on a pauper's oath after the filing of which the transcript was not filed for more than 90 days. *Rhodes v. Coleman-Fulton Pasture Co.* (Civ. App.) 185 S. W. 355.

Under arts. 1608, 1610, 2084, held that, where no excuse was shown for failing to file the record in the trial court or in the Court of Civil Appeals in time, the motion to affirm the judgment upon certificate would be granted. *Mott v. Scurlock* (Civ. App.) 185 S. W. 1016.

Under arts. 1608, 1610, where judgment was entered in favor of appellee December 16, 1915, and motion for new trial was overruled December 28th, and notice of appeal and appeal bond were filed January 13, 1916, but transcript was not filed in the Court of Civil Appeals within 90 days, judgment will be affirmed. *Tyler v. Smith* (Civ. App.) 187 S. W. 697.

— **Correction after expiration of time.**—Where transcript was not properly prepared, in that it did not show notice of appeal, which was entered of record, for which reason the clerk refused to file it, appellant may not, after the time for filing has elapsed, have it corrected and filed. *Cox v. W. A. Chanslor & Son* (Civ. App.) 170 S. W. 120.

**Excuse for failure to file in time.**—Under this article plaintiffs in error from a judgment on a forfeited bail recognizance held guilty of delay authorizing refusal of motion for certiorari to bring up transcript. *Cruz v. State*, 76 Cr. R. 32, 172 S. W. 235.

Appellant held not to have shown good cause for four months' delay in filing a transcript on appeal, so that the judgment would be affirmed on motion. *Quannah, A. & P. Ry. Co. v. Leckie* (Civ. App.) 176 S. W. 662.

Permission is reluctantly granted to file a transcript presented three days late, where appellants' uncontroverted affidavits showed repeated requests were made of the clerk below to prepare it promptly and he promised to do so, but failed. *Quannah, A. & P. Ry. Co. v. Watkins* (Civ. App.) 193 S. W. 356.

The matter of allowing the filing of the record on appeal after expiration of the statutory period is within the appellate court's discretion. *Houston E. & W. T. Ry. Co. v. Hillen* (Civ. App.) 193 S. W. 782.

Where appellant did not send appeal record to trial judge for approval until five days before expiration of time, and judge failed to file it within the time, filing of the record thereafter will not be allowed where no reason for not filing it earlier is shown. *Id.*

**Waiver of objection.**—Where appellee received notice of the filing of the transcript pursuant to Court of Civil Appeals rule 7b (142 S. W. xi), and did not move to dismiss the appeal because the transcript was filed too late until more than seven months thereafter, he waived the delay in filing the transcript, and cannot excuse his own delay on the ground that he called attention to the time of filing the transcript as soon as he could after appellant's brief had been filed. *Robson v. Moore* (Civ. App.) 166 S. W. 908.

#### Art. 1609. [1025] New appeal bond allowed, when.

**Defects in bond in general.**—Under this article a defective bond gives the Court of Civil Appeals jurisdiction. *Bauer v. Crow* (Civ. App.) 171 S. W. 296.

Under this article a bond, in the amount of probable costs, as fixed by the clerk, instead of double the amount, can be amended. *Rounds v. Coleman* (Civ. App.) 185 S. W. 640.

**Filing new bond.**—Under the statute an appellate court may allow an appeal bond defective in form or substance to be amended by filing a new bond, though the original bond was a nullity. *Garner v. Jamison* (Civ. App.) 162 S. W. 940.

#### Art. 1610. [1016] Certificate of affirmance, and proceedings thereon.

*Cited, Simpson v. Alexander* (Civ. App.) 183 S. W. 852.

**Jurisdiction to affirm on certificate.**—The Court of Civil Appeals has no jurisdiction to affirm on certificate, where the certificate of the clerk is not accompanied by a copy of the appeal bond, though the clerk certifies that such bond was given. *Schackle v. Fogle* (Civ. App.) 162 S. W. 911.

Under Courts of Civil Appeals rule 11a (142 S. W. xi), relating to affirmance on certificate, certificate held not to show the trial court's jurisdiction of the subject-matter and insufficient to confer jurisdiction. *Bird v. Lester* (Civ. App.) 163 S. W. 658.

**Grounds for affirmance in general.**—Judgment will not be affirmed on certificate, because the record in a case appealable to the Seventh district was not filed therein seasonably, or till after motion for such affirmance, it having, owing to confusion in the law, the bar and court being in doubt, been seasonably filed in the Second district as the proper place, and sent to the Seventh district shortly after an authoritative determination by the Supreme Court on the question of which court had jurisdiction. *Rush v. First Nat. Bank* (Civ. App.) 159 S. W. 466.

Where plaintiffs in error made no effort to perfect their writ of error, reserving no exception to the judgment, filing no assignment of errors, or briefs, judgment will be affirmed on motion by defendant in error on the transcript. *Houston Transp. Co. v. Alien* (Civ. App.) 178 S. W. 1005.

Where no appeal is perfected against a defendant, a judgment in its favor will be affirmed upon motion. *Foster Lumber Co. v. Rodgers* (Civ. App.) 184 S. W. 761.

Under arts. 1608, 1610, 2084, held that, where no excuse was shown for failing to file the record in the trial court or in the Court of Civil Appeals in time, the motion to affirm the judgment upon certificate would be granted. *Mott v. Scurlock* (Civ. App.) 185 S. W. 1016.

In view of Courts of Civil Appeals rule 11a (142 S. W. xi), where an affirmance is asked on a certificate filed, a failure to file the statement of facts in time will be noted by the Court of Civil Appeals, although the appellee does not raise the question. *Id.*

Under arts. 1608, 1610, where judgment was entered in favor of appellee December 16, 1915, and motion for new trial was overruled December 28th, and notice of appeal and appeal bond were filed January 18, 1916, but transcript was not filed in the Court of Civil Appeals within 90 days, judgment will be affirmed. *Tyler v. Smith* (Civ. App.) 187 S. W. 697.

**Transcript presented by appellee.**—Where defendant in error filed a complete transcript of the record on motion to affirm on certificate, and the motion was denied as prematurely filed, the transcript would be considered a sufficient filing of the record to warrant a consideration of the case on its merits. *Bartley v. Robinson* (Civ. App.) 161 S. W. 386.

A motion to affirm on certificate must be denied where the transcript accompanying the motion does not contain a copy of the judgment which the motion seeks to have affirmed. *Brightman v. Brightman* (Civ. App.) 166 S. W. 415.

**Time for filing certificate and motion.**—Where an appeal is not prosecuted, the appellee may move for an affirmance on certificate at any time during the term to which it was returnable. *Louisiana-Rio Grande Canal Co. v. Quinn* (Civ. App.) 160 S. W. 151.

Where defendant in error's motion to affirm was denied at the term at which the transcript should have been filed, because made within the 90 days allowed, a similar motion at the next term will be denied because filed too late. *Bartley v. Robinson* (Civ. App.) 161 S. W. 386.

**Effect of subsequent writ of error.**—Where appellant loses his right to file his transcript by delay, without sufficient excuse, the right of the appellee to an affirmance on a certificate is absolute, though the appellant has previously sued out a writ of error. *Bird v. Lester* (Civ. App.) 163 S. W. 658; *Golding v. Cull* (Civ. App.) 158 S. W. 1152.

### Art. 1611. [1017] Transcript filed and cause heard after affirmance on certificate, when.

**Effect of filing new record and citation before affirmance.**—Under this article, where plaintiff in error filed new record one day before defendant in error moved to affirm on certificate, accompanied by defendant in error's record, but did not present any reason why statutory right of affirmance on certificate should have been denied, etc., defendant in error's motion to dismiss cause for identity of records will be granted. *Raines v. Western Union Telegraph Co.* (Civ. App.) 186 S. W. 436.

### Art. 1612. Assignments of error; requisites of.

Cited, *United Benevolent Ass'n of Texas v. Lawson* (Civ. App.) 166 S. W. 713; *Seeling v. Alamo Iron Works* (Civ. App.) 173 S. W. 520; *Watson v. Patrick* (Civ. App.) 174 S. W. 632; *Consolidated Kansas City Smelting & Refining Co. v. Schulte* (Civ. App.) 176 S. W. 94; *Craver v. Greer* (Sup.) 179 S. W. 862; *Arthe-Levy-Bernhard Co. v. McBurnett* (Civ. App.) 186 S. W. 867; *Holloman v. Black* (Civ. App.) 188 S. W. 973.

1. **Construction and operation of statute in general.**—Acts 33d Leg. c. 136, amending this article, does not detract from the force of the rules of briefing. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

Where, at the time the cause was briefed for the Court of Civil Appeals, Act April 4, 1913 (Acts 33d Leg. c. 136), had been passed, but not published or called to the attention of appellants' counsel, an application to rebrief the cause to comply with such act would be allowed. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 163 S. W. 396.

Under art. 2086, and notwithstanding the amendment to this article and Supreme Court rule 24 (142 S. W. xii), a writ of error held too late, though filed within 12 months after denial of new trial. *St. Louis & S. F. Ry. Co. v. Stapp* (Civ. App.) 171 S. W. 1080.

Statutes and rules as to the form and sufficiency of assignments of error should be liberally construed so as not to cut off the approach of parties in good faith seeking relief for prejudicial error. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

2. **Necessity for assignment of errors—In general.**—A court of civil appeals has no authority to revise judgment of trial court except on matters distinctly specified by assignments of error. *Ludtke v. Smith* (Civ. App.) 186 S. W. 266; *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063; *Dunn v. Epperson* (Civ. App.) 175 S. W. 837; *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798; *Friedman v. Huntsville Cotton Oil Co.* (Civ. App.) 177 S. W. 573.

On appeal from an order declining to continue a temporary injunction, appellants are not required to file briefs containing formal assignments of error. *Auto Transit Co. v. City of Ft. Worth* (Civ. App.) 182 S. W. 685.

3. — **Rulings on pleadings.**—An objection that the court erred in holding plaintiff's petition insufficient cannot be considered where not assigned as error. *F. A. Piper Co. v. Oppenheimer* (Civ. App.) 158 S. W. 777.

Where demurrer was sustained to an intervenor's plea and he filed no assignment of error, the ruling will not be reviewed on appeal. *Wilkerson v. Stasny & Holub* (Civ. App.) 183 S. W. 1191.

Where there was no assignment as to sustaining of demurrers to an answer, assignments as to the exclusion of paragraphs of a contract set up in the answer were wholly abstract and inapplicable. *Pecos & N. T. Ry. Co. v. Hall* (Civ. App.) 189 S. W. 535.

4. — **Rulings as to evidence.**—Rulings on evidence not presented by assignments of error or propositions thereunder as required by Courts of Civil Appeals rules 24, 25 (142 S. W. xii) will not be considered. *Browder v. Memphis Independent School Dist.* (Civ. App.) 172 S. W. 152, judgment affirmed (Sup.) 180 S. W. 1077.

Under rule 24 for the government of Courts of Civil Appeals (142 S. W. xii), failure to assign error on the exclusion of evidence held to waive appellants' right to complain. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

5. — **Instructions.**—The impropriety of a charge, making a wife's right to sell community land to provide necessaries after the husband's desertion contingent upon her having minor children to support, will not authorize a reversal, where the error was not assigned. *Adams v. Wm. Cameron & Co.* (Civ. App.) 161 S. W. 417.

Plaintiff cannot complain on appeal of a special charge given for defendant, where it was not excepted to or assigned as error in the motion for new trial. *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

Appellants desirous to contend that the evidence fails to support an affirmative answer to an issue, or that there was no evidence justifying such issue's submission, must raise such questions by proper assignments. *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224.

6. — **Verdict, findings, or judgment.**—When conclusions of fact are voluntarily filed by the trial court, neither party is required to take notice, and no exception to the conclusions and no assignments of error are required of parties against whom such find-

ings are made to entitle them to attack the judgment on the ground that it is unsupported by the evidence. *I.e. Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

In a personal injury action, where there was no assignment that the verdict, as reduced by the court, was excessive, a judgment for plaintiff will not be disturbed because of improper argument of counsel, which went to the amount of recovery only. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

If a request for filing conclusions of fact and law was made after the motion for new trial was overruled, a distinct assignment of error thereon filed with the clerk of the trial court, as required by the statute and rules prior to 1911, should be made in order to review such refusal. *Overton v. Colored Knights of Pythias* (Civ. App.) 163 S. W. 1053.

Where a temporary injunction was dissolved long before the trial of the case, the authority of the trial court to issue the injunction could only be material on the question of costs, which could not be considered in the absence of an assignment of error presenting it. *Clarke v. A. B. Frank Co.* (Civ. App.) 168 S. W. 492.

Where there was no assignment raising the question of the preponderance of the evidence, the court can only look to the facts to see if there was sufficient evidence to support the judgments. *Marks v. Sambrano* (Civ. App.) 170 S. W. 546.

A finding of the trial court will be treated as warranted by evidence when not attacked as erroneous. *Todd v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 173 S. W. 617.

Where conclusions were filed after the close of the term, the defeated party attacking the conclusions must do so by a distinct assignment of error, as required by statute and rules prior to 1911. *Id.*

An appellant, who failed to secure a bill of exceptions and assign error upon the failure of the court to file findings of fact and conclusions of law within the time prescribed, is not entitled to a reversal for such failure. *Bliss v. San Antonio School Board* (Civ. App.) 173 S. W. 1176.

In the absence of an assignment attacking the court's findings of fact, it will be presumed that there was evidence to warrant them. *Babcock v. Glover* (Civ. App.) 174 S. W. 710.

In an action for a broker's commission, where error was assigned to a conclusion of law, but not to a finding upon which it was based, it will be presumed that the facts warranted the conclusion. *Id.*

A finding not attacked by assignment of error is conclusive. *Stockton v. Jones* (Civ. App.) 175 S. W. 859.

Whether defendant in suit on policy of insurance was entitled to judgment because trial court at former term had rendered judgment for it would not be ruled upon, when not presented in court below during the trial, or in the assignments of error. *Ætna Ins. Co. v. Dancer* (Civ. App.) 181 S. W. 772.

In an action to foreclose a chattel mortgage, there being no assignment of error preserving defendant's objection to court's action, in submitting an issue of consideration for an alleged release of the mortgage, in soliciting the jury's answer to the question, "What was the consideration?" it cannot be reviewed on appeal. *Lee v. Clay Robinson & Co.* (Civ. App.) 185 S. W. 1061.

7. — **Motions for new trial.**—Under arts. 1986 and 1990, party cannot complain of a judgment conforming to a special verdict as unsupported by evidence, where he did not assign error to refusal to set aside verdict. *Blackwell v. Vaughn* (Civ. App.) 176 S. W. 912.

In view of Rev. St. 1911, art. 1986, assignments of error complaining that special verdict was unsupported by evidence cannot be reviewed; defendant not having assigned as error denial of motion for new trial on ground that verdict was unsupported by evidence. *First Texas State Ins. Co. v. Burwick* (Civ. App.) 193 S. W. 165.

8. **Errors reviewable without proper assignment**—In general.—On an appeal from a judgment granting a temporary mandatory injunction, no formal assignments of error are necessary. *Ft. Worth & D. C. Ry. Co. v. Craig* (Civ. App.) 176 S. W. 827.

Where all special exceptions to appellant's answer were substantially general demurrers, judgment will not be affirmed, regardless of action of court on general demurrers, though special exception includes general demurrer, and though action of trial court in sustaining special exceptions has been waived by failure to assign error thereto. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

9. — **Jurisdictional questions.**—Lack of jurisdiction of the trial court is fundamental, and it must be considered on appeal, even without assignments. *Milner v. Sims* (Civ. App.) 171 S. W. 784; *St. Louis Southwestern Ry. Co. of Texas v. Berry & Slaughter* (Civ. App.) 177 S. W. 1187.

Though the assignment raising the question that the judgment below was not final, and hence not appealable, because it did not dispose of all the issues raised, was not properly briefed, the question will be disposed of, being a jurisdictional one. *Bryan v. Moore* (Civ. App.) 169 S. W. 395.

It is within the province of the Court of Civil Appeals to determine whether it has jurisdiction, regardless of whether the matter is presented by an assignment of error. *Banks v. Blake* (Civ. App.) 171 S. W. 514.

Error by the county court in assuming jurisdiction to enjoin the enforcement of a justice court judgment for less than \$200, necessitates a reversal, though not assigned or briefed. *Smith Bros. Grain Co. v. Jenson* (Civ. App.) 174 S. W. 981.

Entire want of jurisdiction due to demand in excess thereof is fundamental error which cannot be waived. *St. Louis Southwestern Ry. Co. of Texas v. Herndon Produce Co.* (Civ. App.) 188 S. W. 278.

10. — **Errors apparent on face of record.**—Errors of law apparent on the fact of the record require consideration, regardless of the sufficiency of the assignments and brief. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991; *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974; *Holloman v. Black* (Civ. App.) 188 S. W. 973.

The action of the trial court in directing a verdict is an error apparent upon the face of the record, which the appellate court will consider as fundamental error, without an assignment of error. *Owens v. Corsicana Petroleum Co.* (Civ. App.) 169 S. W. 192.

Under arts. 1607, 1612, and Court of Civil Appeals rules 23, 24 (142 S. W. xii), errors held not "apparent upon the record" so as to be reviewed without assignment of error, where their determination required consideration of the pleadings and evidence. *Zmek v. Dryer* (Civ. App.) 174 S. W. 659.

In an action against an employer for death of its servant, error in applying the Employers' Liability Act was not such "error apparent on the face of the record," as to authorize its consideration when not properly assigned. *Consolidated Kansas City Smelting & Refining Co. v. Schulte* (Civ. App.) 176 S. W. 94.

A statement in argument that plaintiff alleged and proved defendant had unlawfully dispossessed plaintiff of his easement and alleged the forfeiture of such right where those matters were not submitted to the jury does not disclose error apparent on the record. *Tomson v. Simmons* (Civ. App.) 180 S. W. 1141.

An assignment that there was no evidence in the record to sustain a finding of the jury requires the Court of Civil Appeals to examine the evidence and determine whether there is contained therein testimony which will support the verdict and judgment. *Feagins v. Texas Machinery & Supply Co.* (Civ. App.) 185 S. W. 961.

Where the issue is one of law upon uncontroverted facts, an assignment complaining of a peremptory instruction for defendants is sufficient under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1612*. *First Nat. Bank of Lafayette, Ind., v. Fuller* (Civ. App.) 191 S. W. 830.

11. — **Fundamental errors.**—An error apparent of record is fundamental and reviewable, though not assigned. *Nunn v. Raby* (Civ. App.) 158 S. W. 187.

The giving of a peremptory instruction will be treated as raising a question of fundamental error, and will be reviewed without any assignment of error. *Rio Grande & E. P. R. Co. v. Kinkel* (Civ. App.) 158 S. W. 214.

Alleged errors in rendering judgment against defendants jointly and severally, although the verdict was against them jointly, and in directing that the judgment should bear interest at the contract rather than the legal rate, were not so fundamental as to be reviewable without an assignment of error under rule 23 for Courts of Civil Appeals (142 S. W. xii). *Lloyd v. American Nat. Bank* (Civ. App.) 158 S. W. 785.

An objection that the petition was insufficient to support the judgment, being one presenting fundamental error, was reviewable, though appellees had not complied with the rules relative to the presentation of errors. *Greene Gold-Silver Co. v. Silbert* (Civ. App.) 158 S. W. 803.

Fundamental errors will be considered, although the statement under the proposition merely refers the court to the synopsis of the pleadings and evidence in the statement of the nature and result of the suit. *Morgan v. Lomas* (Civ. App.) 159 S. W. 869.

That the judgment appealed from is interlocutory, and hence not appealable, is fundamental error, which may be reviewed though not assigned. *Lanius v. People's Home Telephone Co.* (Civ. App.) 160 S. W. 304.

An assignment that the court erred in directing a verdict for plaintiff for any amount raised no fundamental error or error apparent of record. *Harlingen Land & Water Co. v. Houston Motor Co.* (Civ. App.) 160 S. W. 628.

Where the petition alleged that a described tract contained 160 acres, and sought recovery of an undivided one-half, that the verdict and judgment awarded an undivided one-half of the land set forth in plaintiff's petition, without more definite description, was not a fundamental error. *Houston Oil Co. of Texas v. Jones* (Civ. App.) 161 S. W. 92.

The Supreme Court will notice as fundamental error the rendition of a judgment for plaintiffs on a substituted petition, though not briefed, when defendants had not been cited and had not filed an answer thereto or otherwise appeared. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 161 S. W. 911.

Fundamental errors, such as that the petition is fatally defective, and will not support a recovery, and that the citation does not authorize a default judgment, will be considered without assignments of error. *St. Louis, B. & M. Ry. Co. v. Hamilton* (Civ. App.) 163 S. W. 666.

A claim that a verdict for damages for the overflowing of farm lands was not supported by the evidence cannot be assigned as fundamental error. *Id.*

Error, in an action for damages from fraudulent representations as to the quality of seed oats agreed to be delivered, by the delivery of a different quality, in allowing plaintiff damages for the whole crop, when he only owned two-thirds of it, was fundamental error which will be reviewed without an assignment of error. *Handy v. Roberts* (Civ. App.) 165 S. W. 37.

Where a verdict was returned on a peremptory instruction the propriety of the court's action is a question of fundamental error which will be reviewed without an assignment of error. *Ruth v. Cobe* (Civ. App.) 165 S. W. 530.

The error arising from an award of excessive damages based on a mathematical computation is fundamental, and will be considered on appeal, though there is no assignment of error. *Chicago, R. I. & G. Ry. Co. v. Howell* (Civ. App.) 166 S. W. 81.

Error in rendering judgment in a negligence case upon a verdict which failed to find upon special issues of contributory negligence and assumption of risk submitted being fundamental, an assignment of errors was unnecessary. *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439.

A want of evidence or an insufficiency of evidence to sustain the judgment is not such a fundamental error as to require consideration without a proper assignment of error. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

A fundamental error may be waived, unless it is of such a nature as to render the judgment void. *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

An error in overruling a demurrer to a plea of *res adjudicata* was a fundamental error and objections to the assignment complaining thereof were not well founded. *Freidenbloom v. McAfee* (Civ. App.) 167 S. W. 28.

The erroneous direction of a verdict for defendant is fundamental, and must be considered on appeal, even without an assignment of error. *First State Bank & Trust Co. v. Southwestern Engineering & Construction Co.* (Civ. App.) 170 S. W. 860.

Error, if any, in instructing a verdict for defendant, when the admitted and proven facts entitled plaintiff to a judgment, was fundamental error, as to which no assignment of error is necessary. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

The giving of a peremptory instruction does not raise a question of fundamental error or such an error apparent of record as requires consideration, when not assigned and presented in the manner required by the rules. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

A judgment in an action on vendor's lien notes, violating art. 2000, constitutes fundamental error, reviewable in absence of assignments of error in the record. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

The giving or refusing of a peremptory instruction is fundamental error apparent on the face of the record, which must be considered on appeal, although not assigned as error. Acts 33d Leg. c. 59, having no application. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

There being evidence and pleading, to support the verdict and judgment, rendition of the judgment presents no error in law apparent on the face of the record, or fundamental error, requiring reversal, though not assigned, and though no exception was taken to the peremptory charge. *Dees v. Crane* (Civ. App.) 175 S. W. 468.

A defect in the service of a citation is not fundamental, and will not be considered in the absence of an assignment of error. *Tramel v. Guaranty State Bank & Trust Co.* (Civ. App.) 176 S. W. 65.

Where the only assignment of error is made on the hypothesis that the error is fundamental and apparent from the face of the record, it will be presumed that every fact warranted by the pleadings and essential to the judgment was proved upon the trial. *General Bonding & Casualty Ins. Co. v. Waples Lumber Co.* (Civ. App.) 176 S. W. 651.

Error in overruling plea of privilege held fundamental and reviewable without assignment of error, the finding upon which the ruling was based being a conclusion of law as to the construction of the terms of a letter. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

A special judge's want of authority to act affects the jurisdiction of the court, and is therefore a fundamental error, which may be first raised on appeal. *Dunn v. Home Nat. Bank* (Civ. App.) 181 S. W. 699.

Where property, sequestered, was replevied and judgment went against claimant, held, that judgment which was for principal sum named in the bond, and allowed only a partial credit in event of return, was fundamentally erroneous. *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

Assignments showing that the insurance transaction between the parties was in violation of law and void presented fundamental error, and might be considered, though the assignments were improperly grouped. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

In action on policy, failure of petition to allege any administration of plaintiff's deceased father, the original beneficiary under whom she claimed, held error of law apparent upon the face of the record and fundamental. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

It was not fundamental error for the judgment to award divorce to the wife with custody of two girls and deny custody of a boy to her, on the ground that it was not in accordance with the verdict, which, while not in conflict in itself, required such disposition. *Hunter v. Hunter* (Civ. App.) 187 S. W. 1049.

Failure of the petition to allege a cause of action for mandamus is fundamental error, and must be noticed by the appellate court. *Milner v. Brewer-Monaghan Mercantile Co.* (Civ. App.) 188 S. W. 49.

Error in litigating an issue not pleaded is fundamental, and may be reviewed though not assigned. *Woodley v. Pike* (Civ. App.) 189 S. W. 746.

Error, in rendering a separate judgment for one plaintiff upon the petition stating a joint cause of action in favor of two plaintiffs, is fundamental. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 189 S. W. 997.

Error is fundamental if it goes to the merits of the cause of action. *Goodhue v. Fuller* (Civ. App.) 193 S. W. 170.

Sustaining general demurrer to petition, if error at all, is fundamental, and must be considered even in absence of any assignment of error. *Suhre v. Kott* (Civ. App.) 193 S. W. 417.

Insufficiency of evidence to sustain a judgment is not error apparent on the face of the record, or fundamental error, which under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1607*, can be considered on appeal without assignment of error. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 194 S. W. 218.

**12. Necessity of presenting assignment in motion for new trial.**—See art. 2019 and notes.

Under this article, as amended by Acts 33d Leg. c. 136, an assignment of error not based on an error specifically urged as a ground for new trial cannot be reviewed. *City of San Antonio v. Bodeman* (Civ. App.) 163 S. W. 1043; *Edwards v. Youngblood* (Civ. App.) 160 S. W. 288; *Vinson v. W. T. Carter & Bro.* (Civ. App.) 161 S. W. 49, writ of error denied 106 Tex. 273, 166 S. W. 363; *Edwards v. Youngblood* (Civ. App.) 162 S. W. 1164; *Sallaway v. Grand Lodge, A. O. U. W.* (Civ. App.) 164 S. W. 1041; *Dees v. Thompson* (Civ. App.) 166 S. W. 56; *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21; *Watson v. Patrick* (Civ. App.) 174 S. W. 632; *W. H. Norris Lumber Co. v. Harris* (Civ. App.) 177 S. W. 515; *First Texas State Ins. Co. v. Hare* (Civ. App.) 180 S. W. 282; *Ft. Worth Belt Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1184; *Wellborn v. Wellborn* (Civ. App.) 185 S. W. 1041; *Cole v. Knights of Maccabees of the World* (Civ. App.) 188 S. W. 699; *Holloman v. Black* (Civ. App.) 188 S. W. 973; *Woodley v. Pike* (Civ. App.) 189 S. W. 746; *Thorne v. Dashiell* (Civ. App.) 189 S. W. 986; *Grant v. Grant* (Civ. App.) 190 S. W. 229; *Levy v. Engle Bros. Co.* (Civ. App.) 192 S. W. 548.

Assignments that the court erred in rendering judgment against defendants jointly and severally and in directing that the judgment should bear interest at the contract rate held waived, where not set forth in the motion for a new trial, as required by rule 24 for Courts of Civil Appeals (142 S. W. xii). *Lloyd v. American Nat. Bank* (Civ. App.) 158 S. W. 785.

An assignment of error on appeal, in that judgment against defendant was contrary to and not supported by the testimony, did not conform to an assignment of error on the motion for new trial that judgment was contrary to and not supported by the preponderance of the testimony, and hence would not be considered. *Edwards v. Youngblood* (Civ. App.) 162 S. W. 1164.

The provision that assignments contained in a motion for a new trial shall constitute the assignments upon which the cause is presented on appeal is mandatory, where a motion for a new trial was filed. *Dees v. Thompson* (Civ. App.) 166 S. W. 56.

Where a motion for a new trial contained no charges of error or any claim that the evidence was insufficient to sustain the verdict, it was insufficient to present any question for review under this article, as amended by Acts 33d Leg. c. 136. *Murphy v. Murphy* (Civ. App.) 171 S. W. 263.

That, under the law, a motion for new trial constitutes assignments of error held not to render the statutes and rules governing the requisites of assignments inoperative. *Killman v. Young* (Civ. App.) 171 S. W. 1065.

Under this article, as amended by Acts 33d Leg. c. 136, and articles 1987-1991, exceptions to conclusions of law and findings of fact by the court held sufficient without motion for a new trial and bills of exceptions thereto. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

Under arts. 1607 and 1612, and Court of Civil Appeals rules 23, 24 (142 S. W. xii), appellant, filing a motion for new trial, held confined to the assignments therein on appeal, except for error of law apparent upon the record. *Zmek v. Dryer* (Civ. App.) 174 S. W. 659.

An assignment of error that judgment could not be rendered against appellant for more than a certain sum, not found in the motion for new trial, could not be considered on appeal where it did not constitute an error of law apparent on the face of the record. *United States & Mexican Trust Co. v. Austin* (Civ. App.) 176 S. W. 87.

Under this article, as amended by Acts 33d Leg. c. 136, grounds on which a new trial is sought are assignments of error reviewable on complaint for entering judgment on the verdict. *Missouri, O. & G. Ry. Co. of Texas v. Black* (Civ. App.) 176 S. W. 755.

Under the express terms of rule 101a for district and county courts (159 S. W. xi) and rule 29 for Courts of Civil Appeals (47 S. W. v), assignments of error not specified in the motion for a new trial, or in the assignments of error when no motion for new trial is filed, or copied into brief, are waived. *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

Under arts. 1612, 1989-1991, rules 24, 69 for Courts of Civil Appeals (142 S. W. xii, xxii), and rule 71a (145 S. W. vii), held that motion for new trial was a prerequisite to the consideration of assignments of error other than those fundamental in character. *Craver v. Greer* (Civ. App.) 178 S. W. 699, certified questions answered (Sup.) 179 S. W. 862, answer to certified questions conformed to (Civ. App.) 182 S. W. 368.

Under this article, Court of Civil Appeals rule 29 (142 S. W. xii), and rule 101a (159 S. W. xi), assignments of error presented in the brief of plaintiff in error need not be considered, where they are not portions of or copied from the motion for new trial. *Tennegkeit v. Galveston Electric Co.* (Civ. App.) 182 S. W. 72.

An assignment of error in the overruling of defendant's motion to enter judgment allowing him a set-off claimed by him, not complained of in the motion for a new trial, as required by rule 24 of the Courts of Civil Appeals (142 S. W. xii), could not be considered. *Orand v. Whitmore* (Civ. App.) 185 S. W. 347.

An assignment of error, which does not show that the error therein complained of was presented to the trial court in a motion for new trial, does not require consideration under Court of Civil Appeals rules 24 and 25 (142 S. W. xii). *Jackson v. Houston Hot Well Co.* (Civ. App.) 186 S. W. 247.

Assignment of error to refusal to strike answer to interrogatory 11 will be considered, though it appears that in motion for new trial it was by clerical error referred to as answer to interrogatory 10. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

Under rule 25, Rules for the Courts of Civil Appeals (142 S. W. xii), an assignment cannot be considered where it is not found in the amended motion for a new trial. *Caffarelli Bros. v. Bell* (Civ. App.) 190 S. W. 223.

Notwithstanding arts. 1986 and 1990, as to conclusiveness of special verdict on parties and court, such special findings may, in view of articles 1612, 2023, Court of Civil Appeals rule 24 (142 S. W. xii), and rule 71a for district and county courts (145 S. W. vii), be attacked on motion for new trial, and its refusal reviewed on appeal. *Hale County v. Lubbock County* (Civ. App.) 194 S. W. 678.

**12a. — Where motion for new trial unnecessary.**—Under this article, as amended by Acts 33d Leg. c. 136, and rules 101, 101a (159 S. W. xi), where there is no motion for a new trial, assignments of error may be filed in the trial court and brought up in the transcript. *Cornelius v. Harris* (Civ. App.) 163 S. W. 346.

This article as amended does not change the rule that no motion for a new trial need be filed in cases tried to the court, in which findings of fact and conclusions of law are filed. *Dees v. Thompson* (Civ. App.) 166 S. W. 56.

In cases tried by the court where no motion for new trial is necessary, this article, as amended by Acts 33d Leg. c. 136, does not change the requirement that assignments are to be filed with the clerk of the court below. *Id.*

Under this article held that, where findings of fact and conclusions of law were not filed by the trial court, and plaintiff in error did not file a motion for a new trial therein, there were no assignments of error which could be considered. *Pollard v. Allen & Sims* (Civ. App.) 171 S. W. 302.

Under arts. 1612 and 1991, and district court rule 71a (145 S. W. vii), motion for new trial held unnecessary in case tried without a jury, where conclusions of fact and law are filed and exception taken. *Wilkerson v. Stasney & Holub* (Civ. App.) 179 S. W. 669.

**12b. — Matters arising after motion for new trial.**—As to errors arising subsequent to a motion for a new trial, and which cannot be raised in the motion, probably the proper practice is to file distinct assignments in relation thereto with the clerk of the lower court. *Dees v. Thompson* (Civ. App.) 166 S. W. 56.



Assignments of error not included in the motion for a new trial cannot be considered on appeal, unless they arise after the motion for new trial has been filed, *Hayes v. G. A. Stowers Furniture Co.* (Civ. App.) 180 S. W. 149.

**12c. — Errors apparent on face of record.**—In an action to recover land, assignments that the court erred in awarding to defendants only three forty-seconds of the land, because there was no evidence that a tram company under which plaintiff claimed was a bona fide purchaser, etc., held not to present errors of law apparent on the face of the record, and not reviewable, where they were not presented as grounds for new trial. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 171 S. W. 520.

Where defendant by plea objects to court's jurisdiction, this issue must be determined so that assignments of error in overruling plea to jurisdiction will not be stricken, because motion for new trial did not show a meritorious defense. *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098.

**12d. — Copying of assignments contained in motion.**—The provision of this article as amended that assignments appearing in the motion for a new trial shall constitute the assignments of error, and need not be repeated by the filing thereof, does not supplant Court of Civil Appeals rule 29 (142 S. W. xii), requiring that the assignments of error, as the same appear in the transcript, shall be copied in the brief. *Douthitt v. Farrar* (Civ. App.) 159 S. W. 182.

Laws 1913, c. 136, permitting assignments of error to be made up from the motion for new trial, held not to relieve plaintiff in error from copying assignments of error into his brief, not being retroactive. *Blakely v. Commercial Union Assur. Co.* (Civ. App.) 160 S. W. 443.

Assignments of error which were not true copies of the corresponding paragraphs of the motion for a new trial, which, by Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136, constitute the assignments of error, will not be reviewed. *Ruth v. Cobe* (Civ. App.) 165 S. W. 530.

Assignments of error being substantial copies of the grounds contained in the motion for a new trial, held sufficient. *Gorman v. Brazelton* (Civ. App.) 168 S. W. 434.

Under this article, as amended by Acts 33d Leg. c. 136, assignments of error in appellant's brief will be stricken on motion, where they are not even substantial copies of the assignments in the motion for a new trial. *Bradshaw v. Kearby & Kearby* (Civ. App.) 168 S. W. 436.

An assignment of error which does not contain a copy of the paragraph of the motion for new trial referring to the subject must be disregarded under this article and Court Rules 23, 29 (142 S. W. xii). *E. G. Rail Grain Co. v. Burks-Simmons Co.* (Civ. App.) 171 S. W. 1043.

Under this article held, that an assignment of error not a substantial copy of that set forth in motion for new trial would not be considered. *Gulf, C. & S. F. Ry. Co. v. King* (Civ. App.) 174 S. W. 960.

Under this article the grounds of the motion for a new trial may be copied into the brief. *Speer v. Rushing* (Civ. App.) 178 S. W. 1012.

A general assignment of error, though not copied from the motion for new trial, constituting the only assignments of error filed in the trial court, may, in connection with one copied from such motion, be sufficient for consideration. *Waldon v. Davis* (Civ. App.) 185 S. W. 1000.

**12e. — Reconstruction of assignments.**—This article as amended does not change the former rule that reconstructed assignments are not permitted. *Dees v. Thompson* (Civ. App.) 166 S. W. 56; *J. B. Farthing Lumber Co. v. Illig* (Civ. App.) 179 S. W. 1092; *Progressive Oil Co. v. Crawford* (Civ. App.) 184 S. W. 728.

**13. Right to assign errors.**—Where the court sustained an exception to allegations of the answer, but error was not assigned to the ruling, assignments of error could not be based on the refusal of a special charge submitting the defense presented by the allegations. *St. Louis, S. F. & T. Ry. Co. v. Armstrong* (Civ. App.) 166 S. W. 366.

In garnishment proceedings, a claimant who made no objections at the trial cannot question the rulings by adopting assignments of a claimant who did object. *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (Civ. App.) 185 S. W. 382.

**14. Joint assignments.**—In action against two carriers, assignments of error that there was no evidence against either, and that the great preponderance of the evidence showed no cause of action, held properly overruled, where the evidence supported a finding against one carrier. *Texas Midland R. R. v. Becker & Cole* (Civ. App.) 171 S. W. 1024.

**15. Form and requisites in general.**—Where assignments of error, though not in literal compliance with Rules 23, 24, and 25 for Courts of Civil Appeals (142 S. W. xii), substantially confined appellant to errors raised below showed that the error assigned was urged in the motion for a new trial, and enabled Court of Appeals to verify the identity of the errors, they should be considered. *Chicago, R. I. & G. Ry. Co. v. Pemberton*, 106 Tex. 463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652. Rehearing denied (Sup.) 168 S. W. 126.

An assignment of error, though not conforming to Courts of Civil Appeals rule 25 (142 S. W. xii), will be considered on appeal. *Western Union Telegraph Co. v. Hill* (Civ. App.) 162 S. W. 382; *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400.

Mere statements of abstract propositions of law cannot be treated as assignments of error. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson* (Civ. App.) 162 S. W. 1172.

Assignments of error, each referring to unrelated subjects, and containing propositions which were multifarious, and which had no statements specifically pointing out the particular error complained of, and referring to the pages of the record required to support the proposition, as required by Court of Appeals rules 24, 25, and 31 (142 S. W. xii, xiii), were insufficient. *Burrow v. Brown* (Civ. App.) 167 S. W. 254.

Under Courts of Civil Appeals rule 29 (142 S. W. xii), providing that assignments shall be numbered from the first to the last in their consecutive order, an assignment not pre-

mented in its "consecutive order" may be disregarded. *Taylor v. Butler* (Civ. App.) 168 S. W. 1004.

An assignment of error that a return would not support a judgment by default is a mere legal proposition, and will not be considered as an assignment of error. *Tramel v. Guaranty State Bank & Trust Co.* (Civ. App.) 176 S. W. 65.

Assignments of error not presented and numbered in accordance with Court of Civil Appeals rule No. 29 (142 S. W. xii) will not be considered. *William D. Cleveland & Sons v. First State Bank of Floydada* (Civ. App.) 176 S. W. 663.

The court on appeal will not consider an assignment of error which is multifarious, indefinite, and not properly supported by a statement. *McConnon & Co. v. McCormick* (Civ. App.) 179 S. W. 275.

Under this article and rule 29 for the Courts of Civil Appeals (142 S. W. xii), where appellant in his brief disregarded the numbering of subheads of paragraph 5 of his motion for new trial, making each subhead of the motion a separate assignment of error, there was substantial compliance with the statute and rule. *Rector v. Continental Bank & Trust Co.* (Civ. App.) 180 S. W. 309.

An assignment of error, which refers to no paragraph of the motion for new trial, is not a copy of any part thereof, and is not followed by any proposition or statement, as provided by the rules governing briefs before the Court of Civil Appeals, will not be considered. *Koch v. Noster* (Civ. App.) 182 S. W. 372.

An assignment of error complaining that the verdict was excessive, made for the bearing it would have upon the other assignments presented rather than with any expectation if it stood alone it would be sustained in the form presented, would be overruled, for the reason given therein. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

15½. **Argumentative assignments.**—An assignment of error which is argumentative will be disregarded. *Anthony v. Hardin* (Civ. App.) 175 S. W. 857; *Martinez v. Gutierrez's Heirs* (Civ. App.) 172 S. W. 766; *Walker v. Wilmore* (Civ. App.) 174 S. W. 921.

16. **Specification of errors—In general.**—Courts of Civil Appeals Rules 24 and 25 (142 S. W. xii), requiring assignments to specify the grounds of error and to refer to the part of the motion for new trial in which error is complained of, held in conflict with this article, as amended by Acts 33d Leg. c. 136. *Conn v. Rosamond* (Civ. App.) 161 S. W. 73.

On appeal, in an action on a life policy defended on the ground of suicide, held, appellant's assignments of error based on such defense need not be considered, no clause in the policy as to suicide being shown. *First Texas State Ins. Co. v. Jiminez* (Civ. App.) 163 S. W. 656.

An assignment of error, failing to point out the particular action of the court of which complaint is made, is insufficient. *Ruth v. Cobe* (Civ. App.) 165 S. W. 530.

An assignment of error failing to direct the court's attention to any error will not be considered, in view of Acts 33d Leg. c. 136. *Martin v. Stires* (Civ. App.) 171 S. W. 836.

Under this article assignments of error sufficient to direct the appellate court's attention to the errors complained of were sufficient. *Bonner Oil Co. v. Gaines* (Civ. App.) 179 S. W. 636.

17. — **Certainty and definiteness—In general.**—An assignment of error which is vague and uncertain and does not point out any distinct error, need not be considered. *West Texas Supply Co. v. Dunivan* (Civ. App.) 182 S. W. 425; *McConnon & Co. v. McCormick* (Civ. App.) 179 S. W. 275.

Assignments of error not distinctly specifying the ground of error, and distinctly setting them forth in the motion for new trial, as required by rule 24 of Courts of Civil Appeals rules (142 S. W. xii), are not ground for reversal. *Adams v. Burrell* (Civ. App.) 161 S. W. 51.

Notwithstanding this article as amended, an assignment of error held too general under rules 68 (142 S. W. xxii) and 71a (145 S. W. vii) for the district courts, and rules 24, 25, and 26 for the Court of Civil Appeals (142 S. W. xii). *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

Assignment of error in overruling motion for a rehearing held too general to be considered, unless the record disclosed fundamental error. *Keitt v. Gresham* (Civ. App.) 174 S. W. 884.

Assignment of error, with supporting proposition, held not too general for consideration. *Joy v. Citizens' Life Ins. Co.* (Civ. App.) 178 S. W. 590.

Where assignment of error was multifarious and too general and not in compliance with rules 24, 25, 26, 29 (142 S. W. xii, xiii), it will not be considered. *Morris v. Galveston Electric Co.* (Civ. App.) 194 S. W. 490.

18. — **Reasons and grounds of objection.**—An assignment of error that the court erred in overruling the general and special exceptions of proponent to the contest, in holding that the contest set up a sufficient ground for refusing probate of the will, as complained of in the first ground of proponent's motion for new trial, is too general to entitle it to consideration. *Baker v. McDonald* (Civ. App.) 159 S. W. 450.

Assignments of error, which do not show the objection made below, but leave it to the appellate court to go to the record and dig it out of the bill of exceptions, will not be considered on appeal. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

Under rule 30 for Courts of Civil Appeals (142 S. W. xiii), assignment held insufficient where it disclosed no reason why the charge complained of was erroneous. *Times Pub. Co. v. Rood* (Civ. App.) 163 S. W. 1037.

An assignment of error to the admission of evidence will not be reviewed, where it does not appear whether the objection was to the substance of the evidence, or because the action was claimed to have been barred. *Martinez v. Gutierrez's Heirs* (Civ. App.) 172 S. W. 766.

An assignment of error is insufficient, where neither it nor the bill of exceptions to which it refers states what objections were made to the evidence in question. *Jenkins v. Morgan* (Civ. App.) 187 S. W. 1091.

Since the reasons given to support an assignment of error constitute no part of the assignment itself, the assignment may be good, though the reasons urged in its support are untenable. *First Nat. Bank of Lafayette, Ind., v. Fuller* (Civ. App.) 191 S. W. 830.

19. — **Rulings on pleadings.**—An assignment, complaining that the court overruled the general demurrer and special exceptions contained in plaintiff's supplemental petition, is too general and will not be considered. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

An assignment of error by plaintiff that the court erred in sustaining certain exceptions and demurrers because the petition showed such legal and equitable cause of action and such gross fraud and deceit on defendant's part as entitled plaintiff to a trial on the facts held too general. *Burrow v. Brown* (Civ. App.) 167 S. W. 254.

20. — **Conduct of trial.**—Under this article an assignment that the jury was guilty of misconduct and violated the instructions in considering the verdict is too general. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482.

Assignment asserting prejudice and excitement among the public and complaining of the crowd in the courtroom and their applause, laughter, etc., held too vague and indefinite. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

In action for destruction of property from fire communicated from boarding cars on defendant's siding, an assignment of error in the taking of the policy of insurance to the jury room, in the absence of any alleged injury therefrom, was a mere abstraction. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

In view of Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136, bill of exceptions on which was based an assignment of error complaining of remarks in presence of jury held sufficient to show that remarks were made in presence of jury. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

21. — **Rulings as to evidence.**—An assignment of error to the admission of a deposition, which does not point out the particular exception relied upon, will not be considered, where some of the objections to the answers in the deposition were not well taken. *McFarland v. Lynch* (Civ. App.) 159 S. W. 303.

An assignment of error to the exclusion of part of the testimony of two witnesses presents no question for review where the testimony was not set out and the general statement merely was that they were not permitted to state certain facts which were elicited from other witnesses. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 153 S. W. 375.

An assignment of error to the admission of testimony should set out the testimony objected to. *Id.*

Where some of the questions asked a witness were not leading, an assignment of error complaining of such questions as a whole as leading was insufficient. *Lee v. Moore* (Civ. App.) 162 S. W. 437.

An assignment of error as to the exclusion of evidence to show fraud held too general to be considered, and not cured by the proposition stated under it. *McCullough v. Hurt* (Civ. App.) 175 S. W. 781.

An assignment of error to exclusion of testimony too vague to show what testimony was excluded cannot be considered on appeal. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070.

Assignment of error, in that services alleged to have been rendered by plaintiff, a broker, were different from those stated in the hypothetical question as to their reasonable value, was too general, where it did not point out what should have been changed in the question. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

Under rules 42 and 43 (142 S. W. xiv), upon failure of appellant to file brief and of appellee to file brief before submission of case, an appeal will be dismissed for want of prosecution. *Southwestern Oil & Gas Co. v. Denny* (Civ. App.) 187 S. W. 973.

An assignment of error, which complains of evidence rulings as to several witnesses, and fails to set out the objections made to such rulings, is insufficient. *Jenkins v. Morgan* (Civ. App.) 187 S. W. 1091.

Where an assignment of error, complaining of certain testimony in general terms, did not show what witnesses' testimony was objected to, and the bills of exception were filed after the expiration of time allowed therefor, the assignment must be overruled. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

22. — **Submission of issues to jury.**—Where defendant alleged and testified to facts constituting interstate commerce and assigned error on court's refusal to give charge on assumption of risk under federal doctrine, held that the federal question was sufficiently raised to be reviewed on appeal. *Chicago, R. I. & G. Ry. Co. v. De Bord* (Sup.) 192 S. W. 767.

23. — **Instructions.**—Assignments of error, not pointing out the supposed inaccuracy in the court's definition of undue influence nor the features of undue influence alleged to be inapplicable under the evidence, held too general for consideration. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

Assignments of error, in that the charge in a will contest submitted an issue neither pleaded nor proven, but not pointing out the difference between the issues referred to, was too general to merit consideration. *Id.*

An assignment of error because of the court's refusal of a request is insufficient when it does not appear therefrom upon what ground the complaint is based, and the statement of facts does not set forth sufficient facts to enable the court to determine whether such charge was improperly refused. *Heflin v. Eastern Ry. Co. of New Mexico* (Civ. App.) 159 S. W. 499.

An assignment of error based upon a motion for a new trial on the ground that the court erred in directing a verdict for plaintiff for any amount will not be considered. *Harlingen Land & Water Co. v. Houston Motor Co.* (Civ. App.) 160 S. W. 628.

Assignment that the court erred in its charge, in giving undue prominence to appellee's theory, and proposition thereunder, that charge imparting undue prominence to one theory was improper, held too general to require consideration. *Texas Co. v. Veloz* (Civ. App.) 162 S. W. 377.

An assignment that the court erred in not giving defendant a special charge, etc., held too general. *National Ry. of Mexico v. Ligarde* (Civ. App.) 172 S. W. 1140.

Assignment of error based on bill of exceptions to the refusal of an instruction, not showing on its face that such instruction was submitted to the judge before the general charge and before the argument, held not to be considered on appeal. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

Assignments complaining of court's definition of negligence and proximate cause, but not showing what the definitions were, and the charges not being copied into the brief, held not reviewable. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

Assignments complaining of court's definition of negligence and proximate cause, but not showing what the definitions were, and the charges not being copied into the brief, held not reviewable. *Id.*

The general assignment of error that the court erred in giving its special issues to the jury and refusing those requested by defendant cannot be considered. *Foster v. Bennett* (Civ. App.) 178 S. W. 1001.

An assignment of error in the court's instruction on the measure of damages that it was misleading, confusing, and prejudicial was too general under the rules to be considered. *Smith v. Texas Traction Co.* (Civ. App.) 180 S. W. 933.

An assignment of error, complaining that an instruction was uncertain, confusing, and misleading and calculated to mislead the jury and prejudicial to plaintiff, held too general to be considered. *McGraw v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 182 S. W. 417.

Assignment of error complaining of material omissions from court's general charge, not containing charge objected to, or any reference to page of record where charge might be found, presented nothing for consideration. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

24. — **Verdict, findings, or decision.**—Assignment of error that the verdict is excessive is too general. *Andrews v. Wilding* (Civ. App.) 193 S. W. 192; *Buick Automobile Co. v. Weaver* (Civ. App.) 163 S. W. 594; *St. Louis Southwestern Ry. Co. of Texas v. Williams* (Civ. App.) 170 S. W. 1069.

Assignments that the court's findings were contrary to the evidence, and that the court erred in its conclusion of law because it was without evidence to support it, which did not point out in what respect the finding or conclusion was unsupported by the evidence, was insufficient and would not be considered. *McCall Co. v. Elliott* (Civ. App.) 159 S. W. 872.

Assignments of error, in that the verdict was contrary to the evidence and the law, and was excessive, held too general for consideration. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

An assignment of error that one finding by the trial court was in conflict with two other findings, which does not point out in what respect the findings conflict, is too general. *Cope v. Pitzer* (Civ. App.) 166 S. W. 447.

Assignments of error that the verdict of the jury is unsupported by the evidence, that it is contrary to law, and that the court erred in instructing a verdict in favor of defendants, are too general for consideration. *Ross v. Blunt* (Civ. App.) 166 S. W. 913.

An assignment, "The court erred in receiving the verdict and rendering judgment thereon in this case," was too general for review. *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

An assignment of error that the verdict was contrary to the law and the evidence and should have been for the full amount of plaintiff's claim was too general. *Moore v. Cooper Mfg. Co.* (Civ. App.) 171 S. W. 1034.

An assignment of error that the verdict is contrary to the law and evidence because there is no evidence to establish a fact necessary to sustain the verdict and judgment is sufficient. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

An assignment of error merely that the findings of fact are not supported by the "preponderance" of the evidence, but are against it, held to present nothing for review. *Speights v. Speights* (Civ. App.) 176 S. W. 641.

Assignments of error followed by their respective propositions held not to inform the court as to the respects in which plaintiff in error desired to attack the verdict. *W. H. Norris Lumber Co. v. Harris* (Civ. App.) 177 S. W. 515.

A motion for a new trial attacking both the verdict and the judgment on the ground of the insufficiency of the evidence, or that the undisputed evidence was at variance with the verdict, in view of this article, constituting the motion for new trial the assignments of error, repeated in an assignment of error that the verdict should be set aside because without evidence to support it, sufficiently raised such issue. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

An assignment of error because the verdict was against the great preponderance of the evidence, specifying the same, held sufficient. *Texas & N. O. R. Co. v. Jones* (Civ. App.) 187 S. W. 717.

An assignment of error in that "the verdict was not sustained by the evidence, the facts proven being insufficient on which to base a verdict for the plaintiff," was too general to require consideration. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

An assignment of error which merely asserts that a verdict for plaintiff in an action for personal injuries appears from the evidence to be grossly excessive is too general to be considered. *Andrews v. York* (Civ. App.) 192 S. W. 338.

Assignment of error that the verdict is contrary to the law and evidence and the court's judgment contrary to law is too general to require consideration. *Smith v. Jones* (Civ. App.) 192 S. W. 795.

25. — **Motions for new trial.**—An assignment that the court erred in refusing to grant specified defendants' amended motion for new trial was too general to present any question for review. *Brown v. Brenner* (Civ. App.) 161 S. W. 14.

Assignment that the court erred in denying a motion for new trial because jury allowed the full amount claimed by plea in reconvention, except amount claimed as damages for breach of warranty, held too general. *Gillispie v. Ambrose* (Civ. App.) 161 S. W. 937.

An assignment complaining that the trial court erred in overruling a motion for new trial because verdict and judgment were contrary to, and unsupported by, evidence, was too general and indefinite for consideration. *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170.

An assignment that the court erred in overruling defendant's motion for new trial is too general for consideration. *Texas City Terminal Co. v. Thomas* (Civ. App.) 178 S. W. 707.

26. — **Judgment.**—Assignment merely complaining that judgment was contrary to law and evidence held too general. *American Nat. Bank v. Warner* (Civ. App.) 176 S. W. 863; *Wardlow v. Andrews* (Civ. App.) 180 S. W. 1161.

An assignment of error that the court erred in rendering judgment against defendant on the notes sued on, or either of them for any sum, and an assignment that the court erred in foreclosing a lien on the land described in the judgment, are too general, and will not be considered on appeal. *Coleman v. Garvin* (Civ. App.) 158 S. W. 185.

In an action against the maker and indorser of a note and to foreclose a vendor's lien, an assignment that the court erred in not holding that the plaintiff was a bona fide holder of the note sued on, and in not rendering a judgment against both defendants and for the foreclosure of the lien, is too general for consideration. *Henderson v. Wilkinson* (Civ. App.) 159 S. W. 1045.

An assignment of error, "Because the judgment \* \* \* is contrary to the law and the evidence," with a proposition thereunder equally vague and indefinite, does not require consideration. *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

Assignments of error that a judgment is contrary to law and evidence, is unsupported by evidence, and by a preponderance of evidence, are too general. *Friedman v. Huntsville Cotton Oil Co.* (Civ. App.) 177 S. W. 573.

28. **Including errors in one assignment.**—An assignment of error should not be multifarious. *West Texas Supply Co. v. Dunivan* (Civ. App.) 182 S. W. 425; *Morgan v. Lomas* (Civ. App.) 159 S. W. 869; *Fidelity & Deposit Co. v. Bankers' Trust Co.* (Civ. App.) 161 S. W. 45; *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460; *Gameson v. Gameson* (Civ. App.) 164 S. W. 1104; *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21; *Killman v. Young* (Civ. App.) 171 S. W. 1065; *Jones v. Nix* (Civ. App.) 174 S. W. 685; *Anthony v. Hardin* (Civ. App.) 175 S. W. 857; *Trinity County Lumber Co. v. Conner* (Civ. App.) 176 S. W. 911; *McConnon & Co. v. McCormick* (Civ. App.) 179 S. W. 275; *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224; *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542; *Land v. Johnson* (Civ. App.) 189 S. W. 337.

Though an assignment of error in a motion for new trial, directing the court's attention to error complained of, may be in disregard of rules 24 and 25 of the Court of Civil Appeals (142 S. W. xii), against multifariousness, it should be permitted, in view of the recent statute making an assignment sufficient which directs attention to error complained of. *Kilgore v. Savage* (Civ. App.) 164 S. W. 1081.

An assignment complaining of the overruling of distinct and unrelated motions cannot be considered. *Anderson & Day v. Darsey* (Civ. App.) 171 S. W. 1089.

An assignment of error grouping all the questions raised by several assignments and again urging error was multifarious, and could not be considered. *Clark v. State* (Civ. App.) 189 S. W. 84.

An assignment of error complaining of a remark of the court that he did not intend to have a whole real estate exchange testify in the case held not objectionable on the ground of multifariousness. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

29. — **Rulings on pleadings.**—Assignments that the court erred in overruling demurrers held multifarious and too general to require consideration. *Pollard v. McCrummen* (Civ. App.) 160 S. W. 1148.

Assignments of error that the court erred in overruling exceptions to certain paragraphs of the answer, wherein defendants pleaded stale demand and res judicata, held insufficient, where the paragraphs referred to related to different matters. *Burrow v. Brown* (Civ. App.) 167 S. W. 254.

Assignment of error that court erred in overruling general and special demurrers to answer, held too general, there being several exceptions. *Neison v. Boggs* (Civ. App.) 177 S. W. 1005.

30. — **Rulings as to evidence.**—An assignment complaining of error in the admission of testimony of three witnesses on different grounds, set out in three different bills of exception, held multifarious. *Gulf, C. & S. F. Ry. Co. v. Currie* (Civ. App.) 160 S. W. 656.

An assignment of error complaining of a ruling on evidence and of remarks by the trial court in making the rulings is multifarious. *Coker v. Cooper's Estate* (Civ. App.) 176 S. W. 145.

An assignment complaining of two distinct rulings, one relating to the admission and the other insufficiency of evidence, is too general, and will not be considered. *Shaw v. Thompson Bros. Lumber Co.* (Civ. App.) 177 S. W. 574.

31. — **Instructions.**—An assignment of error complaining of the refusal of two special charges relating to different issues will not be considered. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626; *Rainey v. Old* (Civ. App.) 180 S. W. 923.

A single assignment of error cannot be based on separate paragraphs of the court's charge submitting distinct and unrelated questions to the jury and erroneously submitted as a proposition. *Kelly v. Dallas Consol. Electric Street Ry. Co.* (Civ. App.) 158 S. W. 221.

Defendant's assignment to the giving of an instruction, as unauthorized by the evidence, will not be overruled, because it complains of exclusion of evidence which would have warranted it; it being inadmissible on the theory on which it was offered. *Missouri, K. & T. Ry. Co. of Texas v. Kemp* (Civ. App.) 173 S. W. 532.

An assignment that the court erred in refusing a special charge for a number of reasons raising various questions was multifarious, and could not be considered. *Woodard v. Eskridge* (Civ. App.) 174 S. W. 868.

Grouping four requested peremptory charges in one assignment, held not objectionable. *Missouri, K. & T. Ry. Co. of Texas v. Washburn* (Civ. App.) 184 S. W. 580.

An assignment that the court erred in charging innocent purchasers and refusing to give three special charges presenting three different phases of the question was improper as multifarious. *Lee v. Frater* (Civ. App.) 185 S. W. 325.

Assignment of error, "Because the court erred in submitting \* \* \* any question that \* \* \* could or did suggest \* \* \* that there were joint duties and liabilities of defendants," is insufficient to point out the matter complained of; many issues being submitted. *Galveston, H. & S. A. Ry. Co. v. Packard* (Civ. App.) 193 S. W. 397.

Assignment of error to a charge considered as an objection to it as whole held too general as referring to numerous questions. *Miles v. Harris* (Civ. App.) 194 S. W. 839.

32. — **Verdict, findings, or judgment.**—To sustain an assignment of error that the court erred in giving its special issues to the jury, and in refusing to give those requested, it must appear that every special issue submitted was improper, and that every special issue requested was good. *Foster v. Bennett* (Civ. App.) 178 S. W. 1001.

33. — **Motions for new trial.**—An assignment of error in refusing to grant a new trial, the grounds of the motion for which are appended to and made a part of the assignment of error, is too general and multifarious to be considered. *Rips v. Herman* (Civ. App.) 158 S. W. 781.

An assignment that the court erred in overruling appellant's motion for a new trial, which contained 63 grounds, was too general. *Houston Oil Co. of Texas v. Payne* (Civ. App.) 164 S. W. 886.

An assignment that the court erred in overruling a motion for new trial for errors assigned, set out in the motion, and because the verdict is not supported by evidence as shown by another assignment, held multifarious. *Browder v. Memphis Independent School Dist.* (Civ. App.) 172 S. W. 152, judgment affirmed (Sup.) 180 S. W. 1077.

An assignment of error, which is a combination of several assignments contained in the motion for a new trial, is insufficient. *Jenkins v. Morgan* (Civ. App.) 187 S. W. 1091.

An assignment of error, complaining that the court erred in overruling appellant's motion for new trial because the judgment was contrary to the law and the evidence and the findings of the jury and on account of newly discovered evidence, is multifarious and bad. *Grant v. Grant* (Civ. App.) 190 S. W. 229.

34. **Propositions and statements accompanying assignments of error.**—An assignment in appellant's brief, complaining of the admission of certain evidence, will not be considered, where it is supported by no statement, fails to state the objections made to the evidence, and for supporting propositions refers to propositions under other assignments. *Standard Milling Co. v. Imperial Rice Co.* (Civ. App.) 160 S. W. 637.

Assignments of error not complying with Courts of Civil Appeals rules, rules 29 and 30, requiring appellant to file a brief of the points relied on, separately stating each point of error, and requiring each point under each assignment of error to be stated as a proposition, unless the assignment sufficiently disclosed the point, need not be considered. *St. Louis & S. F. R. Co. v. Finley* (Civ. App.) 163 S. W. 104.

An assignment of error reciting that the verdict in an action for conversion of an automobile was excessive held not supported by a proposition germane to the assignment, or by a sufficient statement. *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80.

An assignment of error having no adequate statement, and followed by an alleged proposition which is mere argument, will not be considered. *Martinez v. Gutierrez's Heirs* (Civ. App.) 172 S. W. 766.

35. — **Necessity of propositions with accompanying statements.**—Assignments of error not followed by propositions and statements will not be considered. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 191 S. W. 591; *Stockwell v. Glaspey* (Civ. App.) 160 S. W. 1151; *Childress v. Robinson* (Civ. App.) 161 S. W. 78; *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson* (Civ. App.) 162 S. W. 1172; *Dees v. Thompson* (Civ. App.) 166 S. W. 56; *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21; *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80; *Rowe v. Crutchfield* (Civ. App.) 168 S. W. 444; *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180; *Walker v. Wilmore* (Civ. App.) 174 S. W. 921; *West Texas Supply Co. v. Duniavan* (Civ. App.) 182 S. W. 425.

Assignments of error unsupported by propositions as required by rule 30 (142 S. W. xiii), governing the briefing of cases, will not be considered. *Greene Gold-Silver Co. v. Silbert* (Civ. App.) 158 S. W. 803; *Willett v. Herrin* (Civ. App.) 161 S. W. 26; *Randals v. Pecos Valley State Bank* (Civ. App.) 162 S. W. 1190.

Rules requiring each assignment of error in a brief to be followed by a proposition and a sufficient statement from the record held not in conflict with this article, as amended by Acts 33d Leg. c. 136. *Conn v. Rosamond* (Civ. App.) 161 S. W. 73.

This article, though repealing rule 25 (142 S. W. xii), held not to abrogate court rules 30 and 31 (142 S. W. xiii), requiring each point in assignment to be stated as a proposition. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

An assignment that the court erred in not granting a new trial because of errors pointed out in the amended motion for new trial is too general to be considered when unaided by proposition or statement. *McIndoo v. Wood* (Civ. App.) 162 S. W. 488.

An assignment of error in not filing conclusions when requested cannot be considered, where not supported by a statement or proposition, and where there is no bill of exceptions showing a request to file such findings or failure to do so, or reference to the record indicating such a request, or statement that the trial court's attention was called thereto. *Overton v. Colored Knights of Pythias* (Civ. App.) 163 S. W. 1053.

An assignment of error complaining of the failure of the court to sustain a demurrer and a special exception, not followed by a proposition as required by the rules, nor by any statement disclosing what special exceptions were presented, or what ruling was made thereon, will not be considered on appeal. *Clarke v. A. B. Frank Co.* (Civ. App.) 168 S. W. 492.

An assignment of error complaining of the admission of evidence, not followed by a proposition, and not a proposition in itself, cannot be considered on appeal. *Id.*

An assignment of error, complaining of the overruling of special exceptions to items of the account sued on, will not be considered where there is no proposition under the assignment. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

Objections to instructions will not be considered, where the assignment of error containing them is not followed by an appropriate proposition raising such objections. *Texas & N. O. R. Co. v. Petersilka* (Civ. App.) 176 S. W. 70.

An assignment of error in that all the findings of the jury were contrary to the evidence was too general, where no propositions were submitted thereunder, and it was not followed by a statement, and would not be considered. *Rotge v. Simmler* (Civ. App.) 176 S. W. 614.

Where neither of two assignments of error was briefed as a proposition, no proposition was made thereunder, and no statement of the evidence in support of the contention made was subjoined to either of them, such assignments were not presented for consideration. *M. Alexander & Co. v. Fletcher & Whitfield* (Civ. App.) 177 S. W. 514.

Assignment of error complaining that court permitted defendant to open and close, held not entitled to consideration, there being no proposition and no sufficient statement, and so far as appeared the court's action being proper. *Nelson v. Boggs* (Civ. App.) 177 S. W. 1005.

Under rules 30 and 31 for the Court of Civil Appeals (142 S. W. xiii), assignments without propositions of law or statements of proceedings cannot be considered. *Tomson v. Simmons* (Civ. App.) 180 S. W. 1141.

Assignment of error consisting of a copy of the motion for new trial, not being labeled "assignment of error" in the brief, and the motion being copied at length without any proposition or statement, could not be considered. *Lee v. Frater* (Civ. App.) 185 S. W. 325.

Assignment of error to refusal to give charge, not followed by any proposition or statement of facts, held not a compliance with rules for Courts of Civil Appeals 29, 30, 31 (142 S. W. xii, xiii). *Galveston Electric Co. v. Hanson* (Civ. App.) 187 S. W. 533.

An assignment of error which is not a proposition itself and is not followed by a proposition, and where the objection to the evidence is not shown by the brief, would not be considered. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

An assignment of error not followed by propositions, as contemplated by rule 30 (142 S. W. xiii), need not be considered. *Grant v. Grant* (Civ. App.) 190 S. W. 229.

Where an assignment of error was not a proposition itself, and was not followed by a proposition or statement under rule 29 (142 S. W. xii), it will not be considered upon appeal. *Witcher v. Adams* (Civ. App.) 191 S. W. 399.

**36. — Sufficiency of propositions in general.**—Where a verdict embodies several matters which are assigned as error, an appropriate proposition singling out a particular matter as erroneous sufficiently raises the question for review. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 319, rehearing denied 160 S. W. 609.

Assignments of error complaining of the exclusion of evidence, followed by a proposition which merely stated the purpose for which it was offered, cannot be considered; the proposition not being sufficient. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

A proposition stating that portion of the charge was indefinite, without indicating wherein it was indefinite, will not be considered. *Galveston, H. & S. A. Ry. Co. v. Templeton* (Civ. App.) 175 S. W. 504.

Assignment of error in overruling motion for a new trial for the reasons enumerated therein, with proposition alleging error in overruling the motion, and statement consisting of copy of the motion, would be overruled. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

**37. — Necessity of specific proposition.**—Proposition under assignment of error held not to make the error complained of specific and plain. *Reliable Steam Laundry v. Schuster* (Civ. App.) 159 S. W. 447.

Propositions under an assignment complaining of the admission of evidence held not to require consideration, being too general, and not pointing out any specific error. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

Assignments of error not specifically stating the error relied on, and under which the propositions are simply that the court erred in giving the judgment, are too general to require consideration. *Richardson v. Houston Oil Co. of Texas* (Civ. App.) 176 S. W. 628.

Defendant's abstract proposition as to assumption of risk by a servant having equal facilities with the master to observe the danger could not profit it, where there were no facts making it a concrete proposition. *San Antonio Brewing Ass'n v. Gerlach* (Civ. App.) 185 S. W. 316.

An abstract proposition is, under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1612, an insufficient assignment of error; as the statement thereunder cannot be looked to in aid of it. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 194 S. W. 218.

**38. — Assignment treated as proposition.**—An assignment of error cannot be considered if it is not a proposition of law within itself and is not supported by any proposition. *Kelly v. Dallas Consol. Electric St. Ry. Co.* (Civ. App.) 158 S. W. 221; *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

An assignment of error, reciting that the court erred in overruling the general demurrer of the plaintiffs, contained in their first supplemental petition, to the answer of defendants as appears by the bill of exceptions, cannot be considered as a proposition, and so need not be considered on appeal. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

Where assignment of error to the refusal to give instructions was submitted as a proposition within itself, and for evidence a reference was made to statements under other assignments, it would not be considered. *Galveston, H. & S. A. Ry. Co. v. Walker* (Civ. App.) 163 S. W. 1038.

Under Court of Civil Appeals Rule 30 (132 S. W. xiii), requiring that each point under each assignment shall be stated as a proposition unless the assignment sufficiently discloses the same, assignments that the verdict is contrary to law and the verdict and judgment not supported by the evidence, without subjoined propositions, present no question for review. *United Benevolent Ass'n of Texas v. Lawson* (Civ. App.) 166 S. W. 713.

Assignment of error in overruling plaintiff's motion for a new trial, submitted as a proposition, held too general and indefinite to be considered. *Moore v. Cooper Mfg. Co.* (Civ. App.) 171 S. W. 1034.

An assignment of error complaining of the denial of a peremptory instruction could not be submitted as a proposition, where it involved many propositions. *Galveston, H. & S. A. Ry. Co. v. Roemer* (Civ. App.) 173 S. W. 223.

An assignment of error which is vague and indefinite and submitted as a proposition will not be considered. *Friedman v. Huntsville Cotton Oil Co.* (Civ. App.) 177 S. W. 573.

Assignment of error attacking judgment as permitting defendant to retain property of plaintiff and that plaintiff was entitled to judgment on the verdict under the pleadings and declaring all other issues immaterial to defeat plaintiff's action is not a proposition presenting error for review. *Allen v. Reed* (Civ. App.) 179 S. W. 544.

An assignment of error under which no proposition is submitted will not be considered, where it does not sufficiently disclose the point insisted on to be a proposition within itself. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

Where appellant did not reserve appropriate exceptions, assignments complaining of the refusal of the charges cannot be considered as propositions of law under other assignments of error; for that would be a mere evasion of the practice acts requiring exceptions. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

Assignments which do not present error cannot be considered as propositions of law under other assignments; for they would not be germane to the assignments to which they were sought to be subjoined. *Id.*

39. — **Statement treated as proposition.** A proposition in support of an assignment of error in an action for a broker's commission held to be a statement of facts, and not a proposition, and not entitled to consideration. *Babcock v. Glover* (Civ. App.) 174 S. W. 710.

Assignment of error on failing to submit issue to jury cannot be considered, in the absence of a proposition, upon a statement that issue was raised by pleadings and was material. *Allen v. Reed* (Civ. App.) 179 S. W. 544.

40. — **Relevancy of proposition to assignment.**—A proposition not germane to the assignment of error will not be considered. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661; *McCall Co. v. Elliott* (Civ. App.) 159 S. W. 872; *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 163 S. W. 338; *Fidelity-Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 167 S. W. 334; *Stewart v. Williams* (Civ. App.) 167 S. W. 761; *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309; *Ford v. Warner* (Civ. App.) 176 S. W. 885; *J. I. Case Threshing Mach. Co. v. Lipper* (Civ. App.) 181 S. W. 236; *Shipp v. Cartwright* (Civ. App.) 182 S. W. 70; *Brady v. Cope* (Civ. App.) 187 S. W. 678; *Sharp v. Morgan* (Civ. App.) 192 S. W. 599.

A proposition as to the effect of the selection of an administrator de bonis non by attorneys interested adversely to the estate is not germane to an assignment of error for overruling a motion requiring the attorneys to state their authority and interest in the case. *Kimmons v. Abraham* (Civ. App.) 158 S. W. 256.

Under assignment urging that court's finding of a novation was contrary to the evidence, propositions that a novation must have a consideration to support it and that there must be an intention to make it a substitute for the old contract held not germane to the assignment. *McCall Co. v. Elliott* (Civ. App.) 159 S. W. 872.

A proposition that the maker of a note has all of the day upon which the note matures to pay it, and where the payee does not exercise his option to declare the note due until the suit is filed the suit was prematurely brought, is not germane to an assignment of error that the petition did not show that the plaintiff properly exercised the option to mature the note. *Shearer v. Chambers County* (Civ. App.) 159 S. W. 999.

Propositions attacking the sufficiency of the evidence to sustain the verdict were not germane to an assignment complaining of a peremptory instruction. *Harlingen Land & Water Co. v. Houston Motor Co.* (Civ. App.) 160 S. W. 628.

A proposition that the court erred in permitting witnesses to give their opinion as to the mental capacity of the grantor in a deed held not germane to an assignment that the court erred in denying defendant's motion for a new trial because a finding of want of capacity was not sustained by the evidence. *Brown v. Brenner* (Civ. App.) 161 S. W. 14.

A proposition that the court erred in canceling deeds but should have directed a verdict for defendants held not germane to an assignment that the court erred in not granting defendants a new trial because the evidence was insufficient to justify a finding that defendants had notice of their incapacity at the time they took the deeds. *Id.*

Propositions that the court erred in overruling a plea of privilege to be sued in another county were not germane and could not be reviewed under an assignment that the court erred in rendering judgment on the merits. *Chrisman v. Lumberman's Nat. Bank* (Civ. App.) 163 S. W. 651.

A proposition that the court erred in sending the jury back for a fuller answer is not germane to an assignment that the answers of the jury showed that they were prejudiced against appellant. *Gameson v. Gameson* (Civ. App.) 164 S. W. 1104.

A proposition, in an action against a carrier for injuries to goods, that in all events freight charges should have been deducted from the amount awarded held not germane to an assignment that plaintiff was not entitled to recover more than \$400, which was the exact amount of the judgment. *Chicago, R. I. & G. Ry. Co. v. Bell* (Civ. App.) 168 S. W. 396.

In an action on life policies, certain propositions held not germane to an assignment of error under which they were urged; and, the other propositions being germane to the assignment only, the propositions in question would be deemed waived. *National Life Ass'n v. Parsons* (Civ. App.) 170 S. W. 1038.

Where no assignment of error was presented to the court's assumption of a fact, proposition to the effect that there was no evidence to establish such fact could not be considered. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 173 S. W. 908.

The proposition that a contention of plaintiff was unduly emphasized in charges given at his request is not germane to defendant's assignment of error to the refusal of a charge. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.



On appeal in an action for breach of a contract of health insurance, proposition questioning sufficiency of facts proved to show plaintiff's right to a rescission could not be considered because not germane to the single assignment of error, concerning the measure of damages. *American Nat. Ins. Co. v. Wilson* (Civ. App.) 176 S. W. 623.

In action on note, given as consideration for corporation stock delivered to the maker, propositions, under assignments of error held not germane thereto. *Sturdevant v. Falvey* (Civ. App.) 176 S. W. 908.

An assignment of error to the exclusion of certain evidence, the proposition and statement under which related to different evidence, will be overruled. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

A proposition that a tort cannot be joined with a contract is not germane to an assignment that suit was premature. *Southwestern Surety Ins. Co. v. Thompson* (Civ. App.) 180 S. W. 947.

The proposition that it was the duty of the court to construe the contract is not germane to an assignment of error complaining only of the overruling of a general demurrer to the answer. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

In an action against a railroad company for mingling white and colored passengers, assignments of error not raising the question cannot be extended by propositions to raise the question that the white passengers suffered mental anguish by reason of proximity of negroes. *Weller v. Missouri, K. & T. Ry. Co.* (Civ. App.) 187 S. W. 374; *Connally v. Missouri, K. & T. Ry. Co.* (Civ. App.) 187 S. W. 376.

A proposition on the admission of evidence under an assignment of error to the sufficiency of the petition is in violation of the rule as not germane to the assignment. *Blount, Price & Co. v. Payne* (Civ. App.) 187 S. W. 990.

Where objection made to admission of evidence did not include question urged in a proposition under an assignment of error, the proposition is not germane to the assignment. *Cole v. Knights of Maccabees of the World* (Civ. App.) 188 S. W. 699.

Assignments of error which were indefinite, uncertain, and multifarious, none of them being such propositions within themselves as could be considered as propositions of law, and which, when followed by any proposition, were followed by such a one as was not germane to the assignments, were improperly briefed. *Hawks v. Longbotham* (Civ. App.) 188 S. W. 734.

41. — **Relevancy of proposition to case.**—A proposition accompanying an assignment of error, though correct as an abstract principle, will not be considered, where it has no basis in the exceptions. *Texas & N. O. R. Co. v. Petersilka* (Civ. App.) 176 S. W. 70.

42. — **Multifarious propositions.**—While an assignment may include several propositions of law, a group of five assignments, followed by only one proposition, which undertakes to present five separate and distinct questions of law, violates the express provision of rule 30 for Courts of Civil Appeals (142 S. W. xiii). *Vickrey v. Dockray* (Civ. App.) 158 S. W. 1160.

Where assignments of error are submitted as propositions, and as such they are multifarious, they will not be considered on appeal. *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400.

A proposition subjoined to an assignment raising and submitting two separate and distinct propositions of law was multifarious, and not entitled to consideration. *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063.

43. — **Showing basis of claim of error.**—The proposition must point out the error in the instructions, the giving of which was assigned as error. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

A proposition in an action on an automobile policy, alleging the company's right to repair the machine at its election, did not state a defense in the absence of a statement that the company attempted to exercise such right. *General Accident, Fire & Life Assur. Corporation v. Ellison* (Civ. App.) 160 S. W. 1141.

A proposition under an assignment of error to the giving of a charge that the charge was on the weight of the evidence, failing however to point out in what respect, would not be considered on appeal. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

44. — **Reference in propositions to other propositions or to record or assignment.**—The practice of setting out a synopsis of the pleadings and evidence under the statement of the nature and result of the suit, and thereafter referring the court thereto in a general manner in support of a proposition, is bad. *Morgan v. Lomas* (Civ. App.) 159 S. W. 869.

Where a proposition under an assignment of error suggests the specific objection to the admission of evidence which is made in the bill of exceptions, which is full and complete on the question, the question will be regarded as being sufficiently raised. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

Assignments of error not propositions in themselves, and followed by no propositions, but referring merely to propositions under another assignment, not germane to them, will not be considered. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

46. — **Grouping assignments.**—Where several assignments of error on different matters are grouped, they should not be considered on appeal. *Conley v. Dimmit County State Bank* (Civ. App.) 181 S. W. 271; *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063; *Davis v. Collins* (Civ. App.) 169 S. W. 1128; *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

Several assignments followed by a single proposition that the court erred in refusing to submit a certain issue, and supported by no statement other than a reference to a certain page of the record for the bill of exceptions, will not be considered. *Mitchel v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

Assignments of error held to relate to the same question, so that they could be grouped in the brief, and considered together. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

Assignments which were grouped, though complaining of sustaining of exceptions to answer raising various questions, will not be considered. *Bray v. Sewall* (Civ. App.) 171 S. W. 795.

Presenting in one group some 13 assignments, with a reference to the record to find out the exceptions, held improper. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Civ. App.) 171 S. W. 1103.

A brief, attempting to join and brief together several assignments each presenting different and distinct points of law, is not allowable under the rules, and an objection by the opposite party will justify striking out the particular assignments. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 174 S. W. 330.

Assignments of error which, although seeking to raise different points made in motion for new trial, are grouped, and are followed by five propositions on different subjects, some of them vague and very abstract, should not be considered. *Colgrove v. Falfurrias State Bank* (Civ. App.) 192 S. W. 580.

47. — **Statement accompanying proposition—Necessity.**—An assignment of error, not supported by a statement from the record as required by the rules, need not be considered on appeal. *Fleck v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 191 S. W. 386; *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582; *Martin v. Gray* (Civ. App.) 159 S. W. 118; *Douthitt v. Farrar* (Civ. App.) 159 S. W. 182; *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666; *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405; *Houston Oil Co. of Texas v. Drumwright* (Civ. App.) 162 S. W. 1011; *Generes v. Security Life Ins. Co. of America* (Civ. App.) 163 S. W. 386; *Bond v. Hancock* (Civ. App.) 163 S. W. 660; *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063; *Ferguson v. Fain* (Civ. App.) 164 S. W. 1040; *Coons v. Lain* (Civ. App.) 168 S. W. 981; *Atchison, T. & S. F. Ry. Co. v. Boyce* (Civ. App.) 171 S. W. 1094; *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180; *Babcock v. Glover* (Civ. App.) 174 S. W. 710; *McConnon & Co. v. McCormick* (Civ. App.) 179 S. W. 275; *Parrott v. Peacock Military College* (Civ. App.) 180 S. W. 132; *Spence v. Fenchler* (Sup.) 180 S. W. 597; *West Texas Supply Co. v. Dunivan* (Civ. App.) 182 S. W. 425; *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819; *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542; *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369; *League v. Brazoria County Road Dist. No. 13* (Civ. App.) 187 S. W. 1012.

An assignment of error which attacks the judgment as unsupported by the evidence will not be considered where no statement is made under the assignment. *Fahey v. Benedetti* (Civ. App.) 161 S. W. 896.

An assignment that the court erred in overruling the special exception of defendant to plaintiff's failure to allege a contract in writing will not be considered, where no statement is submitted and the court on appeal does not know to what ruling complaint is made. *Id.*

An assignment of error will not be considered where it is not followed by any statement and there is no reference to any page of the record for special exceptions, being contrary to Courts of Civil Appeals Rules 25-31 (142 S. W. xii, xiii), relating to the sufficiency of the statement required. *Texas-Mexican Ry. Co. v. Reed* (Civ. App.) 165 S. W. 4.

An assignment of error, complaining of the admission of evidence could not be considered, where it was not followed by a statement showing that the court erred. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

Where assignments of error were not followed by statements showing special exceptions were ever acted upon, it will be presumed the exceptions were abandoned below, and they will not be considered on appeal. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

In action for wrongful death of brakeman, assignment complaining that verdict was excessive because of brakeman's contributory negligence will not be considered where there was no statement on which to base assignment. *Id.*

Appellate court is not required to go further than to consult statement under assignment of error, and need not examine the record. *Id.*

A single assignment of error that the court erred in rendering judgment against the plaintiff "because under the undisputed evidence the plaintiff was entitled to recover," not accompanied by a statement showing the question raised, will not be considered, as it is too general. *Mims v. Foster* (Civ. App.) 185 S. W. 988.

An assignment of error in submitting the issue of pain and mental anguish because there was no evidence to sustain the issue, which is not followed by any statement of the evidence, and is supported only by the proposition that damages for mental suffering, cannot be recovered unless there has been physical injury, does not require a reversal of the judgment. *Andrews v. York* (Civ. App.) 192 S. W. 338.

Where appellant submitted no statement from record under his assignment of error challenging action of trial court in not having submitted question of damages to jury, assignment will not be considered. *Padgett v. Hines* (Civ. App.) 192 S. W. 1122.

48. — **Sufficiency of statement in general.**—An assignment of error will be overruled, where the statement under it is so imperfect that no information can be obtained from it. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

Statement following proposition in assignment of error held not to comply with Courts of Civil Appeals rule 31 (142 S. W. xii), prescribing the requirements of statements, and hence not to be considered. *Grand Lodge, F. & A. M. of Texas, v. Dillard* (Civ. App.) 162 S. W. 1173.

Courts of Civil Appeals rule 31 (142 S. W. xii), prescribing the requisites of the statement in an assignment of error, held not abrogated or affected by Acts 33d Leg. c. 136, amending this article. *Id.*

Where the statement subjoined to an assignment of error complaining of the admission of testimony did not refer to any bill of exceptions, or disclose what exceptions, if any, were urged to the admission of the testimony, it cannot be reviewed. *Darby v. White* (Civ. App.) 165 S. W. 481.

Where a statement under an assignment of error did not show that the alleged errors complained of were made grounds of a motion for new trial, and contained no part of the evidence relating to, or bearing on, the propositions advanced thereunder, the assignment could not be considered. *Supreme Lodge K. P. v. Mims* (Civ. App.) 167 S. W. 835.

Statement accompanying assignments of error complaining of the sustaining of special exceptions to answer held not in compliance with the rules. *Bray v. Sewall* (Civ. App.) 171 S. W. 795.

Statement under assignment of error complaining of peremptory instruction held insufficient, under rule 34 for Courts of Civil Appeals, relative to propositions complaining of fundamental errors. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

An assignment of error will not be considered where the statement subjoined thereto is wholly insufficient to support same and enable the Supreme Court to determine without an examination of the record whether error was committed. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

In action for libel, assignment of error in admission of evidence that plaintiff was not taken before a magistrate before his arrest held not supported by the statement. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

Statement that defendant is entitled to have presented to jury for decision by them any group of facts pleaded by it and developed in trial which, if true, will in law establish given defense does not support assignments of error in refusal to give peremptory instruction in overruling special exception to charge, and refusing to submit a certain issue. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

49. — **Bill of exceptions as sufficient statement.**—Where bill of exceptions was set out in assignment of error, failure to again set it out in statement required by rule 31 (142 S. W. xiii), held not to prevent consideration of the assignment. *Galveston, H. & S. A. Ry. Co. v. Brune* (Civ. App.) 181 S. W. 547.

50. — **References to record, assignment, or brief.**—References to the transcript of the evidence cannot be made to take the place of a statement for the purpose of having an assignment of error considered. *Gillett v. Holligan* (Civ. App.) 162 S. W. 367; *Stockwell v. Glaspey* (Civ. App.) 160 S. W. 1151; *Childress v. Robinson* (Civ. App.) 161 S. W. 78; *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063; *Campbell v. Peacock* (Civ. App.) 176 S. W. 774; *Foster Lumber Co. v. Rodgers* (Civ. App.) 184 S. W. 761.

Where neither the assignment of error nor the statement thereunder stated that appellant made any objection, and where the statement did not mention any bill of exceptions, and the assignment's reference to it did not give the page of the record upon which it could be found, the statement was insufficient. *Gotoskey v. Grawunder* (Civ. App.) 158 S. W. 249.

An assignment of error in refusing to permit appellant to argue his general demurrer and special exceptions cannot be considered, where it is not followed by any statement, except a reference to the record where the assignment of error is copied, and there is no reference to a bill of exceptions or to any action by the court on matters of which complaint is made. *Rips v. Herman* (Civ. App.) 158 S. W. 781.

A reference to a statement of material facts proved in a different portion of the brief is not such a statement as is required by the rules. *Stockwell v. Glaspey* (Civ. App.) 160 S. W. 1151.

Under Rule 31 for Courts of Civil Appeals (142 S. W. xiii), the statement subjoined to a proposition under an assignment of error need not refer to the page of the transcript where the motion for a new trial may be found, unless the motion is necessary to support the proposition. *Chicago, R. I. & G. Ry. Co. v. Pemberton*, 106 Tex. 463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652. Rehearing denied (Sup.) 168 S. W. 126.

Where statement subjoined to propositions did not refer to the pages of the transcript as required by Rule 31 for Courts of Civil Appeals (142 S. W. xiii), the refusal of that court to consider the assignments will not be reviewed by the Supreme Court. *Id.*

An assignment complaining of the overruling of a general demurrer to the answer and stated as a proposition, not supported by any statement other than a mere reference to a page of the bill of exceptions, will not be considered. *Mitchel v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

Assignments of error, complaining of findings, without pointing out wherein they are wrong, with subjoined statements making no reference to the record, but only to the statement at the beginning of the brief, cannot be considered. *Bute v. Williams* (Civ. App.) 162 S. W. 989.

A statement following an assignment of error should cull from the mass of testimony the facts relied upon to sustain the assignment; a mere reference to pages of the testimony from which the proper facts may be ascertained not being sufficient. *Texas-Mexican Ry. Co. v. Reed* (Civ. App.) 165 S. W. 4.

No error was shown in overruling a plea of privilege, where the statement did not refer to the part of the record containing the plea or to the judgment thereon, if any, as required by rule 31 (142 S. W. xiii). *Anderson v. Jackson* (Civ. App.) 168 S. W. 54.

Statements under assignments of error should not refer to bills of exceptions not appearing in the record. *Franklin v. International & G. N. Ry. Co.* (Civ. App.) 174 S. W. 333.

References to a statement of facts are not statements under the assignments of error, within the requirements of the rules. *W. H. Norris Lumber Co. v. Harris* (Civ. App.) 177 S. W. 515.

Rules 31 and 39 of the Court of Civil Appeals (142 S. W. xiii), providing that a brief statement shall be subjoined to each proposition in the brief, with a reference to the pages of the record, are not complied with by a mere reference to the pages of the transcript, without any further statement. *Dolsons v. Sheridan Stove Mfg. Co.* (Civ. App.) 178 S. W. 663.

Where statements under assignments of error made no reference to the portion of the transcript containing a record of the error complained of, such assignments could not be considered not being briefed as required by the rules of the Courts of Civil Appeals. *Texas Grain & Elevator Co. v. Dyer* (Civ. App.) 184 S. W. 1049.

Under this article, as amended by Acts 33d Leg. c. 136, § 1, and rules 30, 31, for the Courts of Civil Appeals (142 S. W. xiii), where the statement under an assignment of error based on the failure to submit the case upon special issues made no reference to the record, except the expression "(See defendants' bill of exception, No. 3)," such assignment was insufficient and could not be considered. *Id.*

51. — **Reference from one statement to another.**—An assignment complaining of the judgment for plaintiffs on the whole testimony "and that wrongfully excluded," stated as a proposition where the only supporting statement was "same as under prior propositions," will not be considered. *Mitchel v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

Where assignments of error are submitted as propositions, followed by a statement referring to statements under other assignments, and no reference is made to the pages of the brief nor of the statement of facts, the assignments will not be considered. *Burnet Fuel Co. v. Ellis* (Civ. App.) 162 S. W. 911.

The statement contemplated by the rules of the Courts of Civil Appeals cannot be supplied by referring to another assignment or proposition as a statement. *Texas-Mexican Ry. Co. v. Reed* (Civ. App.) 165 S. W. 4.

The words "see under seventh," following assignment of error, held insufficient as a statement. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

Assignments of error, the first of which failed to state any evidence raising the issues thereby presented and the others of which referred to the statement under the first assignment though they raised different issues, will not be considered. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

Assignment of error to admission of testimony which does not show what testimony was, but is referred to statement under several assignments, will not be considered. *J. I. Case Threshing Mach. Co. v. Rachal* (Civ. App.) 194 S. W. 418.

52. — **Relevancy to assignment or proposition.**—A statement under an assignment of error held not germane. *Martinez v. Gutierrez's Heirs* (Civ. App.) 172 S. W. 766.

Where supporting statements do not substantiate the contention made in assignments complaining of findings of fact, the assignments will be overruled. *Brown v. Southern Gas & Gasoline Engine Co.* (Civ. App.) 176 S. W. 73.

A statement following an assignment of error complaining of the admission of particular evidence is not germane where the evidence mentioned in the statement is not the same as that specified in the assignment. *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

53. — **Multifarious statement.**—An assignment of error followed by five propositions, after which appeared a statement of the evidence relied on to sustain such propositions, held insufficient to comply with rule 31 (142 S. W. xiii) of the Court of Civil Appeals. *Ft. Worth & D. C. Ry. Co. v. Abbott* (Civ. App.) 170 S. W. 117.

54. — **Setting out proceedings, rulings, exceptions, and facts showing error and injury therefrom.**—An assignment of error complaining of testimony objected to will not be considered, where it is not followed by an intelligible statement, and one which indicates what effect the testimony had on any issue in the case. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

Assignments of error, followed by statements which are merely counsel's version of what the record shows, will be disregarded. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

Assignments of error to the refusal of requested charges will not be considered, where the statements do not set out any testimony showing the applicability of the charges, nor refer to the record, as required by the rules of court, nor show that the substance of the charges was not embodied in the general charge. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

Rulings on evidence will not be reviewed on appeal, unless the statement under the assignments, or the brief elsewhere, indicates the ground of objection. *Edwards v. Youngblood* (Civ. App.) 162 S. W. 1164.

An assignment that the court erred in overruling an objection to testimony on the ground that it was immaterial, irrelevant, and a conclusion will be overruled, where the statement did not show that the witness was not qualified to give an opinion upon the matters asked about. *Chicago, R. I. & G. Ry. Co. v. Kerr* (Civ. App.) 164 S. W. 447.

Where the statement under an assignment complaining of an instruction on the measure of damages for delay in the transportation of live stock consisted of the instruction, but did not point out anything to indicate that the jury awarded excessive damages, the record did not show that the error, if any, in the instruction was prejudicial. *St. Louis, S. F. & T. Ry. Co. v. Armstrong* (Civ. App.) 166 S. W. 366.

An assignment of error complaining of the refusal on default judgment against defendants to file findings of fact and conclusions of law must be overruled where the statement did not show the ground of the motion for new trial, excuse defendants' default, or show that they had a good defense; it not appearing defendants were in any way harmed. *White v. Lowry* (Civ. App.) 166 S. W. 1193.

An assignment complaining of the action of the court in sustaining a special exception will be disregarded, where the accompanying statement did not show any order sustaining the exception. *Chastain v. Hoskins* (Civ. App.) 168 S. W. 421.

Where neither the appellant's statement under an assignment nor the record shows that the court sustained an exception to any part of his petition, the assignment of error to sustaining an exception thereto need not be considered. *City of Ft. Worth v. Morgan* (Civ. App.) 168 S. W. 976.

The refusal to submit a particular defense could not be held erroneous on appeal, where there was no statement from the record, following defendant's assignment of error, indicating that there was any testimony to support such defense. *Houston & T. C. Ry. Co. v. Meadors* (Civ. App.) 169 S. W. 1106.

An assignment to the giving of a paragraph of the court's charge will not be reviewed, where the statement does not show that it was excepted to before the charge was read. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 172 S. W. 1129.

An assignment of error complaining of an instruction will not be considered, where the statement does not show exception taken as required by Acts 33d Leg. c. 59, post, Art. 2061. *Rogers v. Ezell* (Civ. App.) 174 S. W. 1011.

An assignment of error complaining of a finding of fact supported by testimony will be overruled in the absence of any statement showing wherein the finding is incorrect. *Friedman v. Huntsville Cotton Oil Co.* (Civ. App.) 177 S. W. 573.

Mere recital in motion for new trial that court overruled demurrer held not sufficient to present error under rule 31 (142 S. W. xiii), requiring a brief statement subjoined to the proposition in explanation thereof. *Allen v. Reed* (Civ. App.) 179 S. W. 544.

Where appellants did not, by proposition or statement, indicate how the admission of immaterial or irrelevant evidence could have affected the jury, the receipt of such evidence must be considered as harmless. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

An assignment of error in the admission of evidence cannot be considered, where the statement following it does not show what objection was made to the evidence. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

An assignment that the trial court erred in setting aside a judgment rendered at a former term can be reviewed only upon a full statement, showing what issues were joined and what the evidence was on the former trial. *Shipp v. Cartwright* (Civ. App.) 182 S. W. 70.

Assignments of error to the failure to give certain special issues, which are not followed by statements showing what the issues were, cannot be considered. *Bennett v. Rio Grande Canal Co.* (Civ. App.) 182 S. W. 713.

In view of the failure of the statement to show under what conditions or circumstances a witness answered, held, that his statement of his conclusions on cross-examination could not be deemed error. *Shaller v. Johnson-McQuiddy Cattle Co.* (Civ. App.) 189 S. W. 553.

Where statement following assignment of error to admission of testimony failed to show it was objected to, or any bill of exceptions taken to refusal to withdraw it from jury, and no such bill appeared in record, which showed jury was instructed not to consider the testimony, assignment will not be considered. *International & G. N. Ry. Co. v. Sutherland* (Civ. App.) 189 S. W. 575.

55. — **Negating correctness of rulings on particular grounds.**—Assignment that court erred in overruling objection to testimony on grounds going to the qualification of the witness will be overruled, where the statement did not show that the grounds were true. *Chicago, R. I. & G. Ry. Co. v. Kerr* (Civ. App.) 164 S. W. 447.

57. — **Setting out instructions complained of.**—An assignment of error complaining of the charge cannot be reviewed, where neither the assignment nor the statement contained the charge excepted to, or its substance, or directed the appellate court as to the page in the record where it could be found. *Darby v. White* (Civ. App.) 165 S. W. 481; *Magnolia Paper Co. v. Duffy* (Civ. App.) 176 S. W. 89.

58. — **Setting out instructions refused.**—Where an assignment of error fails to give the substance of the requested charge on the refusal of which it is based, and the statement fails in any way to identify it, the court will regard it as waived. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

An assignment of error complaining of the refusal of a special charge not set out in the statement following the assignment will not be considered. *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819.

59. — **Setting out matters of evidence.**—Under Supreme Court rule 31 (142 S. W. xiii), it is the duty of appellant, in preparing a statement, to include a faithful report of all the facts testified to on both sides with reference to the assignment. *General Accident, Fire & Life Assur. Corp. v. Ellison* (Civ. App.) 160 S. W. 1141.

In support of an assignment of error that a certain finding was not supported by the evidence, it was appellant's duty to set out at least the substance of all the evidence on the point. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

An assignment of error complaining of exclusion of evidence will be overruled, where the statement of facts does not contain that part of the evidence and the judge's qualification of the bill of exceptions shows that that part was excluded. *Risinger v. Sullivan* (Civ. App.) 161 S. W. 397.

An assignment complaining that the undisputed facts showed certain matters could not be considered where the statement did not attempt to set out or refer to any evidence to establish such matters. *Mitchel v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

An assignment of error complaining of the rulings on evidence will not be considered where the statement does not give the substance of the testimony with correct references to the pages of the transcript. *McIndoo v. Wood* (Civ. App.) 162 S. W. 488.

Under Courts of Civil Appeals rule No. 31 (142 S. W. xiii), statements under assignments of error complaining of the sufficiency of the evidence, which quote only one question to one witness, which is not found in the preliminary statement of facts, are insufficient, and the assignment will not be considered. *Hein v. Consumers' Ice & Fuel Co.* (Civ. App.) 162 S. W. 1023.

Under Rule 31 (142 S. W. xiii), requiring a statement to be made faithfully in reference to the whole of that in the record bearing upon the proposition, held that a statement purporting to contain all the evidence on a question, but shown by the statement of facts not to do so, was insufficient. *Edwards v. Youngblood* (Civ. App.) 162 S. W. 1164.

In an assignment of error to the exclusion of documentary evidence, a statement giving no information of the substance of the excluded evidence held not a compliance with Courts of Civil Appeals rule 31 (142 S. W. xii), prescribing the requirements of a statement. *Grand Lodge, F. & A. M. of Texas v. Dillard* (Civ. App.) 162 S. W. 1173.

An assignment of error complaining of the refusal of special instructions will not be considered, where it is not followed by a statement from the record showing that such charges were called for by the evidence. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

Assignment of error that the court erred in making remarks tending to discredit a witness must be overruled where the statement under the assignment does not disclose the testimony. *Kell v. Ross* (Civ. App.) 175 S. W. 752.

An assignment of error is not entitled to consideration, where there is not such a statement of the evidence subjoined thereto sufficient to explain and support the proposition and enable the court to determine the question. *McCullough v. Hurt* (Civ. App.) 175 S. W. 781.

Where an assignment complained of the refusal of the court to submit additional questions to the jury, it should be followed by a statement showing the questions and the substance of the evidence on the issues. *Tomson v. Simmons* (Civ. App.) 180 S. W. 1141.

An assignment, complaining that the court erred in not disregarding findings of the jury on special issues and in not rendering judgment for plaintiff despite them, cannot be considered where not accompanied by a statement showing the evidence and the proceedings. *Shipp v. Cartwright* (Civ. App.) 182 S. W. 70.

An assignment, complaining of the introduction of testimony given by plaintiff on a former trial, presents nothing for review, where the statement did not show the nature of the testimony, its materiality, or the objections urged. *Id.*

Assignments of error complaining of the admission of a paper or letter in evidence were insufficient, where there was no statement showing what the paper or letter contained. *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819.

An assignment based on the charge on the ground that there was no evidence to support it, need not be considered, where the statement did not set out the evidence. *Heard v. Bowen* (Civ. App.) 184 S. W. 234.

An assignment complaining of refusal to submit an issue cannot be considered on appeal, where the statement merely set forth that there was abundant evidence to establish appellant's contention. *St. Louis Southwestern Ry. Co. of Texas v. Rutherford* (Civ. App.) 184 S. W. 700.

Where the statement under an assignment of error does not state what the testimony was to which the objection stated in the assignment was made, the assignment must be overruled. *American Nat. Ins. Co. v. Van Dusen* (Civ. App.) 185 S. W. 634.

In view of this article, mere omission of some of the evidence from the assignment which was included in the motion for new trial does not vitiate the assignment. *Clark v. Briley* (Civ. App.) 193 S. W. 419.

General assignment of error, pointing out no particular testimony complained of, and not supported by any statement, will not be considered. *J. I. Case Threshing Mach. Co. v. Rachal* (Civ. App.) 194 S. W. 418.

Assignment of error which does not under proposition subjoin statement of evidence, if any, which raised issue or which in any way shows its materiality, held insufficient. *Miles v. Harris* (Civ. App.) 194 S. W. 839.

Assignment of error which under proposition subjoins statement of evidence relating largely to entire case held not in accord with rules for briefing. *Id.*

62. — **Conclusiveness and effect.**—An assignment of error is limited by the proposition following the assignment. *Day v. Mercer* (Civ. App.) 175 S. W. 764; *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063.

Upon an assignment of error in the submission of an issue, supported by the appellant's undisputed statement that there was no evidence upon the issue, the Court of Civil Appeals would assume it to be true under express provision of rule 41 for Courts of Civil Appeals (142 S. W. xiv). *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

63. — **Assignments in brief not contained in record.**—Under this article, as amended by Acts 33d Leg. c. 136, making the grounds assigned in the motion for new trial constitute the assignments of error, the assignments of error in the brief must be true copies of the corresponding paragraphs of the motion for new trial, and not rewritten or reconstructed assignments. *Freeman v. Texas & P. Ry. Co.* (Civ. App.) 182 S. W. 1158.

64. — **Counter propositions in appellee's brief.**—The including in appellee's brief of alleged "general counter propositions" to show that the decree should be affirmed was contrary to court rules. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

65. **References to motion for new trial or other parts of record.**—Assignments of error which do not refer to that portion of the motion for a new trial in which the error is complained of, as required by Court of Civil Appeals Rule 25 (142 S. W. xii), will not be reviewed. *Irving v. Texas & P. Ry. Co.* (Civ. App.) 157 S. W. 752, judgment affirmed on rehearing 164 S. W. 910; *Rio Grande & E. P. R. Co. v. Kinkel* (Civ. App.) 158 S. W. 214; *Greene Gold-Silver Co. v. Silbert* (Civ. App.) 158 S. W. 803.

An assignment of error complaining of the admission of evidence will not be considered where the court is not referred, as required by Courts of Civil Appeals rule 31 (142 S. W. xiii), to the facts supporting the assignment. *Coleman v. Garvin* (Civ. App.) 158 S. W. 185.

Error in admitting evidence or overruling a motion for a new trial cannot be considered, where neither the assignment of error nor the brief contains a reference to the page of the transcript and clause of the motion for new trial showing that the matters were presented to the lower court. *Brewer v. A. M. Blythe & Co.* (Civ. App.) 158 S. W. 786.

Error in admitting evidence or overruling a motion for a new trial cannot be considered where neither the assignment of error nor the brief contains a reference to the page of the transcript and clause of the motion for new trial showing that the matters were presented to the lower court. *Id.*

Under this article, as amended by Acts 33d Leg. c. 136, providing that a motion for new trial shall constitute an assignment of error, where such motion contained a specification that the court erred in refusing to give a peremptory instruction, it was immaterial that a further assignment of the same error did not refer to the motion, as required by Court of Civil Appeals rule 25 (142 S. W. xii). *Order of United Commercial Travelers of America v. Roth* (Civ. App.) 159 S. W. 176.

Under this article, as amended by Act April 4, 1913, assignments of error in the brief cannot be disregarded because they do not refer to the motion for new trial, as required by Court of Civil Appeals rule 25 (142 S. W. xii), where the same error is complained of. *Douthitt v. Farrar* (Civ. App.) 159 S. W. 182.

Supreme Court Rule 25 (142 S. W. vii), requiring the assignments of error to refer to that portion of the motion for new trial in which the error is complained of, does not apply to assignments of error to the charges given or refused by the court. *Sargent v. Barnes* (Civ. App.) 159 S. W. 366.

An assignment of error that the verdict and judgment were contrary to the law and the evidence, in that they are excessive as to the moving defendant, in the same language as was stated in the motion for new trial, constituted a sufficient compliance with Court of Appeals rules 24 and 25 (142 S. W. xii), requiring assignments of error to refer to the part of the motion for new trial where the same question is raised. *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427.

An assignment of error in admitting the evidence of a certain witness set forth in a specified bill of exceptions was too general to be considered where such bill of exceptions contained five or more distinct rulings on the admission of parts of the testimony of such witness. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

An assignment of error, which refers merely to the record and is not supported by a proper statement will not be considered on appeal. *Standard Milling Co. v. Imperial Rice Co.* (Civ. App.) 160 S. W. 637.

Where an assignment of error and the propositions and statements thereunder make no reference to a bill of exceptions, the court is under no obligation to search through the statement of facts or other part of the record to find bills of exceptions. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

Where assignments of error did not distinctly specify the ground of error relied on nor point out that part of the record in which the error was complained of with such reasonable certainty as was practicable in a clear statement, as required by the rules, they might be treated as waived. *Sweetwater Cotton Oil Co. v. Birge-Forbes & Co.* (Civ. App.) 160 S. W. 1125.

Assignments of error, referring by number to the paragraphs of the motion for a new trial where the errors were complained of, but not referring to the page of the transcript where they might be found, held in literal compliance with rules 24 and 25 for Courts of Civil Appeals (142 S. W. xii). *Chicago, R. I. & G. Ry. Co. v. Pemberton*, 106 Tex. 463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652. Rehearing denied (Sup.) 168 S. W. 126.

Assignments of error complaining of the exclusion of evidence, which do not show the objection made below, and are followed by no proposition or statement except to see the bill of exceptions, will not be considered on appeal. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

An assignment of error that the court erred in directing a verdict will not be considered, where it does not refer to the paragraphs of the motion for new trial in which the questions were presented, and the statement does not contain such reference, and the motion contains no reference to the grounds urged in the assignment. *Fahey v. Benedetti* (Civ. App.) 161 S. W. 896.

It is the duty of the Court of Civil Appeals to pass upon assignments of error, though they do not refer to that portion of the motion for a new trial where the error was complained of. *Texas Co. v. Veloz* (Civ. App.) 162 S. W. 377.

Under Court rule 24 (142 S. W. xii), providing that the assignments of error must distinctly specify the grounds of error relied on and set forth in the motion for new trial, assignments of error not referring in any way to a motion for a new trial are insufficient to warrant consideration. *Houston Oil Co. of Texas v. Drumwright* (Civ. App.) 162 S. W. 1011.

Assignments of error to the exclusion of evidence will not be reviewed, where the Court of Appeals is not referred to any bill of exceptions covering the matter. *Chrisman v. Lumberman's Nat. Bank* (Civ. App.) 163 S. W. 651.

Under rule 25 for Courts of Civil Appeals (142 S. W. xiii), and this article as amended, consideration of assignment of error held not to be denied, though neither it nor the statement referred to the paragraphs of the motion for a new trial, where pages of the transcript containing the motion were referred to. *Gulf Refining Co. v. Pegues Mercantile Co.* (Civ. App.) 164 S. W. 1113.

Where the assignments of error stated that the court erred in advising the jury that "it was the duty of the defendant to exercise ordinary care to furnish a reasonably suitable car for the shipment of plaintiff's horse," for specified reasons, and that the error was raised on the motion for new trial by referring to a page in the transcript, and there was no other effort to point out particularly the portions of the charge objected to, the assignments will not be considered. *Texas & N. O. R. Co. v. Francis* (Civ. App.) 165 S. W. 40.

An assignment of error in admitting testimony will be overruled where there is no reference to the part of the statement of facts, where such testimony appears as required by the rules of the court, and the court, after careful inspection of the statement of facts, fails to find any such testimony. *Texas, G. & N. Ry. Co. v. Berlin* (Civ. App.) 165 S. W. 62.

Where an assignment of error to an instruction on the measure of damages contained no reference to the bill of exceptions, either in the statement or in the proposition thereunder, it could not be reviewed. *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80.

Assignments of error, which do not set out the substance of the bills of exception referred to simply by number, cannot be considered. *Anderson & Day v. Darsey* (Civ. App.) 171 S. W. 1089.

An assignment of error merely referring to a page of the transcript for a paragraph of appellants' motion for new trial to show error will not be considered. *Martinez v. Gutierrez's Heirs* (Civ. App.) 172 S. W. 766.

Where assignments of error referred to bill of exceptions not in the record, held, that they would be disposed of with reference to objections and exceptions in the statement of facts. *St. Louis Southwestern Ry. Co. of Texas v. Moore* (Civ. App.) 173 S. W. 904.

An assignment of error followed by words and references to pages of the transcript will not be considered. *Friedman v. Huntsville Cotton Oil Co.* (Civ. App.) 177 S. W. 573.

Assignments of error to rulings on testimony, shown, as recited therein, by certain bills of exceptions, cannot be considered; such bills of exceptions not being in the record. *Fidelity-Phoenix Fire Ins. Co. v. O'Bannon* (Civ. App.) 178 S. W. 731.

Plaintiff's contention that defendant admitted, and that the undisputed evidence showed, that he was entitled to an item not allowed by the verdict, could not be considered, where the page or pages of the voluminous statement of facts containing such admission and evidence was not given. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

An assignment of error, in that the court erred in refusing to give defendant's charge instructing the jury to find for it as per bill of exceptions No. 1, did not violate Rules for Courts of Civil Appeals, 24, 25, 30, 31 (142 S. W. xiii) prescribing the requisites of assignments of error and the briefing thereof. *Thurber Brick Co. v. Matthews* (Civ. App.) 180 S. W. 1189.

That an assignment of error erroneously refers to the bills of exception by incorrect numbers does not preclude consideration of it, where the court's action fully appears of record, so that no bill of exceptions was necessary; the error being clerical only. *Adams v. San Antonio Life Ins. Co.* (Civ. App.) 185 S. W. 610.

An assignment of error in the main charge as more fully shown by the written objections thereto, made and filed after it had been submitted to opposing counsel and before the charge was read to the jury "as is more fully shown by defendant's bill of exception No. 2 which is here referred to and made a part thereof," in view of the absence of any bill of exceptions No. 2, eo nomine, in the transcript, did not comply with rules 25 and 26 for Courts of Civil Appeals (142 S. W. xii), prescribing the form and contents of assignments of error, and hence did not require consideration. *Wichita Falls Traction Co. v. Berry* (Civ. App.) 187 S. W. 415.

Assignment of error held not to comply with rules 25 and 26 for Courts of Civil Appeals (142 S. W. xii), and not to require consideration. *Id.*

An assignment of error not followed by any special reference to the statement of facts verifying the contention, cannot be considered. *Clark v. State* (Civ. App.) 189 S. W. 84.

Under rules for Courts of Civil Appeals 24, 25 (142 S. W. xii), Rule 31 (142 S. W. xiii), held that assignments of error, not referring to motion for new trial, with a statement not referring to the page of the transcript where a bill of exceptions might be found, were insufficient, and would not be considered. *Perry Bros. v. McNeill* (Civ. App.) 189 S. W. 120.

Under art. 2061, requiring bills of exceptions to refusal of special charges, and Court of Civil Appeals rule 31 (142 S. W. xiii), requiring appellant's brief to contain references to the record, etc., an assignment of error not showing where the bill of exceptions to the charge complained of can be found in the record will not be considered. *Houston Chronicle Pub. Co. v. Lemmon* (Civ. App.) 193 S. W. 347.

66. **Time for filing.**—An assignment of error, appearing for the first time in appellant's brief, need not be considered. *Knight v. England* (Civ. App.) 175 S. W. 480.

Assignments of error filed nearly six months after adjournment of court, none of which was based upon a motion for new trial, will not be considered except as they concern fundamental error. *Fariss v. Beeville Bank & Trust Co.* (Civ. App.) 194 S. W. 1169.

67. **Filing and annexing to record.**—The correctness of a charge will not be considered on appeal, where no assignment of error relating thereto was filed in the trial court. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

Assignments of error not in the record, though in the brief, present nothing for review except fundamental error apparent of record. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

An assignment of error as to the refusal of the court to postpone trial until witnesses could inspect the premises, which was not filed in the court below, will not be considered. *Moody v. Bonham* (Civ. App.) 178 S. W. 1020. *Moody v. Bonham* (Civ. App.) 179 S. W. 670.

Under Rule 101 (159 S. W. xi), assignment of error relating to findings of fact and conclusions of law, filed subsequently to the final judgment, need not be filed in the court below. *Id.*

An assignment, not presented in trial court, cannot be considered on appeal. *Bilingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373.

Against objection, an assignment of error may not be considered, where no such assignment was filed with the trial court. *Waldon v. Davis* (Civ. App.) 185 S. W. 1000.

68. — **Including in transcript.**—Under arts. 1607, 1612, 2113, held, that a transcript not containing copy of assignment of errors and not disclosing reversible error on its face required an affirmation. *English v. Allen* (Civ. App.) 173 S. W. 1172.

Under this article and rule 23 for Courts of Civil Appeals (142 S. W. xii), the Court of Civil Appeals would strike and not consider an assignment of error not filed below and brought up in the transcript. *Rector v. Continental Bank & Trust Co.* (Civ. App.) 180 S. W. 309.

70. **Cross-assignments—Right to assign.**—Where a codefendant unsuccessfully attempted to appeal in forma pauperis, it was before the Court of Civil Appeals as an appellee only, and could not thereafter assign cross-errors against its coappellee under district court rule 101 (142 S. W. xxiv). *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427.

Cross-assignments of error by parties who did not appeal were nevertheless entitled to consideration. *Cain v. Bonner* (Sup.) 194 S. W. 1098.

71. — **Necessity.**—In the absence of a cross-assignment complaining of terms imposed in a judgment for appellee, the court cannot reform the judgment so as to eliminate such terms. *Ford v. Warner* (Civ. App.) 176 S. W. 885.

Where defendant did not assign cross-errors upon plaintiff's appeal, he waived errors prejudicial to him. *Hawkins v. Cook* (Civ. App.) 178 S. W. 624.

Where plaintiff did not on defendant's appeal assign as error the denial of complete relief, the question will not be reviewed. *Owosso Carriage & Sleigh Co. v. McIntosh & Warren* (Sup.) 179 S. W. 257.

Under art. 1639, and in view of rule 101 for district and county courts (159 S. W. xi), defendants in trespass to try title, who failed to file any cross-assignments of error on



appeal, were in no position to complain of court's charge and its refusal to charge. *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

72. — **Filing and annexing to record.**—A cross-assignment of error by appellee which was not filed with the clerk of the trial court, as required by rule 101 for the district and county courts (159 S. W. xi), will not be considered. *Guaranty State Bank of Carthage v. Hull* (Civ. App.) 165 S. W. 104.

Where the record fails to show that a cross-assignment of error was filed in court below, it cannot be considered. *Morrison v. Brooks* (Civ. App.) 189 S. W. 1094.

Under rules for district and county courts, No. 101 (159 S. W. xi), a cross-assignment of error not filed in the court below will not be considered. *Ross v. Moore* (Civ. App.) 191 S. W. 853.

Cross-assignment in appellee's brief urging insufficiency of judgment cannot be considered where record does not show that cross-assignment was filed in trial court and no brief filed in appellate court contains certificate of trial judge that it is copy of brief filed in trial court. *Levy v. Engle Bros. Co.* (Civ. App.) 192 S. W. 548.

73. — **Sufficiency.**—A cross-assignment, wherein appellee insists that the judgment should have been for a greater amount, will not be considered where no statement was submitted under the assignment. *Lee v. White* (Civ. App.) 171 S. W. 1056.

74. **Defects, objections, and amendments.**—After an assignment has been considered and sustained, a party cannot urge its insufficiency. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

The appellee's objection to a consideration of appellant's assignment of error because it violated certain rules of court, not pointing out in what respect any one or more of such rules was violated, would not be considered. *Thurber Brick Co. v. Matthews* (Civ. App.) 180 S. W. 1189.

No notice of appellee's objections to sufficiency of assignments of error, as provided by rule 15a for Courts of Civil Appeals (142 S. W. xi) is required, where appellant fails to comply with rule 29 (142 S. W. xii) in preparing his brief, notwithstanding this article, as amended by Acts 33d Leg. c. 136, nor Supreme Court rule 101 (159 S. W. xi). *Perry Bros. v. McNeill* (Civ. App.) 189 S. W. 120.

75. **Scope and effect of assignment.**—Assignment of error held to raise question of propriety of reversal without allowing remittitur. *Galveston, H. & S. A. R. Co. v. Craighead* (Civ. App.) 175 S. W. 1199, denying rehearing 175 S. W. 453.

An assignment, complaining of premature suit, held insufficient to raise the question of misjoinder. *Southwestern Surety Ins. Co. v. Thompson* (Civ. App.) 180 S. W. 947.

Where appellants joined in the appeal and brief, and the only assignment of error urged affects but one of the appellants, the court will not consider any error committed against the others. *Moore v. Reid* (Civ. App.) 186 S. W. 245.

76. — **Rulings on pleadings.**—Assignments of error that no grounds for the appointment of a receiver for defendant corporation were stated in the petition, and that it stated no cause of action, were equivalent to general demurrer, and required the appellate court to indulge all reasonable intendments in favor of the sufficiency of the petition to sustain the appointment. *Houston & B. V. Ry. Co. v. Hughes* (Civ. App.) 182 S. W. 23.

77. — **Rulings as to evidence.**—An assignment of error in trespass to try title objecting generally to the admission in evidence of a certified copy of a deed will not raise the question whether the deed was admissible as the deed of a certain one of the grantors. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

An assignment of error predicated on a bill of exception held to complain of the admission of testimony and reviewable within this article as amended by Acts 33d Leg. c. 136. *Martin v. Stires* (Civ. App.) 171 S. W. 836.

78. — **Submission of issues to jury.**—An assignment of error to the refusal to charge that there was no presumption that a brakeman was killed as the result of the railroad's negligence, held not to present the issue whether from the mere happening of the accident the jury were likely to find negligence. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

In trespass to try title assignments of error held insufficient to raise the question whether the court erred in refusing to submit the question of damages for plaintiff's breach of his agreement to extend the time for payment of vendor's lien notes. *Workman v. Ray* (Civ. App.) 180 S. W. 291.

An assignment of error complaining of the refusal to direct a verdict for defendant, held limited to the question of variance between pleading and proof. *Gulf, C. & S. F. Ry. Co. v. Tips* (Civ. App.) 182 S. W. 1196.

79. — **Instructions.**—A directed verdict for the plaintiff for the amount due for the conversion of property will not be reversed on appeal by the plaintiff because there was evidence of an independent promise by the defendant to pay more, where the only specification of error was the refusal to give a peremptory instruction for a larger amount upon the theory of conversion. *First Nat. Bank v. Dunlap* (Civ. App.) 159 S. W. 502.

Where no objection was made in assignment of error or proposition to the charge because of a repetition of the same matter in separate paragraphs, a suggestion of repetition under the head of "remarks" will not be entertained on appeal. *Lisle-Dunning Const. Co. v. McCall* (Civ. App.) 167 S. W. 810.

In action against testamentary trustee for services in caring for one devised maintenance and expenses of her last illness, assignment of error, as restricted by the proposition thereunder, held not to present claim that charge was on the weight of the evidence. *McLean v. Breen* (Civ. App.) 183 S. W. 394.

80. — **Verdict, findings, or judgment.**—An assignment of error that there is no evidence to support the verdict or upon which a charge can be predicated raises only the question whether there is any evidence upon which the verdict or charge might be based. *Cotton v. Cooper* (Civ. App.) 160 S. W. 597.

An assignment of error that under a defense pleaded, the evidence introduced, and the verdict thereon, it was error to render judgment for plaintiff does not raise the issue that the answer denied was a bar to recovery. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

An assignment that the court erred in overruling plaintiff's motion to set aside the judgment and to retry the case, because the judgment did not dispose of all the parties or issues, was not sufficient to present the question whether the judgment was final. *Banks v. Blake* (Civ. App.) 171 S. W. 514.

An assignment of error that the testimony did not support the findings on which the court adjudged the costs against defendant held to authorize a review of taxation of costs. *St. Louis Southwestern Ry. Co. of Texas v. Kelly* (Civ. App.) 173 S. W. 540.

In passenger's action for personal injury, where the jury found that his fall was accidental and without negligence, assignment of error in that that answer was contrary to other answers, held not to raise the question that findings as a whole were so conflicting as to make them insufficient to support the judgment. *Smith v. Texas Traction Co.* (Civ. App.) 180 S. W. 933.

In a suit with counts in trespass to try title and for enforcement of vendor's lien, where the assignment was directed only to the vendor's right to rescind, the judgment granting a rescission, rather than a foreclosure, could not be reversed. *Continental Oil & Cotton Co. v. Steele* (Civ. App.) 186 S. W. 269.

In action for damages to automobile, assignments of error held to challenge trial court's findings of fact in favor of the plaintiff. *St. Louis, B. & M. Ry. Co. v. Paine* (Civ. App.) 188 S. W. 1033.

**82. Relation to record.**—In an action for injuries to a shipment of cattle, an assignment of error that a charge was erroneous "because there was no evidence of rough handling and none of unnecessary delay" will be overruled, where there was evidence of rough handling, even though there was none of unreasonable delay. *Chicago, R. I. & G. Ry. Co. v. Swaggerty* (Civ. App.) 163 S. W. 317.

Error could not be predicated upon the admission of the testimony of witnesses claimed to be inadmissible under the pleadings, where neither the brief nor the bill of exceptions showed what the witnesses testified. *Underwood v. Jordan* (Civ. App.) 166 S. W. 88.

An assignment of error that the court erred in sustaining defendant's alleged exception to the fifth paragraph of defendant's answer held not sustained by the record. *Burrow v. Brown* (Civ. App.) 167 S. W. 254.

Grounds of objection to evidence stated in the assignments of error other than those alleged in the bills of exception, will not be reviewed. *Sanford v. John Finnigan Co.* (Civ. App.) 169 S. W. 624.

The record not affirmatively showing articles were admitted, an assignment of error to their admission must be overruled. *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619.

Statements under assignments not faithful to record, but incorrect in certain respects, held to violate rule 31 for Courts of Civil Appeals (142 S. W. xiii), prescribing the form and requisites of statements. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 174 S. W. 330.

An assignment of error, not supported by the record, will be overruled. *Missouri, K. & T. Ry. Co. of Texas v. Neale* (Civ. App.) 176 S. W. 85.

Any assignment of error without support in the court's conclusions of facts, and which fails to challenge the correctness of such conclusions, presents no error. *Fowler v. Carlisle* (Civ. App.) 179 S. W. 528.

Where after general demurrer was sustained to plaintiff's petition he filed two trial amendments and it did not appear that demurrer was then sustained to petition, an assignment of error, complaining of sustaining of general demurrers to original petition before and after the first trial amendment, shows no reversible error. *Texas Cent. R. Co. v. Hoffman* (Civ. App.) 193 S. W. 1140.

In action for breach of contract for joint purchase of cattle, in which there was evidence of a subsequent oral contract varying a prior written agreement, and that parties had submitted their differences to arbitration, which had resulted in an award for plaintiff, an assignment of error that the only contract was the written contract and only issue the division of profits held defective. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

**83. Incorporating assignments in briefs.**—This article, as amended by Acts 33d Leg. c. 136, does not require Courts of Civil Appeals to consider an assignment of error not copied in the brief. *Martin v. Stires* (Civ. App.) 171 S. W. 836.

**84. Effect of failure to properly assign or file.**—The assignments of error not complying with Courts of Civil Appeals Rules 23–25 (142 S. W. xii) for preparation of briefs, and no fundamental error appearing, errors will be treated as waived and will not be reviewed. *Chicago, R. I. & G. Ry. Co. v. Pemberton* (Civ. App.) 155 S. W. 652, judgment reversed 106 Tex. 463, 161 S. W. 2. Rehearing denied (Sup.) 168 S. W. 126.

Where assignments of error are not sufficient to present the case on appeal, and an examination of the record discloses no fundamental error, the judgment must be affirmed. *Irving v. Texas & P. Ry. Co.* (Civ. App.) 157 S. W. 752, judgment affirmed on rehearing 164 S. W. 910.

Court of Civil Appeals Rule 25 (142 S. W. xii), relating to assignments of error, is not mandatory, and the Court of Civil Appeals may in its discretion consider assignments of error disregarding the rule. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

An error not presented as required by Court of Civil Appeals Rule 24 (142 S. W. xii), requiring an assignment of error to distinctly specify the grounds of error relied on, which must have previously been incorporated in the motion for new trial, is deemed to be waived. *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290.

Where an appellant's assignments of error are not prepared in compliance with the court rules, the court may, either on the motion of the appellee or its own motion, refuse to consider them. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

The Courts of Civil Appeals may consider assignments of error failing to comply with

the rules adopted by the Supreme Court where the record shows that a palpable injustice has been committed. *Davis v. Houston Oil Co. of Texas* (Civ. App.) 162 S. W. 913.

In the absence of an assignment of error to the overruling of a motion for new trial for insufficiency of the evidence to support the verdict, the appellate court may assume that the verdict was supported by the evidence on questions of fact, such as negligence and proximate cause. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

Where there are no valid assignments of error in the record, and where the purported assignments are not properly briefed, the Court of Civil Appeals is confined to the consideration of fundamental errors, or errors apparent on the face of the record, of which it must take notice without assignments and briefs. *Pollard v. Allen & Sims* (Civ. App.) 171 S. W. 302.

An assignment of error relating to formal matters, rulings on which were not prejudicial, will not be considered when not briefed according to the rules. *Ara v. Rutland* (Civ. App.) 172 S. W. 993.

The failure to file assignments of error in the trial court will not require a dismissal of the writ of error. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

An assignment of error not presented in conformity to Court of Appeals rule 29 (142 S. W. xii) will not be considered. *Ennis & Dale v. Cator* (Civ. App.) 174 S. W. 947.

Failure to comply with rule 31 (142 S. W. xiii), requiring a brief statement of proceedings in the record to be added to an assignment of error, does not require the court to reconsider its decision, when the assignment has nevertheless been examined. *Olds Motor Works v. Churchill* (Civ. App.) 175 S. W. 785.

In trespass to try title, by failing to assign error to the exclusion of a judgment and sheriff's deed from evidence, appellants held not to have acquiesced in fact in the action of the court. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

Assignments of error not presented in accordance with the rule are not entitled to consideration. *Richardson v. Houston Oil Co. of Texas* (Civ. App.) 176 S. W. 628.

Under the express terms of rule 101a for district and county courts (159 S. W. xi) and rule 29 for Courts of Civil Appeals (47 S. W. v), assignments of error not specified in the motion for a new trial, or in the assignments of error when no motion for new trial is filed, or copied into brief, are waived. *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

Assignments of error not in conformity to the Courts of Civil Appeals rules for briefing and submitting cases will not be considered on appeal. *Allen v. Reed* (Civ. App.) 179 S. W. 544.

Appellants' assignment that the court erred in rendering judgment for the plaintiffs, not being made a distinct ground in the motion for new trial, and being too general, in not distinctly specifying the ground relied on, will be considered as waived, unless the error in entering judgment on the findings was so fundamental that the court would act on it without an assignment. *Foster v. Atlir* (Civ. App.) 181 S. W. 520.

Where the brief on appeal does not show whether objections interposed to the charges of the court complained of were before or after submission to the jury, the assignments of error thereon must be treated as waived. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

Where the record contained no assignment of error, motion for new trial, or bill of exceptions, and no fundamental error is suggested or observed, the judgment will be affirmed. *Simpson v. International & G. N. R. Co.* (Civ. App.) 183 S. W. 10.

Where a proposition under an assignment of error is insufficient, the court, on appeal cannot reframe it to make it fit the record, in order to properly present the issue. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

Where no attack was made on findings establishing right of recovery and the evidence tended strongly to support the findings, they will be adopted as facts, and plaintiff's judgment affirmed in absence of error of law. *Missouri, K. & T. Ry. Co. of Texas v. Washburn* (Civ. App.) 184 S. W. 580.

Where appellant filed no brief or assignments of error and respondents filed briefs and prayed affirmance, under court rule 42 (142 S. W. xiv), judgment will be affirmed; there being no fundamental error which could be considered in the absence of assignments. *Mangum v. Thurman* (Civ. App.) 186 S. W. 227.

Where neither appellant's brief nor the transcript contains any assignment of error, and no fundamental error has been discovered, judgment will be affirmed. *Phillips v. Faircloth* (Civ. App.) 189 S. W. 747.

On form of assignment, proposition, and statement relating to objection to charge, court would not search a long bill of exceptions to ascertain what objections were made and whether made at the proper time. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

**85. Waiver or abandonment of assignment.**—An assignment of error abandoned by plaintiff in error, in open court, will not be considered. *Miller v. Campbell* (Civ. App.) 171 S. W. 251.

In an action against a bank and its president proposition of defendants, appellants, under an assignment of error to the submission of an issue as to exemplary damages held not to confine the specification of error to the bank only and waive it as to its president. *Lester v. Hawkins* (Civ. App.) 181 S. W. 481.

### Art. 1613. [1022] Docket of causes and disposition of same.

**Rights of appellee.**—Failure of appellant to file briefs within the time prescribed by art. 2115, thereby depriving appellee of rights granted by articles 1613, 1616, held not excused. *Goodhue v. Leckie* (Civ. App.) 176 S. W. 647.

### Art. 1614. [1019] Appearance by brief, etc.

Cited, *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

**1. Necessity of briefs.**—Although assignments of error are not briefed as required by law, the court may, in view of another trial, consider them. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Where material error is apparent on face of record affecting appellant's rights, Court of Civil Appeals will consider the matter, though not presented by brief conforming to rules. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

2. **Form and requisites in general.**—Under this article and rule 37 (142 S. W. xiii), typewritten brief containing 40 pages held violative of the statute and rule, and to be stricken. *Waterman Lumber & Supply Co. v. Holmes* (Civ. App.) 161 S. W. 70.

Where motions to affirm show the correctness of the judgment, they serve the purpose of a brief on the part of the appellees. *Dromgoole Bros. v. L. A. Epstein & Co.* (Civ. App.) 173 S. W. 1006.

A brief of appellant not complying with rule 29 for Courts of Civil Appeals (142 S. W. xii), providing that the assignments, as presented in the brief, shall be numbered consecutively, or with rules 24 and 25 (142 S. W. xii), relating to assignments and specifications of error, does not call for consideration. *Jefferson v. McFaddin* (Civ. App.) 178 S. W. 714.

Cross-assignments of appellee, not briefed according to the rules, will not be considered by the appellate court. *Leach v. Thompson* (Civ. App.) 192 S. W. 602.

An assignment of error, not briefed in accordance with the rules, will be overruled. *Daugherty v. Smith* (Civ. App.) 192 S. W. 1131.

3. **Statement of case or of facts.**—In general.—An assignment of error complaining of a ruling on evidence could not be considered where the appellant's brief failed to disclose the grounds of objection made below. *Standard Milling Co. v. Imperial Rice Co.* (Civ. App.) 160 S. W. 637; *Roibal v. Giron* (Civ. App.) 158 S. W. 798.

Assignments of error will not be reviewed where the brief does not contain statements from the record showing the error as required by Court of Civil Appeals rule 31 (142 S. W. xiii). *Wauhup v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

Error cannot be claimed in sustaining an objection to questions to a witness where appellant's brief does not show what objections were sustained, or what the proposed evidence was, or whether it would have been admissible. *Texas Cent. R. Co. v. Neill* (Civ. App.) 159 S. W. 1180.

A ruling on the admission of testimony cannot be reviewed where there is nothing in appellant's brief to indicate that an objection was interposed and the brief does not refer to bills of exception taken to the ruling. *Brown v. Brenner* (Civ. App.) 161 S. W. 14.

The court rules prohibit statements in a brief not sustained by the record. *Stevens v. Haile* (Civ. App.) 162 S. W. 1025.

Where defendant's brief did not set out plaintiff's petition or even its substance, defendant's contention that its general demurrer was improperly overruled cannot be reviewed. *International & G. N. Ry. Co. v. Owens* (Civ. App.) 166 S. W. 412.

Where an objection to a paragraph of the court's charge was not shown by the briefs to have been made in the trial court and overruled, and a bill of exceptions reserved, the Court of Civil Appeals will not search the record, but will assume that none was taken, and that the objection was waived. *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80.

Where statements in appellant's brief are not controverted by appellee's brief, the appellate court is justified under rule 41 (142 S. W. xiv), in accepting appellant's version as true. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

Where the brief filed by appellant failed to comply with rule 31 for Courts of Civil Appeals (142 S. W. xiii), requiring statements of proceedings in the record necessary to an understanding of the propositions, the assignments of error will not be considered. *Pollard v. Allen & Sims* (Civ. App.) 171 S. W. 302.

Brief filed by appellant, referring to brief of its codefendant for statement, contentions, etc., held not a compliance with the rules, so that judgment against such appellant would be affirmed. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

Under art. 1607, where an assignment of error assembles in the brief a group of facts verifiable by reference to the transcript and the statement of facts pointed out in the assignment, the whole of such assignment must be considered. *Texarkana & Ft. S. Ry. Co. v. Brass* (Civ. App.) 175 S. W. 778.

Statements in briefs on an appeal and on a former dismissed appeal held not an admission for purposes of plea of privilege that allegations of venue in the petition were true. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

By express provision of Court of Civil Appeals rule 41 (142 S. W. xiv) whatever of the statements in appellant's brief is not contested will be considered as acquiesced in. *Mutual Film Corp. v. Morris & Daniel* (Civ. App.) 184 S. W. 1060.

Where appellant's brief contains no statement of the nature and result of the suit, nor any assignment of error, proposition of law, or statement of fact, no issue is presented for consideration. *Commonwealth Bonding & Casualty Ins. Co. v. Hendricks* (Civ. App.) 187 S. W. 698.

Where the brief did not show that a charge was presented at the proper time and exceptions properly taken to its refusal, an assignment of error in its refusal would not be considered. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

A brief which in its statement merely said that the trial court's charges were "duly excepted to" is disapproved. *Chicago, R. I. & G. Ry. Co. v. Whorton* (Civ. App.) 191 S. W. 397.

Where appellant's brief failed to show objections urged to admission of testimony, assignments of error relating thereto will not be considered. *First Nat. Bank v. Mangum* (Civ. App.) 194 S. W. 647.

5. — **Setting out instructions.**—Assignments that the court erred in refusing certain special charges were insufficient, where the charges were not disclosed by the brief, and no reference was made to the page or pages of the transcript where they could be found. *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80; *Burnet Fuel Co. v. Ellis* (Civ. App.) 162 S. W. 911.

An assignment of error relating to the charge is not properly briefed where the charges requested were not set out. *Shaller v. Johnson-McQuiddy Cattle Co.* (Civ. App.) 189 S. W. 553.

7. **Specification of errors.**—Assignments complaining of ruling on evidence are not entitled to consideration where the brief fails to disclose the ground of objection urged. *McCall Co. v. Elliott* (Civ. App.) 159 S. W. 872.

Where the bill of exception to admission of testimony shows that objection urged in trial court was entirely different from objection urged in brief, the assignment will be overruled. *Tyler v. McChesney* (Civ. App.) 190 S. W. 1115.

**8. Incorporation of assignment of errors.**—An assignment of error not copied in the brief will not be considered. *Bulloch v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 171 S. W. 808; *Stockwell v. Glaspey* (Civ. App.) 160 S. W. 1151; *Smith v. Bogle* (Civ. App.) 165 S. W. 35; *Trinity & B. V. Ry. Co. v. Dodd* (Civ. App.) 167 S. W. 238; *Chicago, B. & Q. R. Co. v. Wilson* (Civ. App.) 176 S. W. 619; *Dicken v. Cruse* (Civ. App.) 176 S. W. 655.

Under rule 29 for Courts of Civil Appeals (142 S. W. xii), the brief of an appellant presents no matter for review when the assignments were not literally copied therein. *Shipp v. Cartwright* (Civ. App.) 182 S. W. 70; *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460; *Norton v. Lea* (Civ. App.) 170 S. W. 267; *Watson v. Patrick* (Civ. App.) 174 S. W. 632; *Wentzell v. Chester* (Civ. App.) 189 S. W. 304.

Under Courts of Civil Appeals rules 29 and 30 (142 S. W. xii, xiii), assignments of error in appellant's brief should be copies of those contained in the record. *Saliway v. Grand Lodge, A. O. U. W.* (Civ. App.) 164 S. W. 1041; *Ortiz v. Walker* (Civ. App.) 167 S. W. 831; *Dixon v. Cooper* (Civ. App.) 178 S. W. 695; *Dawson v. Falfurrias State Bank* (Civ. App.) 181 S. W. 553.

Under Court of Civil Appeals rule 29 (142 S. W. xii), requiring appellant to file a brief of the points relied on, but not requiring the assignments of error to be presented in the order in which they appear in the original assignment, appellant may in his brief disregard the numbers of the assignments of error in the record and give the assignments new numbers. *St. Louis, I. M. & S. Ry. Co. v. West Bros.* (Civ. App.) 159 S. W. 142; *St. Louis, I. M. & S. Ry. Co. v. Landa & Storey* (Civ. App.) 187 S. W. 358; *CONTRA*, *Grisham v. Connell Lumber Co.* (Civ. App.) 164 S. W. 1107; *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224.

Court of Civil Appeals rule 29 (142 S. W. xii), requiring that assignments of error appearing in the transcript shall be copied in the brief, is satisfied by a substantial copy. *Douthitt v. Farrar* (Civ. App.) 159 S. W. 182.

A motion to dismiss the appeal and affirm the judgment is well taken where the brief for appellant does not refer to assignments of error in the motion for a new trial, as required by Court of Civil Appeals rules 24, 25, and 31 (142 S. W. xii, xiii). *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452.

A motion to disregard assignments of error because not correctly copied in a brief will be overruled where the omitted portions embrace merely the reasons upon which the assignments are based. *Williams v. McComb* (Civ. App.) 163 S. W. 654.

Notwithstanding Acts 33d Leg. c. 136, art. 1612, ante, under Court of Civil Appeals rules 23, 29 (142 S. W. xii, xiii), requiring the record to contain assignments of error, and providing that failure to file same shall be ground for dismissing the writ of error, purported assignments cannot be considered where none of the grounds of the motion for new trial are in the brief of plaintiff in error. *Overton v. Colored Knights of Pythias* (Civ. App.) 163 S. W. 1053.

Under Court of Civil Appeals Rules, rule 27 (142 S. W. xii), requiring appellant to copy in his brief each assignment of error, and other rules requiring each assignment to be so presented that the appellate court can ascertain therefrom, and from the propositions and statements, the questions to be decided, it is improper to give only the substance of assignments. *Iowa Mfg. Co. v. Walcovich* (Civ. App.) 163 S. W. 1054.

A paragraph of the motion for new trial asserting error in an instruction was sufficiently copied into appellant's brief to be considered as an assignment of error under Courts of Civil Appeals Rules, No. 29 (142 S. W. xii), though as copied it omitted a part of the paragraph stating wherein the court erred in its instruction. *Smith v. Bogle* (Civ. App.) 165 S. W. 35.

Under rules 23 and 29 (142 S. W. xii) for Courts of Civil Appeals requiring the record and the briefs to contain assignments of error, distinctly presenting the ground of error relied on, held, that assignments in a brief not purporting to be the same as those set up in the motion for new trial, but being condensed assignments, would be considered as waived. *Coons v. Lain* (Civ. App.) 168 S. W. 981.

An assignment of error as copied in the brief, which materially varies from the original in the record, cannot be considered. *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180.

Brief copying into assignments of error words and sentences not contained in assignments in motion for new trial and omitting other words, etc., held to violate rule that assignments relied on shall be copied in brief. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 174 S. W. 330.

Assignments of error appearing in the brief, but not in the record, as to matters which should have been called to the court's attention in the motion for new trial, cannot be considered. *Dees v. Crane* (Civ. App.) 175 S. W. 468.

Under Court of Civil Appeals rule 29 (142 S. W. xii), error in instructing as to the form of a verdict for defendant cannot be reviewed, where the assignment in the brief related to the form of the verdict for plaintiff. *Hermann v. Schroeder* (Civ. App.) 175 S. W. 788.

Where there were no assignments of error and the brief did not correspond with paragraphs in the motion for new trial, matters attempted to be presented by the brief need not be decided. *Stevens v. Marshall* (Civ. App.) 178 S. W. 972.

Where assignments of error are grounds assigned in a motion for new trial, they, as given in the brief, must, as required by Rule 25 (142 S. W. xii), refer to the portion of the motion in which they are complained of. *J. B. Farthing Lumber Co. v. Illig* (Civ. App.) 179 S. W. 1092.

Under the rule requiring assignments of error to be copied in the brief, an assignment in the brief complaining of the admission of part of the testimony of a witness will not be considered, where the assignment in the motion for new trial complains of the admission of all his testimony. *Dewees v. Nicholson* (Civ. App.) 182 S. W. 396.

The excessiveness of an award of damages for nondelivery of a telegram cannot be considered on appeal, where the appellant's brief did not present that assignment in proper manner. *Western Union Telegraph Co. v. Bailey* (Civ. App.) 184 S. W. 519.

Where the record shows that certain rulings of the court below were attacked in a motion for new trial, and that such rulings constitute the assignments of error urged in this court, it is unnecessary that appellant's brief should specifically so state. *Dunlap v. Squires* (Civ. App.) 186 S. W. 843.

**9. Citation of authorities.**—In citing cases, the names of the litigants, as well as the book and page, should be given, and, when not given, the numbers of the reports and pages should be verified. *Smith v. McBryde* (Civ. App.) 173 S. W. 234.

**10. References to record.**—Error in admitting evidence or overruling a motion for a new trial cannot be considered, where neither the assignment of error nor the brief contains a reference to the page of the transcript and clause of the motion for new trial showing that the matters were presented to the lower court. *Brewer v. A. M. Blythe & Co.* (Civ. App.) 158 S. W. 786.

Where the court is referred by appellant to "bill of exceptions No. —," the page of the record not being given, the court will not search the record to find such bill. *Hill v. Neese* (Civ. App.) 160 S. W. 314.

A statement of the evidence is insufficient where it refers to the pleadings for part of the facts on which the assignment is based instead of to the facts proved by the evidence introduced. *General Accident, Fire & Life Assur. Corporation v. Ellison* (Civ. App.) 160 S. W. 1141.

An assignment of error complaining of a ruling on evidence will not be considered where the brief does not refer to any bill of exceptions covering the matter. *Loftus v. Zier* (Civ. App.) 162 S. W. 476.

A brief will not be stricken because of failure to refer to the pages of the record sustaining the points urged, where it was sufficient to apprise the court of appellant's contentions. *Thornburg v. Moon* (Civ. App.) 180 S. W. 959.

Assignments of error identical with grounds assigned in motion for new trial, where bills of exception relied on, though not copied in the brief, were referred to and the pages of the transcript where they may be found were given, were sufficiently supported by a reference to the record. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 185 S. W. 615.

Brief on appeal held not to comply with the rules requiring reference to record where objections are made so as to require consideration of assignments of error in the giving and the refusal of charges. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

**11. Additional or supplemental briefs.**—A brief intended as an amendment to the original brief of appellant could not be considered, where it was not merely a citation of additional authorities, as authorized by rule 38 (142 S. W. xiii), but met appellee's objection that the original briefs did not contain proper statements under the various propositions. *Greene Gold-Silver Co. v. Silbert* (Civ. App.) 158 S. W. 803.

An amended brief undertaking to re-present and re-brief various assignments of error was not such an amendment as is permitted by rule 38 for Courts of Civil Appeals (142 S. W. xiii), providing that a brief may be amended by citation of additional authorities, and hence that only the argument therein would be considered. *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1963.

**12. Printing and typewriting.**—A brief typewritten in single space on thin tissue paper, and hence almost unreadable, is in direct violation of Rules for Courts of Civil Appeals 29, 37 (142 S. W. xii, xiii), regulating the preparation of briefs. *Hall v. Shoemaker* (Civ. App.) 178 S. W. 803.

**15. Defects, objections, and amendments.**—The printed argument cannot be looked to to supply vital defects in the brief. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

Where a brief did not comply with Rules 30 and 31 of the Courts of Civil Appeals (142 S. W. xiii), held, that the defect could not be cured by the printed argument. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

Where assignment is not properly briefed, but same matter is presented under another assignment, it will be considered on appeal. *Citizens' Nat. Bank of Plainview v. Slaton* (Civ. App.) 189 S. W. 742.

Assignments as to special exceptions contained only in amended brief, which attempts to remedy defects in original brief, not being permitted by any rule of law, cannot be considered. *Suhre v. Kott* (Civ. App.) 193 S. W. 417.

**16. Striking out brief.**—Brief of defendant abusing the trial court and opposing counsel, and a motion by plaintiff to strike it containing abusive language in reference to opposing counsel, stricken from the files on the court's own motion. *Mossop v. Zapp* (Civ. App.) 179 S. W. 685.

Where briefs of the plaintiff in error were stricken because not filed in time, only fundamental errors can be considered. *Knight v. Simons* (Civ. App.) 168 S. W. 1018.

Where a brief containing statements derogatory to the trial judge was stricken and the party was required to file a new brief, merely filing a copy of the old brief, with ink smeared over the objectionable portions, was insufficient to comply with the court's orders. *Mossop v. Zapp* (Civ. App.) 183 S. W. 839.

Where appellant's brief was not prepared according to Courts of Civil Appeals rules, in that it contained and referred to no assignments of error and its propositions were too general and not followed by sufficient statement of proceedings, it will be stricken from the record. *Hughes v. Willis* (Civ. App.) 191 S. W. 584.

Appellee's brief in Court of Civil Appeals will not be stricken for failure to notify appellant of its filing, especially where appellant does not claim that the delay prejudiced it, nor request a postponement for purpose of submitting a reply brief. *Houston & T. C. R. Co. v. Derden* (Civ. App.) 194 S. W. 489.

**17. Scope and effect.**—Under rules 40 and 41 for the Courts of Civil Appeals (142 S. W. xiv), where appellants alone filed briefs, such court is authorized to regard so much of their briefs as is prepared in conformity with such rules as a proper presentation of the case without examination of the record. *Hawks v. Longbotham* (Civ. App.) 188 S. W. 734.

Where respondent's counsel, who lost the clerk's transcript of the record after it was filed in the Court of Civil Appeals, failed to have certified a substitute transcript offered by them, held, that the motion to substitute would be overruled, and the statement of the case and statements supporting the assignments of error in appellant's brief will be treated as correct. *Patterson v. Sylvan Beach Co.* (Civ. App.) 171 S. W. 515.

On appeal from judgment in suit restraining sale on foreclosure, statement in defendant appellee's brief that plaintiff appellants' plea, asserting their right to recover penalties for usury, was not called to attention of trial court when case was disposed of will be regarded as admission that plea was then on file. *Wooton v. Jones* (Civ. App.) 189 S. W. 350.

**18. Failure to file, or to file in time—Effect in general.**—Under Rules 40 and 41 for Courts of Civil Appeals (142 S. W. xiv) where the record contained no statement of facts or evidence or briefs for appellees, court could decide case on issues presented by appellants' brief. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

Under rule 41 for Courts of Civil Appeals (142 S. W. xiv), where appellees filed no briefs, the statements in appellant's brief will be regarded as acquiesced in. *Texas & P. Ry. Co. v. Cauble* (Civ. App.) 168 S. W. 369.

Where plaintiff in error fails to file a brief, the brief of defendant in error may, under rule 42 (142 S. W. xiv), be accepted as a correct presentation of the case without examination of the record further than to see that the judgment is one that can be affirmed on the cause as presented by defendant in error. *Shuttlesworth v. Armour & Co.* (Civ. App.) 168 S. W. 439.

Though the appellant files no brief, a suggestion by the appellee that the appeal was taken for delay only requires the court to reverse the judgment for any material error there may be therein. *W. A. Leyhe Piano Co. v. American Multigraph Sales Co.* (Civ. App.) 171 S. W. 494.

Under court rule 40 (142 S. W. xiv) an appellant's brief may be accepted as a proper presentation of the case, without examination of the record, where appellee files no brief. *Occident Fire Ins. Co. v. Linn* (Civ. App.) 179 S. W. 523.

**19. — Excuses.**—In trespass to try title against C. & Co., in which it impleaded the T. Co. on its warranty of title, verbal agreement by one of the attorneys for the T. Co. alone, extending time of plaintiffs to file their briefs, held not an excuse for the failure to file such briefs within the time previously stipulated or within a reasonable time before the submission of the case. *Brown v. Wm. Cameron & Co.* (Civ. App.) 164 S. W. 425.

**21. — Dismissal.**—Failure of appellant to file briefs in the Court of Civil Appeals as required by this article and court rule 29 (142 S. W. xii), is ground for dismissal. *Ft. Worth Belt Ry. Co. v. Perryman* (Civ. App.) 158 S. W. 1181; *Banks v. McMahan* (Civ. App.) 162 S. W. 366.

Where no briefs were filed in the trial court, and there was no agreement by one of two defendants in error for their filing in the appellate court, the writ of error will on motion be dismissed as to him. *Buick Automobile Co. v. O'Keefe* (Civ. App.) 174 S. W. 969.

Motion to dismiss appeal where appellants did not file briefs within time required by rules, or within time stipulated, case having been filed April 4th, set for submission for November 9th, and appellants applying November 1st for permission to file briefs, will be granted under rule 39 for Courts of Civil Appeals (142 S. W. xiii). *Alderete v. Mosley* (Civ. App.) 189 S. W. 1083.

Under Rev. St. art. 2115, and rule 39, Rules for the Courts of Civil Appeals (142 S. W. xiii), where appellants offer no excuse for failure to file copy of brief in district court, appeal must be dismissed. *Hensley v. Pena* (Civ. App.) 190 S. W. 247.

**23. — Affirmance.**—Where appellant filed no brief or assignments of error and respondents filed briefs and prayed affirmance, under court rule 42 (142 S. W. xiv), judgment will be affirmed; there being no fundamental error which could be considered in the absence of assignments. *Mangum v. Thurman* (Civ. App.) 186 S. W. 227; *Record Co. v. Popplewell* (Civ. App.) 161 S. W. 930; *Robinson v. Hill* (Civ. App.) 193 S. W. 1082.

Under rules of Court of Civil Appeals, rule 42 (142 S. W. xiv), where appellant fails to file a brief, the record will not be examined further than to see that the judgment is one which can be affirmed on the view presented by appellee's brief. *Cooper Mfg. Co. v. Golding* (Civ. App.) 163 S. W. 103.

Where appellant fails to file brief in court below or Court of Civil Appeals, and case is submitted by appellee on the transcript, unless there is fundamental error, judgment must be affirmed. *Guaranty State Bank v. Eland* (Civ. App.) 189 S. W. 546.

The judgment will be affirmed if appellant files no brief; there being no fundamental error. *Alderete v. Moore* (Civ. App.) 166 S. W. 453.

Where the judgment disposed of all the parties and was in conformity with the issues, it will be affirmed, in the absence of briefs. *Bartholomew v. Culver* (Civ. App.) 171 S. W. 498.

Where the appellant files no brief and there is no error apparent on the face of the record and the judgment is one which the court could legally render, it will be affirmed. *Halbert v. Toyah Valley Bank* (Civ. App.) 175 S. W. 508.

Where examination of record failed to disclose any fundamental error, and appellant submitted no brief on appeal, judgment will be affirmed. *Compton v. Hopkins* (Civ. App.) 193 S. W. 1091.

## CHAPTER SEVEN

## HEARING CAUSES

Art.  
1616. Hearing of cases, order of.

Art.  
1618. Death does not abate, when.

**Article 1616. [1022] Hearing of cases, order of.**

See *Goodhue v. Leckie* (Civ. App.) 176 S. W. 647; note under art. 2115.

**Art. 1618. [1026] Death does not abate, when.**

**Effect of death in general.**—Under this article, on the death of a party to an appeal after the appeal bond has been filed and approved, the appeal does not abate, though the original cause of action may be one which does not survive. *Hughes v. Hughes* (Civ. App.) 170 S. W. 847.

## CHAPTER EIGHT

## CERTIFICATION OF QUESTIONS TO SUPREME COURT, ETC.

Art.  
1619. Questions of law certified to supreme court.  
1620. Dissenting opinion; point of dissent certified to supreme court.

Art.  
1623. Conflict with decision of another court of civil appeals; question and record transmitted and certified to supreme court, etc.

**Article 1619. [1043] Questions of law certified to supreme court.**

Cited, *Ft. Worth Belt Ry. Co. v. Jones*, 106 Tex. 345, 166 S. W. 1130; *Moore v. State* (Sup.) 181 S. W. 438 (dissenting opinion); *Lindsay v. Collings* (Civ. App.) 182 S. W. 879.

**Certification of questions in general.**—The Court of Civil Appeals has no jurisdiction to certify questions to the Supreme Court after the expiration of the term at which it finally disposed of the case. *Noble v. Broad* (Civ. App.) 173 S. W. 643.

**Questions which may be certified.**—The Court of Civil Appeals will not certify to the Supreme Court a question which in its opinion has been previously decided by that court. *Lock v. Citizens' Nat. Bank* (Civ. App.) 165 S. W. 536.

Where judges of Court of Civil Appeals fully concur in opinion, questions at issue will not be certified to Supreme Court. *Pierce Fordyce Oil Ass'n v. Woodrum* (Civ. App.) 188 S. W. 245.

— Dependent on Arts. 1521, 1522.—See notes under art. 1522.

— Dependent on Art. 1591.—See notes under art. 1591.

**Answer of Supreme Court.**—Where the only question involved on an appeal to the Court of Civil Appeals was certified to the Supreme Court which answered it in favor of the appellee, the judgment must be affirmed. *Dallas County v. Lively* (Civ. App.) 167 S. W. 1107, conforming to opinion of Supreme Court, 106 Tex. 364, 167 S. W. 219.

A determination by the Supreme Court that a bona fide club selling intoxicating liquors only to its members is not engaged in the business of selling such liquors held dictum, in view of the questions certified under the provisions of Rev. St. 1911, art. 1619. *State v. Country Club* (Civ. App.) 173 S. W. 570.

The answers to questions propounded by the Court or Civil Appeals to the Supreme Court are conclusive upon the Court of Civil Appeals. *Masterson v. Harris* (Civ. App.) 179 S. W. 284, conforming to answers to certified questions (Sup.) 174 S. W. 570.

The decision of the Supreme Court on questions certified from the Court of Civil Appeals is the law of the case on its return. *Middleton v. Texas Power & Light Co.* (Civ. App.) 188 S. W. 276.

**Art. 1620. [1040] Dissenting opinion; point of dissent certified to supreme court.**

**Certification of questions in general.**—Where a Court of Civil Appeals has final jurisdiction of a cause, it is not mandatory upon it to certify to the Supreme Court because of the dissent of one of its members. *Sellers v. Puckett* (Civ. App.) 180 S. W. 639.

Where a dissenting justice of the Court of Appeals withdraws his dissent, appellant is not entitled to certification to the Supreme Court on account of the dissent. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

**Questions which should be certified.**—Where the question involved in an action for damages to an interstate shipment of live stock was a federal question, it was not mandatory upon the Court of Civil Appeals, one of the judges of which dissented, to certify the case to the state Supreme Court. *Chicago, R. I. & G. Ry. Co. v. Dalton* (Civ. App.) 177 S. W. 556.

Where dissent to the majority opinion is not on a question of law material to the decision, a motion to certify will be overruled. *Gestean v. Bishop* (Civ. App.) 181 S. W. 696.

Where sole question for Court of Civil Appeals involved location of boundary, it was not incumbent on court, because of dissent of a justice, to certify cause to Supreme Court under this article. *Boynton Lumber Co. v. Houston Oil Co. of Texas* (Civ. App.) 189 S. W. 749.



**Art. 1623. Conflict with decision of another court of civil appeals; question and record transmitted and certified to supreme court.**

Cited, *Farmer v. Evans* (Civ. App.) 192 S. W. 342.

**Duty and propriety of certification in general.**—Under this article, where a decision of a Court of Civil Appeals clearly conflicts with an earlier decision of another Court of Civil Appeals, the question should be certified to the Supreme Court. *First Nat. Bank of Aspermont v. Conner*, 172 S. W. 1106, 106 Tex. 549.

A question already determined by Supreme Court will not be certified to it, although there may be a conflict with the subsequent decision of Court of Civil Appeals. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

Decision of Court of Appeals conflicting with decision of another Court of Appeals on same question necessitates certification of question for final adjudication to Supreme Court. *Id.*

In determining whether Supreme Court shall require certification of decision by Court of Civil Appeals, under this article, equitable considerations, showing that petitioner has been denied some rights, cannot be considered. *Coultruss v. City of San Antonio* (Sup.) 187 S. W. 194.

In a case in which the jurisdiction of the Court of Civil Appeals is made final by art. 1591, a conflict of decision between different Courts of Civil Appeals does not confer jurisdiction on the Supreme Court to grant a writ of error. *Camp v. National Equitable Soc. of Belton* (Sup.) 191 S. W. 699.

Where decision of Court of Civil Appeals in case in which its jurisdiction is final, is in conflict with decision of Court of Civil Appeals of another district, mandamus will issue from Supreme Court to require certification of questions as required by this article. *Warren v. Willson* (Sup.) 192 S. W. 529.

**Nature and extent of conflict in decisions.**—Holding of Court of Civil Appeals that execution of building contractor's bond by lumber company was ultra vires held in conflict with earlier decision that execution of liquor dealer's bond by wholesale liquor corporation was not ultra vires, requiring the question to be certified to the Supreme Court. *First Nat. Bank of Aspermont v. Conner*, 172 S. W. 1106, 106 Tex. 549.

This article requires that the certificate of a question of law, and the record in a case in which the decision conflicts with a prior decision, be made only when the decision is in direct conflict with a prior decision, and the test is whether one would overrule the other if in the same court. *Coultruss v. City of San Antonio* (Sup.) 179 S. W. 515.

Decisions of a Court of Civil Appeals, denying a discharged policeman recovery of salary subsequently accruing, held not in conflict with other cases, so as to require certification to the Supreme Court. *Id.*

Decision of Court of Civil Appeals that bank was not liable to wife for her individual bank deposit withdrawn by her husband held in conflict with prior decision of another Court of Civil Appeals that wife's contract, acquiesced in by husband, was valid, and under this article such conflict should be certified to Supreme Court. *Warren v. Willson* (Sup.) 192 S. W. 529.

**Decisions of same court.**—Mandamus to require certification to Supreme Court of decision of Court of Civil Appeals under this article cannot be based on conflict between decisions of same court. *Coultruss v. City of San Antonio* (Sup.) 187 S. W. 194.

**Conflict with decisions of Supreme Court.**—While Courts of Civil Appeals, under Vernon's Sayles' Ann. Civ. St. 1914, art. 1623, are required to certify questions where rulings are in conflict with other decisions of Court of Civil Appeals, they are not required to certify questions on ground that rulings are in conflict with Supreme Court decisions. *Warren v. Willson* (Sup.) 192 S. W. 529.

## CHAPTER NINE

### JUDGMENT OF THE COURT

Art.	Art.
1626. If judgment reversed, when reformed and when remanded.	1629. Affirmance with damages in case of delay.
1627. Judgment on affirmance or rendition, etc.; damages adjudged, when; finality.	1630. Remittitur.
1628. No reversal for want of form.	1631. Suggestion of remittitur.
	1633. Mandate issued, when.

**Article 1626. [1027] If judgment reversed, when reformed, when remanded.**

Cited, *Texas, C. & N. Ry. Co. v. Berlin* (Civ. App.) 165 S. W. 62; *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

**Dismissal of appeal.**—See art. 2078, note 8.

A motion to dismiss an appeal, because the petition for writ of error was not signed, came too late, when not filed within 30 days after the transcript was filed, as required by Court of Civil Appeals rule 8 (142 S. W. xi). *Zimmerman v. Baugh* (Civ. App.) 160 S. W. 593.

Upon appeal from a judgment of the county court, which was without jurisdiction, the appeal will not be dismissed, but the cause will be reversed and remanded to enable that tribunal to dismiss the action. *Ft. Worth & R. G. Ry. Co. v. Mathews* (Civ. App.) 169 S. W. 1052.

A motion to dismiss a writ of error, filed one day before submission of the cause, held too late. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

Under rule 8 for the Court of Civil Appeals (142 S. W. xi), a motion not filed within 30 days, to dismiss a writ of error, on the ground that the petition for the writ was not filed within 12 months after final judgment, must be dismissed, unless the objection is jurisdictional. *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922.

Where case was filed in Court of Civil Appeals June 7th, motion filed October 2d to dismiss appeal for defect in sheriff's return of service of petition in error held too late. *Price v. J. B. Faircloth & Co.* (Civ. App.) 181 S. W. 707.

The appeal of a railroad for which, at the instance of its bondholder, a receiver has been appointed, from the order of appointment, will not be dismissed as moot because subsequently another receiver is appointed by a United States court, and the road does not appeal from, and apparently acquiesces in, the second appointment. *Houston & B. V. Ry. Co. v. Hughes* (Civ. App.) 182 S. W. 23.

Want of prosecution held ground for dismissal of appeal in absence of fundamental error in the trial of the cause. *Anderson v. Engler* (Civ. App.) 184 S. W. 309.

Under rule 8 for Courts of Civil Appeals (142 S. W. xi), motion to dismiss for an informality, as distinguished from a jurisdictional question, not made within 30 days after the filing of the transcript, waived such question. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

Under rule 8 (142 S. W. xi) motion to dismiss for failure to file briefs in time not filed within 30 days after filing the transcript is too late. *Hamlet v. Leicht* (Civ. App.) 187 S. W. 1004.

Where a motion to dismiss an appeal, on ground that matters in controversy have been settled, as well as supporting affidavit, failed to show that the settlement had in fact been made, motion should be overruled. *Kernagan v. City of Ft. Worth* (Civ. App.) 194 S. W. 626.

**Affirmance.**—Where plaintiff, suing a defendant and several codefendants desired that the judgment for codefendants should not be disturbed, the court on the appeal of defendant will affirm the judgment for codefendants. *St. Louis, I. M. & S. Ry. Co. v. West Bros.* (Civ. App.) 159 S. W. 142.

Where, after an appeal was perfected, the appellant and one of the appellees agreed in writing that the judgment should be affirmed, it would be affirmed as to such appellee, though reversed as to the others. *Powell v. Stephens* (Civ. App.) 164 S. W. 1058, modifying judgment on rehearing 163 S. W. 672.

In an action for the death of a child, where there was no evidence as to value of the services or the costs of support, the jury may find that the parents have suffered no pecuniary loss, and the rule of nominal damages does not apply, so that a verdict for defendants cannot be set aside. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

There is no jurisdiction on appeal by a defendant in trespass to try title from judgment for plaintiff to even affirm for nonappeal judgment on a cross-bill by another defendant making others parties, and raising different issues from those between plaintiff and the appealing defendant. *Ketchum v. Boggs* (Civ. App.) 194 S. W. 201.

**Modification or reformation of judgment.**—Where the error in a judgment was not called to the attention of the trial court and the error was in the entry of the judgment rather than in any proceedings had on the admission of testimony or the application of the rules of law, the court on appeal will correct the judgment and affirm it as corrected. *Nunn v. Raby* (Civ. App.) 158 S. W. 187.

Where the error in assessing interest as a part of the damages was not definitely brought to the notice of the lower court, defendant would not avoid the payment of costs by having that item stricken out and the judgment reformed on appeal. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

In an action on a fraternal insurance policy for \$1,000, which expressly provided that the insurer might retain \$50 out of each \$1,000 for the purpose of constituting a special fund, a judgment for the full amount of the policy need not be reversed, but will be reformed so as to allow the reduction. *National Council of the Knights and Ladies of Security v. Sealey* (Civ. App.) 162 S. W. 455.

Where the judgment in condemnation proceedings, instead of describing the land, contains references to the petition for a description thereof, it may be reformed by the appellate court so as to describe the land as it was described in the petition. *San Antonio, U. & G. R. Co. v. Bobo* (Civ. App.) 163 S. W. 377.

A judgment that can be corrected in the appellate court will not be remanded. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

The excess of \$1.50 in judgment for \$578.50 in a suit on a fire policy for \$500, because of excessive allowance of interest, held too trivial to call for remittitur or to justify reformation of judgment. *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

The appellate court can reform the judgment to enter such a one as the lower court should have entered only when it appears that the facts have been fully developed and further competent evidence cannot be introduced to support the judgment below. *Ashley v. Holland* (Civ. App.) 180 S. W. 635.

Although a judgment is inartistically drawn, and, as drawn, does not meet the pleadings and proof, but the intention of the jury is plain, it will be reformed, only, on appeal, and not reversed. *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194.

Where separable damages were assessable against codefendants, but the verdict assessed the whole award against one, the appellate court cannot correct the error by calculating what the jury should have awarded against the defendant not mentioned in the verdict. *San Antonio & A. P. Ry. Co. v. McCammon* (Civ. App.) 181 S. W. 541.

Under this article Court of Civil Appeals will, on motion, correct judgment reversing judgment of county court, reversing judgment in justice court for plaintiff, so as to include judgment against sureties on bond on appeal from justice court. *Ribble v. Roberts* (Civ. App.) 184 S. W. 278.

A judgment of the county court on appeal from a justice court's judgment, adding a penalty and items in excess of the amount within the jurisdiction of the justice court, was invalid; but it could be reformed and affirmed on appeal to the Court of Civil Appeals. *North American Ins. Co. v. Jenkins* (Civ. App.) 184 S. W. 307.

Error in allowing damages barred by a statute of limitations may be corrected by an appellate court without remanding the case. *Donada v. Power* (Civ. App.) 184 S. W. 793.

In suit for damages for breach of defendant's contract to sell and deliver bran, alleging aggregate loss in the amount of \$975, verdict and judgment allowing for loss of profits in the sum of \$1,000 would be reformed and reduced to amount claimed. *Kolp v. S. F. Scattergood & Co.* (Civ. App.) 185 S. W. 329.

In a servant's personal injury action, held that the court on appeal, will consider an award as a general award for all damages and from it deduct sums already received by the servant as consideration for a settlement, and enter judgment for the balance. *Mis-souri, K. & T. Ry. Co. of Texas v. Ellison* (Civ. App.) 185 S. W. 1020.

In a suit to recover land, an item of the judgment allowing for timber converted its value in its manufactured state would be reformed to allow plaintiff only its value in its natural state. *North Texas Lumber Co. v. First Nat. Bank of Atlanta* (Civ. App.) 186 S. W. 258.

In action for damages to goods in transit where the record shows no evidence as to employment of attorneys, or the value of their services, a judgment allowing plaintiff an attorney's fee was without basis in the evidence, and will be reformed by striking out the amount so allowed. *Andrews v. Fuller* (Civ. App.) 186 S. W. 275.

Where an erroneous judgment was rendered, and the error plainly appears from the record, the appellate court may reform the judgment. *Stewart v. Briggs* (Civ. App.) 190 S. W. 221.

Where attorneys sued a railroad company and their client alleging an assignment of part of a cause of action as attorney's fees, and that the company had settled by paying a sum to the client, and a judgment was rendered canceling the settlement and awarding damages on the client's cross-complaint, and for plaintiffs for their share in the award, held that, on reversal of the judgment for damages, judgment for plaintiffs against their client should be modified and entered for the sum to which they were entitled on the settlement. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

Where verdict was for \$25,000 and judgment was entered for that amount, the appellate court may, where undisputed evidence shows that amount agreed to be paid was \$15,000 and the charge did not authorize recovery for any other amount, reform the judgment and affirm it for the correct amount. *O'Neal v. Bush & Tillar* (Civ. App.) 191 S. W. 1133.

In an action for conversion of automobile, where trial court erroneously added an amount for interest to plaintiff's judgment, it is duty of appellate court to render such judgment as should have been rendered below. *Magnolia Motor Sales Corp. v. Chaffee* (Civ. App.) 192 S. W. 562.

In action against surety on notes, where there was conclusion of law that plaintiff was entitled to recover face amount of notes with interest, etc., an unintentional error in calculation of interest would be corrected on appeal. *Pennock v. Texas Builders' Supply Co.* (Civ. App.) 193 S. W. 760.

**Reversal—In general.**—Where in a suit for partition and an accounting of rents and profits plaintiffs claimed a lien on defendant's share for their part of the rents and profits, they could not have a judgment affirmed as to the partition and reversed on cross-assignments of error with reference to error in findings as to rents and other personal property. *Wauhoh v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

Under Court Rule 62a, providing that where the issues are severable the entire judgment will not be reversed for an error affecting only a part, the whole judgment in trespass to try title brought by only part of the tenants in common, wherein damages for the cutting of timber were also recovered will not be reversed, but only that part which improperly awarded the entire damages to plaintiffs. *Nona Mills Co. v. Jackson* (Civ. App.) 159 S. W. 932.

Where the jury did not follow erroneous instructions as to the measure of damages, and it did not appear what evidence they considered in arriving at an excessive verdict, such verdict will be reversed. *Louisiana Rio Grande Canal Co. v. Quinn* (Civ. App.) 161 S. W. 375.

Under rule 62a for Courts of Civil Appeals (149 S. E. x), the appellate court may, in an action by a woman to set aside her former husband's deeds to their community property, reverse only that part of the judgment which erroneously granted partition without evidence of value. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

Where a money verdict does not accord with the theory upon which it was found, errors in its computations require a reversal of the judgment rendered thereon. *Willingham v. Brown* (Civ. App.) 163 S. W. 107.

Notwithstanding art. 1997, providing that there shall be but one final judgment, where, in trespass to try title, there are several defendants whose defenses are severable, the judgment against nonappealing defendants will be affirmed, though the judgment in favor of other defendants is reversed. *State v. Dayton Lumber Co.* (Civ. App.) 164 S. W. 48.

Rule 62a for Courts of Civil Appeals (149 S. W. x), authorizing reversals in part, held not applicable in action for damages, where there was no evidence showing the amount of the damages, which was the matter in controversy. *Texas & N. O. R. Co. v. Weems* (Civ. App.) 165 S. W. 1194.

Under rule 62a (149 S. W. x), a judgment in a suit to quiet title and to reform plaintiff's conveyance, where the court improperly directed a verdict of reformation, will be reversed only as to that issue; that error not affecting a judgment in plaintiff's favor for the land included in her conveyance. *Johnson v. Conger* (Civ. App.) 166 S. W. 405.

That a judgment for plaintiff must be reversed for new trial as between the defendants, to determine who is the principal debtor and who are sureties, will not require reversal as between defendants and plaintiff. *Solomon v. Merchants' & Planters' Nat. Bank* (Civ. App.) 168 S. W. 1029.

In replevin against two defendants, one of whom counterclaimed for breach of contract, a judgment for both will be reversed and remanded when an improper issue on the counterclaim was submitted and the rights of the parties to the goods replevined depended upon the determination of the issue raised by the counterclaim. *Gordon v. Ratliff* (Civ. App.) 169 S. W. 372.

Where the court on appeal cannot determine on which of two issues the verdict was rendered, the error in instructions submitting one of the issues necessitates a reversal. *Killman v. Young* (Civ. App.) 171 S. W. 1065.

Judgment of divorce will be reversed and annulled, where after perfection and submission of appeal the appellate court is shown that the parties have settled their troubles and become reunited, and that plaintiff is not disposed to further prosecute the suit. *Crawford v. Crawford* (Civ. App.) 172 S. W. 724.

Reversal of judgment against one defendant held not to require reversal of judgment in favor of another defendant as to which neither plaintiffs nor the defendant against whom judgment was rendered complained or took any exception. *International & G. N. Ry. Co. v. Hamon* (Civ. App.) 173 S. W. 613.

Under Court of Civil Appeals rule 62a (149 S. W. x), a decree allowing a recovery of lands sold under execution from the purchasers and of the proceeds of other sales from the sheriff, which was erroneous only as to the latter, will be reversed only as to that part. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

Where severable causes of action are joined and tried together against two or more defendants, the reversal of the judgment as to one does not require reversal as to the others. *Kansas City, M. & O. Ry. Co. v. Cave* (Civ. App.) 174 S. W. 872.

Where, because of agreement, judgment could not be reversed as to one defendant for denial of nominal damages, held that it would be improper to reverse as to the other defendant. *Northcutt v. Hume* (Civ. App.) 174 S. W. 974.

Where there was no relation between two railroad companies, the reversal of a judgment against the company which appealed will not require reversal of a judgment in favor of the other company. *Pecos & N. T. Ry. Co. v. Holmes* (Civ. App.) 177 S. W. 505.

Where one of two carriers, defendants in action for damages to shipment of cattle, had instructed verdict in its favor, and the other suffered judgment, and alone appealed, the judgment, though reversed and remanded as to the appellant, would be affirmed as to such defendant. *San Antonio & A. P. Ry. Co. v. Shankle & Lane* (Civ. App.) 183 S. W. 115.

Although a judgment must be reversed as to the several liabilities of the defendants to each other, that does not require that it also be reversed as to the liability of one of them to the plaintiff. *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867.

Where nonappealing defendant was sued only as member of firm, held, that reversal of judgment against the firm required a reversal of the judgment against him. *Miller v. First State Bank & Trust Co. of Santa Anna*, 184 S. W. 614.

Reversal of judgment against appealing defendants held not to require reversal of judgment against nonappealing defendants on separate and distinct causes of action. *Id.*

An assignment of error to an allowance of \$172.55, of which \$34 was possibly erroneous, will be entirely overruled when the \$34 deduction would make no appreciable difference in the result, especially where there is no assignment specifying the \$34 item. *Texas Bldg. Co. v. Collins* (Civ. App.) 187 S. W. 404.

Under rule 62a for Court of Civil Appeals (149 S. W. x), and where policy showed that parties intended that it should be a severable contract, judgment for plaintiff would be reversed in so far as it affected interest claimed as an heir and by assignment of other heirs of deceased joint beneficiary. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

Where only one of defendants appealed from denial of his privilege to be sued in county of his residence, and judgment was reversed and dismissed as to him, it would not be disturbed as against other defendants. *Hughes v. Turner* (Civ. App.) 189 S. W. 87.

Under the statute providing that there shall be but one final judgment in a case, in an action against contractor and sureties on contractor's bond, a judgment against contractor on admission of liability and sustaining exceptions of sureties to complaint, being a final judgment, to which contractor was not a party, a reversal for error will operate as a reversal as to all parties. *Buell Planing Mill Corp. v. Bullard* (Civ. App.) 189 S. W. 776.

Under Court of Civil Appeals rule 62a (149 S. W. x), a judgment, improperly rendered in a cross-action by one defendant against another, can be reversed without reversing the judgment properly rendered for plaintiff. *Wood v. Love* (Civ. App.) 190 S. W. 235.

Where recovery awarded attorneys suing a railroad and its injured employé was conditioned upon the liability of the road at all for the damages in excess of the amount already paid the employé in settlement, a reversal in favor of the road operated as a reversal of the entire judgment. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

Where judgment was rendered in favor of one defendant and against others and no complaint was made on appeal as to the judgment in favor of that defendant, that part of the judgment will not be reversed on reversal of the judgment against the other defendants, if the presence of the successful defendant is not necessary in the subsequent proceedings. *Doolen v. Hulsey* (Civ. App.) 192 S. W. 364.

A judgment refusing to vacate a judgment against a married woman, on a note signed by her without her husband joining and without his consent, and merely enjoining the execution thereof, will be reversed, former judgment to be declared void. *Shaw v. Proctor* (Civ. App.) 193 S. W. 1104.

Where one defendant alone appealed, there was no warrant for reversing the judgment on behalf of another defendant, who did not appeal. *Sullivan v. Doyle* (Sup.) 194 S. W. 136.

Where case is submitted on an incorrect measure of damages, and the appellate court cannot determine what might have been the result if correctly submitted, it will be reversed, although the verdict might be sustained by the evidence if a correct measure had been adopted. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

Reversal on appeal by a defendant from judgment for plaintiff in trespass to try title affects only them and those parties to the suit, who were interested in the issues in litigation between them. *Ketchum v. Boggs* (Civ. App.) 194 S. W. 201.

— **Rendering final judgment.**—Where the case was fully developed below, it is the duty of the appellate court, if possible, to render such judgment as should have been

rendered by the trial court. *Ball-Carden Co. v. Ridgell* (Civ. App.) 171 S. W. 509; *Miller v. McCord* (Civ. App.) 159 S. W. 159; *Marshall v. Beason* (Civ. App.) 165 S. W. 75; *Missouri, K. & T. Ry. Co. of Texas v. Moore* (Civ. App.) 172 S. W. 568; *Kirby Lumber Co. v. Henry* (Civ. App.) 178 S. W. 23; *Dunlap v. Squires* (Civ. App.) 186 S. W. 843; *West Texas Lumber Co. v. Tom Green County* (Civ. App.) 188 S. W. 283; *Graham v. Cansler* (Civ. App.) 191 S. W. 856; *St. Louis Southwestern Ry. Co. of Texas v. Harrell* (Civ. App.) 194 S. W. 971.

In a suit for partition, where the defendants resisted the plaintiffs' claim on the ground of the ten-year statute of limitations, and the record showed no other claim of title and that the claim of limitations was insufficient, and did not indicate that the defendants had been prevented from making their strongest case, on reversal of an erroneous judgment for the defendants judgment will be entered for the plaintiffs. *Williams v. Randall* (Civ. App.) 158 S. W. 253.

That defendants did not introduce any of the witnesses who testified on the trial, and that the testimony for plaintiff was in the main uncontradicted, did not make it improper to render judgment for plaintiff on the reversal. *Bridgewater v. Hooks* (Civ. App.) 159 S. W. 1004.

Where the Court of Appeals cannot find to its satisfaction that there was no issue presented by the evidence which should have been submitted to the jury, which was not submitted, it cannot render the judgment which should have been rendered below, where the trial court improperly rendered judgment on its own findings on a question not submitted to the jury. *Payne v. Ellwood* (Civ. App.) 163 S. W. 93.

When a verdict is too uncertain to support a judgment, the appellate court cannot enter judgment thereon, since to do so would be to make the verdict for the jury. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

Where plaintiff proved his case in the lower court and the defendant failed to establish any defense whatever, judgment will be rendered for plaintiff on appeal from a judgment for the defendant. *Bixler v. Rinn* (Civ. App.) 166 S. W. 96.

Where counsel for defendant insurer consented to the appellate court's determination of their counsel fees, the court will allow a fee, though there be no evidence before it, instead of remanding the cause. *Wright v. Grand Lodge K. P., Colored* (Civ. App.) 173 S. W. 270.

Under this article the Court of Civil Appeals cannot enter judgment on reversal unless the evidence was such that the district court should have instructed a verdict for appellant. *Mitchum v. Chicago, R. I. & G. Ry. Co.* (Sup.) 173 S. W. 878, reversing judgment *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 140 S. W. 811.

In action to enjoin defendants from interfering with the property and books of a farmers' union, held, that the court, on reversing judgment for defendants, might render judgment for plaintiffs. *Ryan v. Witt* (Civ. App.) 173 S. W. 952.

Where plaintiff has not made out a cause of action, judgment for plaintiff will be reversed and rendered. *Freear-Brin Furniture Co. v. Merritt* (Civ. App.) 174 S. W. 859.

In an action against a city for injury from electric current, where evidence was only enough to raise a suspicion that the city's current was on its wires, appellate court would reverse judgment for plaintiff and render judgment for city. *McKinney Ice, Light & Coal Co. v. Montgomery* (Civ. App.) 176 S. W. 767.

Plaintiff held not entitled to judgment on appeal where the jury specially found defendant's negligence, but the special issues failed to require a finding that the acts of deceased were negligent. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

Under this article plea of privilege held to be sustained on appeal, instead of remanding for new trial on such plea. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

The court, reversing final judgment in action to set aside execution sale, confirming judgment on which sale was had, must enter such judgment as could, under the pleadings, verdict, and evidence, have been entered by the trial court. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 180 S. W. 928.

On plaintiff's appeal from judgment of the county court denying judgment for the amount admitted by defendant to be due, it was the duty of the Court of Civil Appeals under the statute to render the judgment which should have been rendered by the county court. *Fletcher v. Grinnan* (Civ. App.) 181 S. W. 550.

By direct provision of this article, where the judgment below is reversed, and there is no matter of fact to be ascertained, damage to be assessed, and the matter to be decreed is not uncertain, the court will render the judgment the court below should have rendered. *Prudential Life Ins. Co. of Texas v. Smyer* (Civ. App.) 183 S. W. 825.

Where apparently plaintiffs' only available witnesses testified fully, without showing a necessary fact, under this article, the cause will not be remanded for new trial, on reversal, but judgment will be rendered. *Mutual Film Corp. v. Morris & Daniel* (Civ. App.) 184 S. W. 1060.

Though defendant's plea in abatement, on ground of pendency of another action, between same parties, involving same subject-matter, in district court of another county, had attached to it a certified copy of the petition and answer in such district court, the Court of Appeals, sustaining the plea, has no power to render judgment dismissing the case. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

The court, on reversing a judgment for the beneficiary of the member of a fraternal order, can render judgment for the order, where the uncontradicted evidence shows that under the constitution the member was not entitled to a death donation. *United Brotherhood of Carpenters and Joiners of America v. Luck* (Civ. App.) 189 S. W. 1036.

In a suit on a note and to foreclose a chattel mortgage, if an allegation of value is found by appellate court to be insufficient to fix jurisdiction of county court, it would merely require a reversal of case, and not a dismissal. *Dempster Mill Mfg. Co. v. Humphries* (Civ. App.) 189 S. W. 1110.

Under this article the court will, when the case has been fully developed and the losing party has not been forced to proceed on defective pleadings, render judgment instead of remanding the case where the remand is sought apparently for the purpose of amendment. *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* (Civ. App.) 192 S. W. 607.

Where appellant insurance company proved a cancellation of the policy sued upon, appellee failing to establish grounds for setting it aside and there being nothing to suggest his testimony would be different, judgment will be entered for appellant. *Globe Fire Ins. Co. v. Limburger* (Civ. App.) 193 S. W. 222.

In action on a fire policy where court should have instructed a verdict for defendant because plaintiff did not show an insurable interest, held, that the appellate court will render judgment for defendant. *St. Paul Fire & Marine Ins. Co. v. McQuary* (Civ. App.) 194 S. W. 491.

— **Remand for new trial or further proceedings.**—Where the evidence greatly preponderates against the judgment, but there are facts tending to support the findings, the Court of Civil Appeals cannot reverse and render judgment for the defeated party, but must reverse and remand. *W. R. Miller & Co. v. Hobdy* (Civ. App.) 159 S. W. 96.

Appellate courts cannot reverse and render judgment because the verdict is against the great preponderance of the evidence, but they may reverse and remand the case for a new trial. *St. Louis Southwestern Ry. Co. of Texas v. Cole* (Civ. App.) 159 S. W. 146.

Under this article, where on the facts found plaintiff was entitled to judgment, and the facts were fully developed, held that on reversal of a judgment for defendant a new trial would not be granted to enable them to procure additional evidence. *Bridgewater v. Hooks* (Civ. App.) 159 S. W. 1004.

Upon reversal by United States Supreme Court of judgment affirming judgment for plaintiff, in action for death of employé, because of error in overruling exceptions to petition, on the ground that it did not show whether the state or federal statutes applied, held, that judgment would not be rendered for defendant, but that the case would be remanded for a new trial. *St. Louis, S. F. & T. Ry. Co. v. Seale* (Civ. App.) 160 S. W. 317.

Where an action was brought as one to recover for a deficiency in acreage of land contracted to be sold by reason of the existence of a road on the land, upon reversing a judgment for plaintiff for failure to sustain the action on that ground, the Court of Civil Appeals will not return the case to permit amendment of the petition so as to allege an action for fraudulent representations that the road had been abandoned. *Bonzer v. Garrett* (Civ. App.) 162 S. W. 934.

In an action to recover for mental suffering from delay in a telegram, the court, on reversing for want of notice of plaintiff's interest sufficient to sustain a recovery, will remand for another trial, where it appeared that another witness might testify as to notice. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 162 S. W. 999.

In an action for usury, where the trial court did not find whether plaintiff had executed a release of the usury, and its conclusion that the release was unsupported by consideration was erroneous, the court must reverse and remand the cause, and cannot finally dispose of it. *Cotton v. Beatty* (Civ. App.) 162 S. W. 1007.

Where plaintiff was entitled, at most, to nominal damages, and recovered costs in the court below, a judgment for defendant would not be remanded to enable plaintiff to recover nominal damages. *Major v. Hefley-Coleman Co.* (Civ. App.) 164 S. W. 445.

Under this article a judgment for plaintiff will not be reversed without remand, even though the evidence showed that plaintiff was not entitled to recover on the cause of action stated, where plaintiff might amend his pleadings, and recover on the cause of action set up in the amended pleadings. *Ft. Worth & D. C. Ry. Co. v. Copeland* (Civ. App.) 164 S. W. 857.

The evidence being insufficient to sustain the judgment setting aside an order of the Railroad Commission requiring reversal, but, there being some evidence of the order being unjust and unreasonable, and the case appearing not to have been fully developed, it will be remanded. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

Where, though a petition was demurrable, the demurrer was either overruled or not presented, judgment erroneously rendered for defendant on another ground will be reversed in order that plaintiff might amend. *Ogg v. Ogg* (Civ. App.) 165 S. W. 912 (following) *Jiron v. Jiron* (Civ. App.) 136 S. W. 493.

Where the court erroneously rendered judgment for the defendant on a cross-action in an amount equal to plaintiff's judgment, the case need not be remanded for new trial, but judgment will be rendered for the plaintiff, under this article. *Dees v. Thompson* (Civ. App.) 166 S. W. 56.

Where the record on appeal from a judgment shows that it was rendered on admissions made for purposes only of hearing a motion for judgment, the court reversing the judgment must remand it because the case had not been fully developed in the trial court. *State Exchange Bank v. Smith* (Civ. App.) 166 S. W. 666.

If in the opinion of the court on appeal the verdict is contrary to the evidence, or against such preponderance of the evidence, that it ought not to stand, a new trial must be awarded. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

Liabilities of the several defendants in a suit for personal injuries, where a verdict had been directed for them on account of plaintiff's contributory negligence, held not to be determined on appeal, but to require a new trial. *Keevil v. Ponsford* (Civ. App.) 173 S. W. 518.

A judgment on a general verdict for plaintiff will be reversed, the case remanded for new trial, the custom which could make the insurance valid not having been pleaded or considered at the trial; the testimony having been an irresponsive answer. *Norwich Union Fire Ins. Society v. Dalton* (Civ. App.) 175 S. W. 459.

Court of Civil Appeals on appeal from judgment of county court not acquiring jurisdiction on appeal from justice's court will reverse judgment and remand. *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657.

Where verdict was for plaintiff, and defendant appealed, assigning error to improper mode of proof of deceased witness' testimony on a former trial, and the other evidence was insufficient to sustain the verdict, the appellate court would not reverse and render judgment, but remand for new trial. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

In an action for injuries to a motor car, held that a judgment for plaintiff would not, under evidence tending to show discovered peril, be reversed without remand, though he was guilty of contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Hart* (Civ. App.) 178 S. W. 795.

Where amended petition shows an amount beyond the jurisdiction of the trial court, but the record does not show the amount originally sued for, the cause will be remanded, instead of dismissing it. *San Antonio & A. P. Ry. Co. v. Schaeffer* (Civ. App.) 179 S. W. 540.

In a suit to enforce a chattel mortgage on a stock of goods, where the jury found against the last purchaser in favor of his vendors, held that, where it did not appear whether they found against his plea of misrepresentations or found a ratification, the erroneous judgment should be reversed and remanded, instead of merely reversed. *Denman v. James* (Civ. App.) 180 S. W. 1157.

Where case had been fully developed and did not show liability of certain defendants, new trial held not to be granted upon reversal of judgment for plaintiff. *McMurry v. Tuttle* (Civ. App.) 181 S. W. 694.

Where the case was fully developed below, and the evidence showed defendant was not liable, judgment for plaintiff should be reversed on appeal without remand. *Kansas City, M. & O. Ry. Co. of Texas v. Adams* (Civ. App.) 182 S. W. 365.

On reversal of judgment in favor of original defendant and rendition of judgment for plaintiff on plaintiff's appeal, new trial held to be granted as between such defendant and other defendants against whom it asked judgment. *Mosler Safe Co. v. Atascosa County* (Civ. App.) 184 S. W. 324.

In trespass to try title, where there was no proof of the exact amount that plaintiffs would lose by the judgment and the court could not determine the amount of recovery for breach of warranty to plaintiffs, the case, as between plaintiffs and their warrantor, would be remanded for a trial of issue of damages. *Diffie v. White* (Civ. App.) 184 S. W. 1065.

Though the evidence shows that the amount in controversy removed the case from the jurisdiction of the county court where brought, the case would not be dismissed, but remanded, so that plaintiff might, if he could in good faith, amend to show jurisdiction, and, if not, dismiss. *Glasscock v. Sinks* (Civ. App.) 185 S. W. 405.

Appellate courts will not reverse judgments that the parties may amend their pleadings to conform to the evidence. *Texas Hide & Wool Co. v. Edwards* (Civ. App.) 185 S. W. 886.

Under rule 62a for Courts of Civil Appeals (149 S. W. x), where issues in an action were severable, and error affected only a part of matter in controversy, findings of trial court, not found to be prejudicial, will be deemed conclusive, and judgment affirmed as to that part, and the cause remanded for trial of issues affected by error. *Donada v. Power* (Civ. App.) 186 S. W. 871.

Court of Civil Appeals would not set aside verdict for injured lineman and grant a new trial for alleged insufficient evidence to show that he did not understand the nature and effect of his release. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

Court of Civil Appeals held unable to dismiss, instead of reversing and remanding, upon sustaining appellee's cross-assignment that trial court erred in not sustaining plea of abatement on ground of pendency in district court of another county of a suit between the same parties, involving the same subject-matter. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

Even where the court below had no jurisdiction, it is the better practice on appeal to reverse and remand. *Id.*

In an action against street railroad by party who drove his automobile in broad daylight against moving street car, reversed for determination of material issues of fact. *Southern Traction Co. v. Hawkins* (Civ. App.) 191 S. W. 570.

Where it does not appear that the case has been fully developed as to one issue, it should on reversal be remanded, and judgment should not be rendered on appeal. *Gulf, C. & S. F. Ry. Co. v. McKie* (Civ. App.) 191 S. W. 576.

Where a judgment for plaintiff in trespass to try title was reversed upon assignments relating to the admission of evidence, case will be remanded for another trial, instead of entering judgment for defendant in the Court of Civil Appeals. *Leal v. Moglia* (Civ. App.) 192 S. W. 1121.

Where justice court had no jurisdiction of action, plaintiff seeking to recover in excess of jurisdictional amount, and cause was appealed to county court, and thence to Court of Civil Appeals, latter will not remand to give plaintiff opportunity to amend to eliminate question of jurisdiction by reducing amount sought. *Houston & T. C. R. Co., v. Patterson* (Civ. App.) 193 S. W. 691.

— **Proceedings after remand.**—Where an order of the county court dismissing an appeal from the justice was reversed and the cause remanded, the county court on retrial had full jurisdiction to make all proper orders regarding costs. *Tevebaugh v. Smith Land Co.* (Civ. App.) 163 S. W. 664.

Where an order dismissing a cause appealed from a justice was reversed on a further appeal to the Court of Civil Appeals and the cause remanded for trial, no further order setting aside the order of dismissal was necessary to reinstate the cause and confer jurisdiction on the county court to retry it. *Id.*

A ruling on evidence on appeal is the law of the case on retrial. *Western Union Telegraph Co. v. Erwin* (Civ. App.) 164 S. W. 908.

Where a judgment is reversed for error, and the cause remanded, failure of the trial court to comply with the ruling of the appellate court is cause for reversal, though appellant may also have a remedy by mandamus. *First State Bank & Trust Co. v. Southwestern Engineering & Construction Co.* (Civ. App.) 170 S. W. 860.

Allowance of compensation to a guardian ad litem for infant defendants may in part be made after affirmance of judgment on appeal. *Simmons v. Arnim* (Civ. App.) 173 S. W. 184.

Bill of review will lie in district court after judgment of an appellate court and after mandate has been issued for observance, without leave granted by appellate court. *Houston E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 194 S. W. 642.

**Construction and effect of judgment.**—An adjudication, in an action to foreclose a vendor's lien notes, of matters between two defendants against each other in their independent cross-actions is not a part of the main suit, but is severable from it and from judgment, so that a reversal as to one of the defendants or as to part of the judgment cannot open up the whole judgment. *Swift v. Beemer* (Civ. App.) 160 S. W. 989.

Where plaintiff sues to recover land and obtains judgment below and continues in possession until the case is reversed, defendant is entitled to recover the reasonable rental value. *Neff v. Heimer* (Civ. App.) 163 S. W. 140.

A reversal of a judgment held to carry with it a judgment against another party defendant who did not appeal. *Garrett v. A. G. McAdams Lumber Co.* (Civ. App.) 163 S. W. 320.

Under art. 1997, providing that there shall be but one judgment, reversal as to one defendant reverses judgment as to both. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

If the trial court's judgment was not final, the Court of Civil Appeals did not acquire jurisdiction, and its judgment of affirmance is a nullity, and should be set aside. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

Reversal held to necessitate another trial, since it does not conclusively appear that the case was fully developed in the court below. *Dunlap v. Squires* (Civ. App.) 186 S. W. 843.

**Collateral attack.**—A judgment of the Court of Civil Appeals as to which the Supreme Court denied a writ of error cannot be impeached collaterally. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

### Art. 1627. [1028] Judgment on affirmance or rendition, etc.; damages adjudged, when; finality.

**Affirmance of judgment dissolving injunction.**—This article does not authorize the assessment of damages on the affirmance of a judgment dissolving an injunction restraining a sale under a deed of trust. *Hicks v. Murphy* (Civ. App.) 162 S. W. 925.

### Art. 1628. [1024] No reversal for want of form.

1. **Prejudice to rights of party as ground of review.**—Without a showing of injury from the error of the trial court, the error is harmless. *American Surety Co. of New York v. Hardwick* (Civ. App.) 186 S. W. 804.

3. — **Errors not affecting result.**—A judgment will not be reversed for error, unless it probably caused the rendition of an improper judgment. *Paris & G. N. R. Co. v. Flanders* (Civ. App.) 165 S. W. 98; *Cooney v. Dandridge* (Civ. App.) 158 S. W. 178; *Missouri, K. & T. Ry. Co. of Texas v. Perryman* (Civ. App.) 160 S. W. 406; *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120; *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819; *Myers v. Grantham* (Civ. App.) 187 S. W. 532.

Where a substituted trustee seized property under a chattel mortgage which had been fully satisfied, error, committed by the court in an action for conversion of the property, in restricting the powers of the trustee under the mortgage is harmless. *John E. Morrison Co. v. Butler* (Civ. App.) 158 S. W. 1185.

Where judgment on a fire policy was only for \$500, the fact that a finding that the property destroyed was worth \$1,000 was not warranted by the evidence was harmless. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

In an action on an award, and also upon the merits of the controversy, where the jury sustained the award, and, independently thereof, found for plaintiff on the merits, the award, or any errors in the arbitration proceedings, became immaterial. *Slaughter v. Crisman & Nesbit* (Civ. App.) 178 S. W. 1.

The refusal of the court in an election contest to cast out alleged illegal ballots is harmless, where, if such ballots had been rejected, it would not have affected the result. *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

In action to try title, finding by jury that defendant acquired title by limitation rendered errors assigned as to issue of dedication and record title harmless. *City of El Paso v. Wiley* (Civ. App.) 180 S. W. 661.

Under rule 62a of the Court of Civil Appeals (149 S. W. x), prohibiting reversal for harmless error, the Court of Civil Appeals cannot reverse for error from which no substantial injury resulted. *Koch v. Noster* (Civ. App.) 182 S. W. 372.

Error in overruling plea of limitation to certain damages in action for personal injuries did not injure defendant, where instructions did not authorize recovery for such damages, and no such damages were recovered. *Southern Traction Co. v. Reagor* (Civ. App.) 186 S. W. 272.

Where court's conclusion that plaintiff husband was entitled to divorce for cruel treatment was clearly established, assignment of error that another ground of divorce was not properly proved or pleaded is immaterial. *Nesbit v. Nesbit* (Civ. App.) 194 S. W. 405.

Court of Appeals will not reverse for error not reasonably calculated to cause, or which did not probably cause, rendition of improper judgment. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 194 S. W. 1154.

4. — **Errors in cases of decisions correct on merits.**—Under Court of Civil Appeals Rule 62a (149 S. W. x), an error which is merely technical is not a ground for reversal. *Trinity & B. V. Ry. Co. v. Voss* (Civ. App.) 160 S. W. 663.

7. **Presumption as to effect of error.**—In an action for the price of a traction engine, where the defendant's own testimony may have conclusively established plaintiff's plea of estoppel, in which case error in excluding defendant's evidence as to breach of war-



ranty would have been harmless, this court in support of a judgment for plaintiff must indulge the presumption that it was harmless. *Clark & Schaeffer v. Gaar-Scott Co.* (Civ. App.) 163 S. W. 681.

In the absence of a statement of facts, the Court of Civil Appeals was unable to conclude that error, if any, in admitting certain evidence was harmful. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 164 S. W. 903.

Courts of Civil Appeals rule 62a (149 S. W. x), prohibiting reversals unless the error complained of amounted to such a denial of appellant's rights as probably caused the rendition of an improper judgment, abolished the presumption that injury results from an erroneous ruling. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

Rule that the admission of incompetent evidence is not ground for reversal, where there is competent evidence sufficient to support the judgment, since it will be presumed that the court based its findings only upon the competent evidence, held not to apply, where the bill of exceptions expressly stated that incompetent evidence was considered by the court. *Texas & P. Ry. Co. v. Dickson Bros.* (Civ. App.) 167 S. W. 33.

It must appear that an erroneous charge calculated to mislead the jury did not have that effect, or the judgment will be reversed. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

In action for slander, allegations that plaintiff would be debarred from honorable employment and excluded from society of respectable people held not objectionable as being vague and uncertain. *Southwestern Telegraph & Telephone Co. v. Wilkins* (Civ. App.) 183 S. W. 429.

**8. Burden to show prejudice from error.**—The burden is on appellant to show injury as well as error. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819; *Houston & T. C. R. Co. v. Loofts* (Civ. App.) 160 S. W. 300; *Jones v. Doty* (Civ. App.) 165 S. W. 15; *City of Comanche v. Hoff & Harris* (Civ. App.) 170 S. W. 135; *Fuller v. El Paso Live Stock Commission Co.* (Civ. App.) 174 S. W. 930; *Lyon-Gray Lumber Co. v. Nocona Cotton Oil Co.* (Civ. App.) 194 S. W. 633.

**9. Errors favorable to party complaining.**—An appellant cannot complain of errors in his favor. *Farmers' & Merchants' Bank v. Owens* (Civ. App.) 178 S. W. 734; *St. Louis Southwestern Ry. Co. v. Wilkes* (Civ. App.) 159 S. W. 126; *Sherman Oil Mill v. Neff* (Civ. App.) 159 S. W. 137; *Woolley v. Canyon Exch. Co.* (Civ. App.) 159 S. W. 403; *Citizens' Planing Mill Co. v. Tunstall* (Civ. App.) 160 S. W. 424; *Cotton v. Cooper* (Civ. App.) 160 S. W. 597; *Citizens' Nat. Bank of Waco v. Abeel* (Civ. App.) 160 S. W. 609; *Missouri, K. & T. Ry. Co. of Texas v. Leabo* (Civ. App.) 161 S. W. 382; *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405; *Lattimore v. Puckett & Wear* (Civ. App.) 161 S. W. 951; *Missouri, K. & T. Ry. Co. of Texas v. Barber* (Civ. App.) 163 S. W. 116; *Staley v. Colony Union Gin Co.* (Civ. App.) 163 S. W. 381; *Richards v. Osborne* (Civ. App.) 164 S. W. 392; *Dees v. Thompson* (Civ. App.) 166 S. W. 56; *Johnson v. Conger* (Civ. App.) 166 S. W. 405; *Dallas Consol. Electric St. Ry. Co. v. Stone* (Civ. App.) 166 S. W. 708; *Memphis Cotton Oil Co. v. Goode* (Civ. App.) 171 S. W. 284; *Prince v. Taylor* (Civ. App.) 171 S. W. 826; *Scarborough v. Wheeler* (Civ. App.) 172 S. W. 196; *Ara v. Rutland* (Civ. App.) 172 S. W. 993; *Woodard v. Eskridge* (Civ. App.) 174 S. W. 868; *Texas Cent. R. Co. v. Claybrook* (Civ. App.) 178 S. W. 580; *Parker v. Watt* (Civ. App.) 178 S. W. 718; *Capps v. City of Longview* (Civ. App.) 178 S. W. 730; *San Antonio, U. & G. R. Co. v. Green* (Civ. App.) 182 S. W. 392; *Hicks v. Hunter* (Civ. App.) 183 S. W. 792; *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867; *Heard v. Bowen* (Civ. App.) 184 S. W. 234; *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070; *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289; *Panhandle & S. F. Ry. Co. v. Norton* (Civ. App.) 188 S. W. 1011; *Chicago, R. I. & G. Ry. Co. v. Comstock* (Civ. App.) 189 S. W. 109; *Cochran v. Gibson* (Civ. App.) 191 S. W. 161; *Graham v. Kessler* (Civ. App.) 192 S. W. 299; *Dunn v. Land* (Civ. App.) 193 S. W. 698; *Pennock v. Texas Builders' Supply Co.* (Civ. App.) 193 S. W. 760; *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 194 S. W. 462; *Vaky v. Phelps* (Civ. App.) 194 S. W. 601; *Hattaway v. Planters' Cotton Oil Co.* (Civ. App.) 194 S. W. 1119.

**10. Technical or formal errors.**—An error of 30 cents in a judgment is too trivial an amount to warrant reviewing it. *Fatherree v. Pickens* (Civ. App.) 188 S. W. 947.

**11. Parties.**—In an action against an original contractor and the owner of a building for materials furnished a subcontractor, defendants were not prejudiced by the failure to join representatives of the subcontractor, as he left no property subject to execution. *Wilson v. Sherwin-Williams Paint Co.* (Civ. App.) 160 S. W. 418.

Where a grocery company sued a bankrupt retail grocer and the executrix of his guarantor on the unsatisfied portion of its claim, the joinder of the debtor, though improper, was not prejudicial to the executrix; judgment having been in favor of the debtor on account of his discharge. *Neblett v. Cooper Grocery Co.* (Civ. App.) 180 S. W. 1162.

Any error in overruling exception to petition, on the ground of the action being against a firm and not its members held harmless, under the circumstances, and in view of Rev. St. 1911, art. 1863. *Wright Bros. v. Leonard* (Civ. App.) 183 S. W. 780.

Though another was improperly joined as defendant, yet judgment having been rendered against defendant alone, and plaintiff not having appealed therefrom improper joinder was not ground for reversal under rule 62a (149 S. W. x), it being presumed the verdict was warranted, there being no statement of facts. *Missouri, K. & T. Ry. Co. of Texas v. Elias* (Civ. App.) 184 S. W. 312.

Where the state sued to recover taxes assessed for school purposes for the use of a school district, and district, the proper party and in whose favor alone judgment was rendered, came in by trial amendment, error, if any, in joining state as plaintiff was harmless. *Clark v. State* (Civ. App.) 189 S. W. 84.

**13. Pleading.**—In general.—Failure to allege in the petition the part of the contract sued on, which limited plaintiff's right of recovery to a certain amount, was harmless to the defendant, where the entire contract was read in evidence and the court limited plaintiff's recovery to the amount limited in the contract. *Northern Irr. Co. v. Dodd* (Civ. App.) 162 S. W. 946.

The mere failure to replead as directed by rule 27 for the district and county courts (142 S. W. xix), if the case is not then tried, will not work a reversal. *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28.

Where the number of the case in which a judgment was rendered was incorrectly given in an application for garnishment under it, but there was no question as to its identity, the mistake was not reversible error. *Citizens' Bank & Trust Co. v. Rogers* (Civ. App.) 170 S. W. 258.

In trespass to try title by partnership, sustaining of plea in abatement for misjoinder held harmless as to one of the partners who was permitted to proceed as plaintiff for the recovery of the surveys to which he claimed title. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

Where loss was due to initial carrier furnishing improper car, carrier held not prejudiced by exclusion of an allegation of answer that liability should terminate on delivery to connecting carrier. *International & G. N. Ry. Co. v. J. E. Bryant & Co.* (Civ. App.) 171 S. W. 815.

Failure to verify petition as required by art. 1829b was not ground for reversal. *Order of Aztecs v. Noble* (Civ. App.) 174 S. W. 623.

Error, if any, in omitting reference to condition precedent, which would not have affected result, would not justify a reversal of judgment for plaintiff. *Just v. Herry* (Civ. App.) 174 S. W. 1012.

Where a chattel mortgage erroneously set up the giving of two instead of a single note to secure the debt, the error was immaterial and foreclosure could be had. *Bailey v. Culver* (Civ. App.) 175 S. W. 1083.

In an action for breach of contract to buy cattle, allegation of complaint that quantity sold was two cars, defective for vagueness, held harmless under defendant's pleadings on the evidence. *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

In an action against a bank for breach of contract, the improper joinder of a tort action against the cashier and bank held prejudicial. *First Nat. Bank of Gorman v. Mangum* (Civ. App.) 176 S. W. 1197.

In an action against a telephone company for damages for mental suffering, any defect in the petition in not stating how plaintiff could have gone to the funeral held harmless. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 178 S. W. 574.

In an injured servant's action against his employer who had not accepted the Workmen's Compensation Act, any error in the unnecessary allegation by plaintiff that defendant employed large numbers of employes, and that it was not a subscriber to the act, was harmless. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

In an action for debt and to foreclose vendor's lien notes, the answer, setting up failure of consideration, not being verified, and hence not sufficient to prevent the taking of a default judgment, its withdrawal by defendant's attorney did not injure defendant. *Browne v. McGuire* (Civ. App.) 181 S. W. 479.

In an action for conversion, where plaintiff alleged malice in the seizing of his cattle by the defendant's officers and agents under a writ of attachment, error in not stating the names of such officers and agents held harmless. *First Nat. Bank of Hereford v. Hogan* (Civ. App.) 185 S. W. 880.

In wife's suit to set aside decree of divorce fraudulently obtained by husband, allegations of petition, if unnecessary or in the nature of evidentiary facts, held not to require a reversal of judgment for her, in view of rule 62a for Courts of Civil Appeals (149 S. W. x). *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

In action for damages for breach of contract to sell gravel, overruling an exception on the ground of variance between allegation as to amount to be delivered daily, and contract attached as exhibit to petition showing the amount to be delivered, held harmless error, as contract controlled and cured any misdescription in the pleading. *Grand Prairie Gravel Co. v. Joe B. Wills Co.* (Civ. App.) 188 S. W. 680.

Where a petition in suit on a written contract and to foreclose a mechanic's lien was filed in the district court, and defendant cited to appear therein, and judgment by default was rendered, the fact that the petition was addressed to the judge of the county court and filed therein and was later withdrawn to be filed in the district court was not reversible error. *Herring v. Herring* (Civ. App.) 189 S. W. 1105.

14. — **Demurrers or exceptions.**—Where the evidence warrants the cancellation of a written contract for the sale of land on the ground of fraudulent representations, ruling of the court on exceptions to the petition because the facts set up a verbal contract for the sale of land at variance with the written contract are immaterial, and error therein is harmless. *Sargent v. Barnes* (Civ. App.) 159 S. W. 366.

The improper overruling of an exception to the petition is harmless, where the issue raised by the part excepted to was not submitted to the jury. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

In an action against a corporation on a note for the price of property, the overruling of an exception to allegations in the petition as to plaintiff's knowledge of how the corporation's business was carried on and his belief that the president had authority to execute the note in question is harmless, even though such allegations were immaterial. *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897.

Defendant was not prejudiced by the sustaining of a demurrer to his special answer, where evidence as to the matters embraced therein was admitted under the general issue and submitted to the jury, which found the facts against him. *Hill v. Neese* (Civ. App.) 160 S. W. 314.

The overruling of defendant's exception to plaintiff's allegation of a certain item of damage by the increased cost of insurance, due to defendant's maintaining a nuisance, a planing mill, was not prejudicial to defendant, where no evidence was offered on that point and no recovery for such damage was awarded by the jury. *Citizens' Planing Mill Co. v. Tunstall* (Civ. App.) 160 S. W. 424.

In an action to compel performance of a contract of rental, or in alternative for damages, with cross-action for cancellation of the contract, damages, and possession, the sustaining of a special exception to the part of the petition seeking a mandatory injunction held immaterial, where the jury found against plaintiff on every issue. *Coy v. Rowland* (Civ. App.) 164 S. W. 14.

Error in overruling an exception to an immaterial portion of a petition was harmless. *Lammers v. Wolfertz* (Civ. App.) 164 S. W. 1102.

Where, in an action for injuries to a brakeman by defendant's violation of the safety appliance acts, the court submitted all the issues that could arise under the federal or state statutes, which are practically the same, defendant was not prejudiced by the sustaining of exceptions to the part of its answer pleading the federal law. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

Error in overruling exceptions to a defense of failure of consideration for a note sued on by a bona fide holder, and in receiving evidence in support of such plea, was cured by peremptory withdrawal of such defense from the jury. *First Nat. Bank of Iowa City, Iowa, v. Dorsey* (Civ. App.) 166 S. W. 54.

The error in overruling exceptions to the petition in an action against a railroad company for injuries to animals frightened by a train, for failure to specify the date of the injury, or identify the train, held not prejudicial, where the company procured the testimony of its engineers running trains on the date of the accident proved by plaintiff. *Chicago, R. I. & G. Ry. Co. v. Clark* (Civ. App.) 166 S. W. 129.

Error, if any, in overruling defendant's exception to a petition because ambiguous, in that it first declared upon a written contract for lumber sold and delivered, and then that it was delivered at defendant's special instance and request, was harmless, in view of undisputed evidence establishing the written contract declared on. *Fink v. San Augustine Grocery Co.* (Civ. App.) 167 S. W. 35.

Courts of Civil Appeals rule 62a. (149 S. W. x) having the effect of abolishing presumption of injury from error, any error in overruling an exception to a general allegation of negligence, no injury therefrom being apparent, is not ground for reversal. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545.

The facts alleged in the petition being specifically answered by defendant, any error in overruling an exception to the petition as not complying with Rev. St. 1911, art. 1827, as amended by Acts 33d Leg. c. 127, requiring a petition to plead by separate paragraphs, consecutively numbered, each fact going to make up the cause of action and other allegations, was harmless. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

Refusal to sustain a special exception to a portion of plaintiff's original petition seeking damages for particular expenses held harmless, where the verdict showed that none of such items were included. *Houston & T. C. Ry. Co. v. Meadors* (Civ. App.) 169 S. W. 1106.

In action for wrongful attachment, assignment of error complaining of overruling of exception to allegations intended as a basis for exemplary damages held without merit, where no exemplary damages were recovered. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

In action for wrongful attachment, error, if any, in overruling exceptions to allegations that judgment in the attachment action was rendered on a debt not due held cured by instruction that the former judgment was res judicata of that issue. *Id.*

Where plaintiff sued for breach of contract, and pleaded certain slanderous charges to show malice only, and the court did not submit the issue of slander to the jury as a ground for recovery, the overruling of exceptions for misjoinder of causes of action was not ground for reversal of a judgment for plaintiff. *Oklahoma Fire Ins. Co. v. Ross* (Civ. App.) 170 S. W. 1062.

Any error in overruling exceptions to certain allegations of a petition held harmless. *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 171 S. W. 1097.

Overruling of exception to paragraph in defendant's answer, held harmless, where the issue raised thereby was not submitted, and no assignment was presented to the admission of any testimony thereon. *Williams v. Phelps* (Civ. App.) 171 S. W. 1100.

Where no bill of exception was taken to an instruction that a contract was nonenforceable, error could not be assigned to the overruling of exceptions to allegations of the answer that the contract was invalid. *Id.*

The failure to sustain an exception to a paragraph of the petition is not reversible error, where the paragraph is not material to plaintiff's recovery. *Morris v. Brown* (Civ. App.) 173 S. W. 265.

Error in overruling an exception to a supplemental petition which sought to allege res judicata was harmless, where no evidence was admitted on that issue. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

Error in overruling a special exception to a petition for personal injury held harmless, where defendant was not surprised by evidence, and did not complain of the damages. *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974.

Error in overruling exceptions to a portion of a petition on which no relief was granted does not require a reversal of the judgment. *Staacke v. Routledge* (Civ. App.) 175 S. W. 444.

Where appellant was in no way prejudiced by the misjoinder of parties, the overruling of his exception and plea setting up misjoinder was not prejudicial. *Western Nat. Bank of Ft. Worth v. Texas Christian University* (Civ. App.) 176 S. W. 1194.

Where appellant was in no way prejudiced by the misjoinder of actions, the overruling of his exception and plea setting up misjoinder was not prejudicial. *Id.*

Where issues raised by allegations in a petition to which special exceptions were overruled, were not submitted, and defendant's liability was predicated on other facts, the ruling was immaterial. *Missouri, K. & T. Ry. Co. of Texas v. Ryon* (Civ. App.) 177 S. W. 525.

In an action on note, error, if any, in overruling exception to answer, held harmless, where the subsequent pleadings raised such issue and the case was tried thereon. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

Defendant cannot complain of court's refusal to rule on a general demurrer, unless it is well taken. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

In an action for damage to a shipment of bananas, error in overruling a special exception to the petition which insufficiently described the property as to quantity was harmless, where defendant admitted receiving four carloads and in a cross-action its

freight charges at a rate per hundred were allowed. *Illinois Cent. R. Co. v. Freeman* (Civ. App.) 182 S. W. 369.

Error in sustaining special exceptions to the petition is harmless, if the general demurrer was properly sustained. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

Any error in sustaining demurrer for misjoinder was harmless, where case was tried as though no demurrer had been sustained. *Broussard v. Wilson* (Civ. App.) 183 S. W. 814.

Overruling exceptions to a pleading of a certain item of damage was harmless, where the item was not submitted to the jury. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

Overruling special exception to petition in trespass to try title for failure to set out chain of title was not prejudicial, where parties agreed at trial upon common source of title. *Keppler v. Texas Lumber Mfg. Co.* (Civ. App.) 184 S. W. 353.

In action on contract, error in overruling plaintiff's exception to a part of the defendant's answer was harmless, where the matter set up in a paragraph as a defense was not submitted to the jury as constituting a defense. *Tyler Box & Lumber Mfg. Co. v. City Nat. Bank of Paris* (Civ. App.) 185 S. W. 352.

Overruling exceptions to allegations of the petition as irrelevant and immaterial, if error, held harmless, for which, under Court of Civil Appeals rule 62a (149 S. W. x), reversal is not to be granted. *Thornton v. Goodman* (Civ. App.) 185 S. W. 926.

Under rule 62a (149 S. W. x), erroneous refusal of special exception complaining of failure of petition to specify negligence complained of, in an action for the killing of a cow, was harmless where verdict against railroad company was based on failure to keep a lookout, and engineer was present and testified. *Kansas City, M. & O. Ry. Co. of Texas v. Oates* (Civ. App.) 185 S. W. 1014.

Under rule 62a (149 S. W. x) nonprejudicial error in overruling a demurrer held not ground for reversal. *Blount, Price & Co. v. Payne* (Civ. App.) 187 S. W. 980.

An order sustaining a demurrer to the answer which in effect strikes from the answer allegations of the insured's breach of a provision of policy, requiring annual inventory and keeping record of the business, is prejudicial error where defendant's defense of forfeiture was left without legal basis or pleading. *Westchester Fire Ins. Co. v. McMinn* (Civ. App.) 188 S. W. 25.

Where plaintiff foreign corporation, was not entitled to recover on contract, because it violated art. 7796, denouncing monopolies, erroneous sustaining of exception to plaintiff's petition, directed to absence of allegation that it had procured permit to do business in state, was harmless. *W. T. Rawleigh Medical Co. v. Mayberry* (Civ. App.) 193 S. W. 199.

In a suit by a private citizen under authority of art. 4674, to enjoin an incorporated club from maintaining a liquor nuisance, error in overruling a special exception to paragraphs of complaint constituting an inquiry into defendants' charter rights and an effort to prevent it from exercising a power not authorized by law held harmless. *Rowan v. Stowe* (Civ. App.) 193 S. W. 434.

Any error in sustaining exceptions to pleadings was harmless, where the case was thereafter heard on the merits without reference to them. *Paddleford v. Wilkinson* (Civ. App.) 194 S. W. 467.

In architect's action for services in preparing plans, defended on ground that plans did not comply with building ordinances, error, in overruling exceptions to allegations as to the building ordinances held harmless, in view of rule 62a (149 S. W. x). *Vaky v. Phelps* (Civ. App.) 194 S. W. 601.

Error, if any, in overruling exception to a supplemental petition for insufficiency of allegations is harmless, where the amended petition on which the case was tried contained the same language and no exception was taken to it. *Id.*

If there was error in overruling plaintiff's special exceptions to plea of defendants praying for recovery of one-half of money paid to plaintiff in an effort to reach compromise which was never consummated, such error was harmless in view of evidence which amply supported the claim. *Farmers' & Merchants' Nat. Bank of Nocona v. H. C. London & Sons* (Civ. App.) 194 S. W. 635.

15. — **Amendments and supplemental pleadings.**—Error, if any, in allowing plaintiff to file a supplemental petition after the parties had announced ready for trial and the exceptions to his pleadings had been overruled held not such a denial of defendant's rights as to be reasonably calculated to cause the rendition of an improper judgment, within rule 62a for Courts of Civil Appeals (149 S. W. x), and so not to be reversible error. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

A judgment will not be reversed merely because the basis of a plaintiff's cause of action first appeared in the supplemental petition. *J. I. Case Threshing Mach. Co. v. First Nat. Bank* (Civ. App.) 160 S. W. 662.

Where, though the county court on an appeal from justice court denied a motion to strike out a cause of action not set up in the justice court, when made, the judgment recited that it was sustained, thus indicating that the new cause of action was not considered, the error was cured. *McKneely v. Beatty* (Civ. App.) 161 S. W. 18.

Any error on the ground that the first supplemental petition alleged a new cause of action was immaterial, where the judgment for plaintiff described the land as described in the original petition with an immaterial variance. *Howard's Unknown Heirs v. Skolant* (Civ. App.) 162 S. W. 978.

Where defendant's original answer alleged that plaintiff's agent had express authority to make the contract in controversy, any error in permitting defendant at the trial to amend so as to allege that the agent had implied authority, etc., and refusing plaintiff a continuance, was not prejudicial, where the agent, on the stand admitted that he did have express authority. *Houston Oil Co. of Texas v. Payne* (Civ. App.) 164 S. W. 886.

A change in the district court on appeal from a justice's court of the cause of action is harmless, where no issues brought about by the change were presented to the jury by the court or the evidence. *Adair v. Stallings* (Civ. App.) 165 S. W. 140.

That plaintiff styled his amendment filed in the county court on appeal from the justice court a "first supplemental petition," instead of an amendment, was immaterial. *American Nat. Ins. Co. v. Bird* (Civ. App.) 174 S. W. 939.

Error, if any, permitting plaintiff to file a supplemental petition after the jury had

been selected and the other pleadings read, was not reversible error, where it in no wise influenced the jury in finding against appellant. *St. Louis Southwestern Ry. Co. of Texas v. Shumate* (Civ. App.) 178 S. W. 1050.

Refusal to permit defendant to withdraw its announcement of ready, to file a supplemental answer, held harmless, where the answer was actually an amendment, and the court permitted the filing of a trial amendment. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

Plaintiff held not injured by refusal to permit amendment setting up estoppel and offering to do equity, as it made such offer at the trial and introduced all its evidence. *Houston Oil Co. of Texas v. Reese-Corriher Lumber Co.* (Civ. App.) 181 S. W. 745.

Within Court of Civil Appeals rule 62a (149 S. W. x) against reversal for error in trial, unless probably causing improper judgment, overruling demurrer for want of allegation held harmless; the allegation being in supplemental petition. *Merchants' & Bankers' Fire Underwriters v. Williams* (Civ. App.) 181 S. W. 859.

Permitting filing of trial amendment after verdict held not prejudicial, where prayer of the amendment was refused. *Alamo Trust Co. v. Prudential Life Ins. Co. of Texas* (Civ. App.) 183 S. W. 787.

Where an original cross-bill, with the trial amendments permitted to be filed, contained all material allegations in an offered amendment, an erroneous ruling of the trial court refusing to permit the amendment was harmless. *Vaden v. Buck* (Civ. App.) 184 S. W. 318.

It was harmless error to overrule an exception to an amended petition because it did not specifically designate the pleading amended by giving the date the same was filed. *Clark v. State* (Civ. App.) 189 S. W. 84.

16. — **Striking out or dismissing.**—Where the judge who first tried the action dismissed the complaint, failure of the third judge who entertained an amended complaint, substantially the same, to set aside the dismissal was not reversible error, for the rendering of a judgment in favor of the plaintiff was in effect a setting aside of such order; the same being true of an interlocutory order entered by a second judge which required the addition of other parties defendant. *Webb v. Reynolds* (Civ. App.) 160 S. W. 152.

17. **Interlocutory proceedings.**—Refusal of continuance asked for by associate counsel because they were not "fully informed," and the leading counsel were otherwise engaged, cannot be complained of, the pleading and record indicating not only a well-prepared case, but a thorough understanding of the issues by counsel. *Banner v. Thomas* (Civ. App.) 159 S. W. 102.

In an action on an insurance policy, defendant was not prejudiced by the action of the court in refusing it a continuance to procure the testimony of a witness to prove a fact which insured admitted at the trial. *Camden Fire Ins. Ass'n of Camden, N. J., v. Puett* (Civ. App.) 164 S. W. 418.

Denial of continuance for absence of witness held not prejudicial to plaintiff, where the affidavit of the absent witness produced on a motion for a new trial showed that his testimony would not have been of material benefit to plaintiff. *Smith v. Huff* (Civ. App.) 164 S. W. 429.

If the court abused its discretion in refusing a nonstatutory application for a continuance, it was not ground for reversal, where the application was based on the absence of a witness, who testified fully on a former trial, which testimony was admitted by agreement, and was to the same effect that the application stated he would testify. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

In suit on a note, where the judgment, under the circumstances, was binding on a bank not a party, error of the court in declining to continue the case to make the bank a party was immaterial. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

Plaintiff in garnishment proceedings cannot complain of errors in rulings affecting mechanic's liens, where the claim of the debtor's assignee exceeded the amount due from the garnishee. *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (Civ. App.) 185 S. W. 382.

Defendant cannot complain of refusal of continuance to take the deposition of an absent physician, where with the consent of plaintiff such physician's written certificate was used before the jury. *Missouri, K. & T. Ry. Co. of Texas v. Cornelius* (Civ. App.) 188 S. W. 34.

Refusal to consider motion to quash attachment was harmless, where motion was without merit. *Stringfellow v. Patterson* (Civ. App.) 192 S. W. 555.

Failure to grant defendant continuance where amendment at trial raises new issue is without prejudice where court's charge does not authorize a finding on such issue. *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

Action of trial court in overruling motion for continuance to procure cumulative testimony of absent witness does not present such error as should cause reversal of judgment entered against defendant who asked continuance. *Texas & N. O. R. Co. v. Cummins* (Civ. App.) 193 S. W. 161.

18. **Selection and impaneling of jurors.**—Where the bill of exceptions did not show that one of several connecting carrier defendants exhausted its peremptory challenges, or that any juror was accepted objectionable to such carrier, it was not prejudiced by the court's refusal to allow each defendant six peremptory challenges. *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427.

Where the overruling of a challenge for cause to a juror is assigned as error, and it appears that the juror was removed on peremptory challenge, but it does not appear that the party complaining used his other five challenges, or was compelled to accept an objectionable juror, no prejudice is shown to have resulted from the ruling. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

Where the attorney for an injured servant, on the voir dire examination of a juror connected with an indemnity insurance policy, after ascertaining that the master had no policy with the juror's company, asked further questions, endeavoring to insinuate that the master was protected by such a policy, his conduct was prejudicial, and warrants reversal. *Houston Car Wheel & Machine Co. v. Smith* (Civ. App.) 160 S. W. 435.

The allowance of improper questions upon the voir dire examination of jurors is not,

under rule 32a. (149 S. W. x), reversible error, where it did not appear that defendant was prejudiced. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

The refusal to allow a peremptory challenge to the jury, if error, was harmless, where the court took the case from the jury and instructed a verdict. *Brown v. City of Amarillo* (Civ. App.) 180 S. W. 654.

Overruling of challenge compelling plaintiff to exhaust peremptory challenges held not prejudicial where it did not appear that he was required to accept an objectionable juror. *Lockney State Bank v. Bolin* (Civ. App.) 184 S. W. 553.

In an action for personal injuries, error of plaintiff's counsel in asking two jurors, who did not serve on jury, if they represented an insurance company, was harmless, where bill of exceptions fails to show that question was asked in the presence and hearing of persons who afterwards served on jury. *Carter-Mullaly Transfer Co. v. Bustos* (Civ. App.) 187 S. W. 396.

Bills of exception charging error in overruling challenges to jurors qualified by showing that the challenged jurors did not sit in the case, and that appellant did not object to any other jurors nor ask further challenge, do not show prejudicial error. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 191 S. W. 591.

Though it was not proper to allow each party six challenges, there was no ground for complaint where each exercised but three challenges. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549.

Where assignments of error complain of action of court in not excluding jurors, thereby compelling appellant to challenge them, appellant must show that he exhausted his challenges, or was in some way injured by being compelled to exhaust his peremptory challenges. *Colgrove v. Falfurrias State Bank* (Civ. App.) 192 S. W. 580.

19. **Conduct of trial or hearing in general.**—Remarks of trial judge in ruling held not reversible error. *Rhea v. Cook* (Civ. App.) 174 S. W. 892; *Taylor v. Butler*, 168 S. W. 1004; *Coker v. Cooper's Estate* (Civ. App.) 176 S. W. 145.

Error cannot be predicated on the refusal to permit counsel for interveners to open and close where there was no injury therefrom. *Cooper v. Marek* (Civ. App.) 166 S. W. 58; *Abernathy Rigby Co. v. McDougle, Cameron & Webster Co.* (Civ. App.) 187 S. W. 503.

In an action for injuries in a crossing accident, defendant held not prejudiced by the act of the officer in permitting the jury to visit the crossing. *St. Louis Southwestern Ry. Co. of Texas v. Waits* (Civ. App.) 164 S. W. 870.

A remark of the trial judge in reference to a matter which was not submitted to the jury was not prejudicial, and did not justify a reversal under Courts of Civil Appeals rule 62a. *Lammers v. Wolfertz* (Civ. App.) 164 S. W. 1102.

Where a verdict for plaintiff raised a presumption that the rights of the parties were fixed by a verbal contract of shipment and not a written contract, limiting the carrier's liability, a statement by the trial court, that some of the provisions of the written contract were without consideration, while improper, is harmless. *St. Louis, S. F. & T. Ry. Co. v. Gilliam & Jackson* (Civ. App.) 166 S. W. 706.

Harm to plaintiff from holding of night session of court when his leading counsel was absent through illness held not apparent. *Kirkland v. Rutherford* (Civ. App.) 171 S. W. 1031.

Where rescission of a contract is sought for insanity alone, statement by the court that it was alleged the party "was by reason of impaired health and weakness of mind wholly incapacitated" was prejudicial error. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

Under rule 31 for district and county courts (142 S. W. xx), including the provision of art. 1953, held, on the pleadings in an action on a note, that the granting to defendants of the right to open and close was reversible error. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

In view of the record and the failure of appellant to show that the award of damages was excessive, held that a remark by the court urging the jury to agree upon that issue was not reversible error. *Western Union Telegraph Co. v. Oakley* (Civ. App.) 181 S. W. 507.

In an action for damages for flooding lands, where the verdict was large, and the court made improper remarks before the jury, the error cannot be disregarded on the ground that it affected only the question of excessiveness of the verdict. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

Where the court's statement in the presence of the jury could not have influenced the jury on issues submitted, there was no reversible error. *First Nat. Bank v. Mangum* (Civ. App.) 194 S. W. 647.

20. **Rulings as to evidence in general.**—Error in requiring defendants to prove the execution of a receipt offered in evidence by them held harmless, where its execution was readily proved, the genuineness of the signature was admitted, and the court charged that it was prima facie evidence of a payment. *Richards v. Osborne* (Civ. App.) 164 S. W. 392.

Defendant may not complain of the insufficiency of evidence of grounds of negligence, alleged in the petition, other than those which were submitted to the jury. *Southern Pac. Co. v. Walker* (Civ. App.) 171 S. W. 264.

An assignment of error attacking the sufficiency of the evidence with respect to issues not submitted to the jury will be overruled. *Bankers' Trust Co. v. Franks* (Civ. App.) 178 S. W. 602.

Errors in receipt and rejection of evidence in a personal injury action held not reversible, under rule 62a (149 S. W. x) for the Court of Civil Appeals, not being prejudicial in view of other evidence. *Missouri, O. & G. Ry. Co. of Texas v. Webb* (Civ. App.) 178 S. W. 728.

21. **Rulings on questions to witnesses.**—Permitting defendant to ask a hypothetical question, as to the cause of the condition in which witness found deceased, cannot be complained of, where his answer was not responsive and the facts he stated could not prejudice plaintiffs. *Weisner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 164 S. W. 405.

Error in allowing a witness to be improperly cross-examined as to his character held not harmless. *Houston Chronicle Pub. Co. v. Tiernan* (Civ. App.) 171 S. W. 542.

Where the witness had already testified to a fact assumed in question, the assumption is harmless error. *Galveston, H. & S. A. Ry. Co. v. Vogt* (Civ. App.) 181 S. W. 841.

In an action for commission for effecting a sale of land, where the evidence as to plaintiff's right to commission was conflicting, the impropriety of allowing leading questions to plaintiff as to defendant's promise cannot be held harmless under rule 62a (149 S. W. x) and the judgment affirmed. *Britain v. Rice* (Civ. App.) 183 S. W. 84.

Cross-examination of witness based on contradictory testimony of another witness, while not approved, because presenting the testimony of the impeaching witness to the jury twice, once by deposition, and once orally, held not so prejudicial as to warrant a reversal. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

In an action against a carrier for damages to cattle by delay, failure by the plaintiff to answer questions as to other shipments made by him was not prejudicial error. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

The admission of testimony on cross-examination which tended to contradict inferences to be drawn from the testimony of the same witness on direct examination was not prejudicial error. *Id.*

In an action for personal injuries, where plaintiff unintentionally obtained information on cross-examination of defendant's witnesses that defendant was insured, error held not reversible. *Carter-Mullaly Transfer Co. v. Bustos* (Civ. App.) 187 S. W. 396.

In action for personal injuries, error in permitting physician, witness for plaintiff, to testify that he had testified for certain railroads in similar cases, was not reversible, where defendant had asked witness if plaintiff was going to pay him, and other physicians testified to plaintiff's injuries. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

In personal injury action, the exclusion of testimony of doctors on former trial as impeaching evidence held not prejudicial. *Missouri, K. & T. Ry. Co. v. Gilcrease* (Civ. App.) 187 S. W. 714.

In action by pedestrian for injuries when struck by railway cars, it was prejudicial to permit plaintiff's brother, who was not a physician, to testify that after the accident plaintiff recovered and was in perfect health. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

In action against railroads for delay in shipment of live stock, impropriety in question to plaintiffs calling for expression of opinion, held harmless in view of answer. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

22. **Admission of evidence—Prejudicial effect in general.**—*Kansas City, M. O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582; *Kelly v. Dallas Consol. Electric St. Ry. Co.* (Civ. App.) 158 S. W. 221; *Ilseng v. Carter* (Civ. App.) 158 S. W. 1163; *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138; *Sargent v. Barnes* (Civ. App.) 159 S. W. 366; *Fred A. Jones Co. v. Drake* (Civ. App.) 159 S. W. 441; *Baker v. McDonald* (Civ. App.) 159 S. W. 450; *Newman v. Tarwater* (Civ. App.) 159 S. W. 495; *Porter v. Memphis Land & Commission Co.* (Civ. App.) 159 S. W. 497; *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897; *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909; *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145; *Cooper Cotton Oil Co. v. Cooper Gin Co.* (Civ. App.) 160 S. W. 401; *Sullivan v. Fant* (Civ. App.) 160 S. W. 612; *T. B. Allen & Co. v. Shook* (Civ. App.) 160 S. W. 1091; *St. Louis, B. & M. Ry. Co. v. Barnes* (Civ. App.) 162 S. W. 373; *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 162 S. W. 457; *McCarthy v. Blackwell* (Civ. App.) 162 S. W. 1163; *Ft. Worth & R. G. Ry. Co. v. Keith* (Civ. App.) 163 S. W. 142; *Maddox v. Clark* (Civ. App.) 163 S. W. 309; *Higby v. Kirksey* (Civ. App.) 163 S. W. 315; *Higby v. Kirksey* (Civ. App.) 163 S. W. 315; *San Antonio, U. & G. R. Co. v. Bobo* (Civ. App.) 163 S. W. 377; *Patrick v. Barnes* (Civ. App.) 163 S. W. 408; *St. Louis, B. & M. Ry. Co. v. Fielder* (Civ. App.) 163 S. W. 606; *Kennedy v. Winfrey* (Civ. App.) 163 S. W. 1018; *Houston Oil Co. of Texas v. Payne* (Civ. App.) 164 S. W. 886; *Hughes v. Four States Life Ins. Co.* (Civ. App.) 164 S. W. 898; *Ferguson v. Fain* (Civ. App.) 164 S. W. 1040; *Ferguson v. Fain* (Civ. App.) 164 S. W. 1040; *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059; *St. Louis Southwestern Ry. Co. v. Duncan* (Civ. App.) 164 S. W. 1087; *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8; *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28; *Texas & N. O. R. Co. v. Francis* (Civ. App.) 165 S. W. 40; *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120; *Castleberry v. Bussey* (Civ. App.) 166 S. W. 14; *Spires v. McElroy* (Civ. App.) 166 S. W. 457; *Henson v. Baxter* (Civ. App.) 166 S. W. 460; *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495; *Barnard & Moran v. Williams* (Civ. App.) 166 S. W. 910; *Loftus v. Sturgis* (Civ. App.) 167 S. W. 14; *Reserve Loan Life Ins. Co. v. Benson* (Civ. App.) 167 S. W. 266; *Whited v. Johnson* (Civ. App.) 167 S. W. 812; *Supreme Lodge K. P. v. Mims* (Civ. App.) 167 S. W. 835; *Allen v. Bland* (Civ. App.) 168 S. W. 35; *Continental Oil & Cotton Co. v. Wristen & Johnson* (Civ. App.) 168 S. W. 395; *Funk v. House* (Civ. App.) 168 S. W. 481; *Sanford v. John Finnegan Co.* (Civ. App.) 169 S. W. 624; *Pecos & N. T. Ry. Co. v. Morrison* (Civ. App.) 169 S. W. 1098; *Missouri, K. & T. Ry. Co. of Texas v. Interstate Chemical Co.* (Civ. App.) 169 S. W. 1120; *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309; *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Civ. App.) 171 S. W. 517; *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 171 S. W. 537; *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 171 S. W. 806; *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 171 S. W. 1097; *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114; *Browder v. Memphis Independent School Dist.* (Civ. App.) 172 S. W. 152, judgment affirmed (Sup.) 180 S. W. 1077; *State Mut. Fire Ins. Co. of Texas v. Cathey* (Civ. App.) 172 S. W. 187; *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739; *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222; *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241; *Ft. Worth & D. C. Ry. Co. v. Firestone* (Civ. App.) 173 S. W. 919; *Orient Land Co. v. Reeder* (Civ. App.) 173 S. W. 939; *Ft. Worth & R. G. Ry. Co. v. Hales* (Civ. App.) 173 S. W. 991; *Fuller v. El Paso Live Stock Commission Co.* (Civ. App.) 174 S. W. 930; *Rogers v. Ezell* (Civ. App.) 174 S. W. 1011; *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465; *Gulf, C. & S. F. Ry. Co. v. Graham* (Civ. App.) 175 S. W. 472; *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W.

488; *International & G. N. Ry. Co. v. Davis* (Civ. App.) 175 S. W. 509; *Texas & P. Ry. Co. v. Eddleman* (Civ. App.) 175 S. W. 775; *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822; *Cline v. Booty* (Civ. App.) 175 S. W. 1081; *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084; *Houston B. & T. Ry. Co. v. Lewis* (Civ. App.) 176 S. W. 68; *Texas Mfg. Co. v. Fitzgerald* (Civ. App.) 176 S. W. 891; *Harris v. Shear* (Civ. App.) 177 S. W. 136; *Phillip-Carey Co. v. Manes* (Civ. App.) 177 S. W. 158; *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17; *Gibson v. Dickson* (Civ. App.) 178 S. W. 44; *Gulf, C. & S. F. Ry. Co. v. Bogy* (Civ. App.) 178 S. W. 577; *Missouri, O. & G. Ry. Co. of Texas v. Webb* (Civ. App.) 178 S. W. 728; *Waterhouse v. Gallup* (Civ. App.) 178 S. W. 773; *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833; *International & G. N. Ry. Co. v. Penney* (Civ. App.) 178 S. W. 970; *Pulkra-beck v. Griffith & Griffith* (Civ. App.) 179 S. W. 282; *Missouri, K. & T. Ry. Co. of Texas v. Dale Bros. Land & Cattle Co.* (Civ. App.) 179 S. W. 935; *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104; *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119; *De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.* (Civ. App.) 180 S. W. 153; *Moose v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 179 S. W. 75, writ of error granted (Sup.) 180 S. W. 225; *City of El Paso v. Wiley* (Civ. App.) 180 S. W. 661; *Denman v. James* (Civ. App.) 180 S. W. 1157; *McCormack v. Crawford* (Civ. App.) 181 S. W. 485; *Galveston, H. & S. A. Ry. Co. v. Brune* (Civ. App.) 181 S. W. 547; *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361; *Illinois Cent. R. Co. v. Freeman* (Civ. App.) 182 S. W. 369; *West Texas Supply Co. v. Duniyan* (Civ. App.) 182 S. W. 425; *Scruggs v. Gage* (Civ. App.) 182 S. W. 696; *San Antonio & A. P. Ry. Co. v. Shankle & Lane* (Civ. App.) 183 S. W. 115; *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384; *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404; *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773; *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839; *Kerbow v. Woodridge* (Civ. App.) 184 S. W. 746; *Cherbonnier v. Shirley* (Civ. App.) 185 S. W. 641; *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979; *Matthews v. Kirkland* (Civ. App.) 186 S. W. 423; *Weller v. Missouri, K. & T. Ry. Co.* (Civ. App.) 187 S. W. 374; *Connally v. Same* (Civ. App.) 187 S. W. 376; *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508; *Townsend v. Pilgrim* (Civ. App.) 187 S. W. 1021; *Northern Texas Traction Co. v. Nicholson* (Civ. App.) 188 S. W. 1028; *Burrell Engineering & Construction Co. v. Grisier* (Civ. App.) 189 S. W. 102; *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128; *St. Louis Southwestern Ry. Co. of Texas v. Kimmey* (Civ. App.) 189 S. W. 550; *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784; *Nelson v. Butler* (Civ. App.) 190 S. W. 811; *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142; *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804; *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549; *First Texas State Ins. Co. v. Burwick* (Civ. App.) 193 S. W. 165; *Dunn v. Land* (Civ. App.) 193 S. W. 698; *Chapman v. Levy & Levy* (Civ. App.) 193 S. W. 1101.

23. — Facts otherwise established.—*Banner v. Thomas* (Civ. App.) 159 S. W. 102; *Cage v. King* (Civ. App.) 159 S. W. 174; *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145; *Sullivan v. Fant* (Civ. App.) 160 S. W. 612; *Trinity & B. V. Ry. Co. v. Voss* (Civ. App.) 160 S. W. 663; *Sweetwater Cotton Oil Co. v. Birge-Forbes & Co.* (Civ. App.) 160 S. W. 1125; *Ex parte Sams* (Civ. App.) 161 S. W. 388; *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083; *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400; *Lawson v. Hamilton Compress Co.* (Civ. App.) 162 S. W. 1023; *St. Louis & S. F. R. Co. v. Rich* (Civ. App.) 162 S. W. 1194; *Higby v. Kirksey* (Civ. App.) 163 S. W. 315; *Chicago, R. I. & G. Ry. Co. v. Swaggerty* (Civ. App.) 163 S. W. 317; *Randolph v. Lewis* (Civ. App.) 163 S. W. 647; *Clark v. Hendricks* (Civ. App.) 164 S. W. 57; *Missouri, K. & T. Ry. Co. of Texas v. Cadenhead* (Civ. App.) 164 S. W. 395; *Weisner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 164 S. W. 405; *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 164 S. W. 442; *First Nat. Bank v. Chapman* (Civ. App.) 164 S. W. 900; *Texas, G. & N. Ry. Co. v. Berlin* (Civ. App.) 165 S. W. 62; *Southern Pac. Co. v. Vaughn* (Civ. App.) 165 S. W. 885; *Watson v. Rice* (Civ. App.) 166 S. W. 106; *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658; *Sockwell v. Sockwell* (Civ. App.) 166 S. W. 1188; *Corrigan, Lee & Halpin v. Heubler* (Civ. App.) 167 S. W. 159; *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279; *Alexander v. Garcia* (Civ. App.) 168 S. W. 376; *International Travelers' Ass'n v. Branum* (Civ. App.) 169 S. W. 389; *Norton v. Lea* (Civ. App.) 170 S. W. 267; *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809; *Denton v. English* (Civ. App.) 171 S. W. 248; *Molloy v. Brower* (Civ. App.) 171 S. W. 1079; *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 171 S. W. 1097; *Williams v. Phelps* (Civ. App.) 171 S. W. 1100; *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180; *Floegge v. Meyer* (Civ. App.) 172 S. W. 194; *Ratliff v. Wakefield Iron & Coal Land Improvement Co.* (Civ. App.) 172 S. W. 198; *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222; *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619; *Texas & P. Ry. Co. v. Graham & Price* (Civ. App.) 174 S. W. 297; *Holman v. Houston Oil Co.* (Civ. App.) 174 S. W. 886; *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925; *American Nat. Ins. Co. v. Bird* (Civ. App.) 174 S. W. 939; *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465; *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708; *Biggerstaff v. McGill* (Civ. App.) 175 S. W. 711; *Kell v. Ross* (Civ. App.) 175 S. W. 752; *Dunn v. Epperson* (Civ. App.) 175 S. W. 837; *Rowan v. Hodges* (Civ. App.) 175 S. W. 847; *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084; *Houston B. & T. Ry. Co. v. Lewis* (Civ. App.) 176 S. W. 68; *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634; *Chicago, R. I. & G. Ry. Co. v. Core* (Civ. App.) 176 S. W. 778; *McCollow v. Dollar* (Civ. App.) 176 S. W. 876; *J. W. Carter Music Co. v. Evans* (Civ. App.) 177 S. W. 1014; *Slaughter v. Crisman & Nesbit* (Civ. App.) 178 S. W. 1; *Texas Cent. R. Co. v. Claybrook* (Civ. App.) 178 S. W. 580; *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691; *Hall v. Ray* (Civ. App.) 179 S. W. 1135; *McCormack v. Crawford* (Civ. App.) 181 S. W. 485; *Crum v. Thomason* (Civ. App.) 181 S. W. 803; *J. I. Case Threshing Mach. Co. v. Webb* (Civ. App.) 181 S. W. 853; *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83; *Wilson v. Avery Co. of Texas* (Civ. App.) 182 S. W. 884; *Mansell v. Western*



Union Telegraph Co. (Civ. App.) 182 S. W. 1178; Texas & P. Ry. Co. v. Sherer (Civ. App.) 183 S. W. 404; E. Alkemeyer Co. v. McCardell (Civ. App.) 183 S. W. 416; Wolnitzek v. Lewis (Civ. App.) 183 S. W. 819; Zavala Land & Water Co. v. Tolbert (Civ. App.) 184 S. W. 523; Houston Oil Co. of Texas v. Jones (Civ. App.) 184 S. W. 611; Ft. Worth & D. C. Ry. Co. v. Hapgood (Civ. App.) 184 S. W. 1075; Gulf, C. & S. F. Ry. Co. v. Rodriguez (Civ. App.) 185 S. W. 311; Kolp v. S. F. Scattergood & Co. (Civ. App.) 185 S. W. 329; American Nat. Ins. Co. v. Van Dusen (Civ. App.) 185 S. W. 634; Kansas City, M. & O. Ry. Co. of Texas v. Corn (Civ. App.) 186 S. W. 807; Commonwealth Bonding & Casualty Ins. Co. v. Beavers (Civ. App.) 186 S. W. 859; Same v. Brannin (Civ. App.) 186 S. W. 862; Southern Traction Co. v. Frazier (Civ. App.) 186 S. W. 864; Black v. Wilson (Civ. App.) 187 S. W. 493; Peil v. Warren (Civ. App.) 187 S. W. 1052; Boerger v. Vandegrift (Civ. App.) 188 S. W. 948; Ehlinger v. Speckels (Civ. App.) 189 S. W. 348; T. W. Marse & Co. v. Flockinger (Civ. App.) 189 S. W. 1017; Wilson v. J. W. Crowdus Drug Co. (Civ. App.) 190 S. W. 194; Carr v. Wright (Civ. App.) 190 S. W. 254; De Shazo v. Eubank (Civ. App.) 191 S. W. 369; Houston, E. & W. T. Ry. Co. v. Brackin (Civ. App.) 191 S. W. 804; Andrews v. Wilding (Civ. App.) 193 S. W. 192; Texas City Transp. Co. v. Winters (Civ. App.) 193 S. W. 366; Galveston, H. & S. A. Ry. Co. v. Packard (Civ. App.) 193 S. W. 397; Dunn v. Land (Civ. App.) 193 S. W. 698; Missouri, K. & T. Ry. Co. of Texas v. Johnson (Civ. App.) 193 S. W. 728; Alling v. Vander Stucken (Civ. App.) 194 S. W. 443; Slayder v. Palmo (Civ. App.) 194 S. W. 1103.

24. — **Defect supplied or objection removed subsequently.**—Neblett v. Barron (Civ. App.) 160 S. W. 1167; Kansas City Southern Ry. Co. v. Carter (Civ. App.) 166 S. W. 115; Hart-Parr Co. v. Alvin-Japanese Nursery Co. (Civ. App.) 179 S. W. 697; Pierce Fordyce Oil Ass'n v. Woods (Civ. App.) 180 S. W. 1181; E. Alkemeyer Co. v. McCardell (Civ. App.) 183 S. W. 416; Pecos & N. T. Ry. Co. v. McMeans (Civ. App.) 188 S. W. 692; La Grone v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 189 S. W. 99; Earhart v. Agnew (Civ. App.) 190 S. W. 1140; De Bruin v. Santo Domingo Land & Irrigation Co. (Civ. App.) 194 S. W. 654.

25. — **Error cured by withdrawal, striking out, or instructions to jury.**—Scott v. Townsend (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138; T. B. Allen & Co. v. Shook (Civ. App.) 160 S. W. 1091; Martin v. Reid (Civ. App.) 160 S. W. 1094; Kirby Lumber Co. v. Stewart (Civ. App.) 161 S. W. 372; Western Union Telegraph Co. v. Hill (Civ. App.) 162 S. W. 382; International & G. N. Ry. Co. v. Sharpe (Civ. App.) 167 S. W. 814; Missouri, K. & T. Ry. Co. of Texas v. Graham (Civ. App.) 168 S. W. 55; Texas & P. Ry. Co. v. Hardin (Civ. App.) 168 S. W. 1017; Memphis Cotton Oil Co. v. Tolbert (Civ. App.) 171 S. W. 309; Glens Falls Ins. Co. of Glens Falls, N. Y., v. Melott (Civ. App.) 174 S. W. 700; Houston & T. C. R. Co. v. Lindsey (Civ. App.) 175 S. W. 708; Texas & P. Ry. Co. v. Rasmussen (Civ. App.) 181 S. W. 212; Western Union Telegraph Co. v. Oakley (Civ. App.) 181 S. W. 507; Cosgrove v. Smith (Civ. App.) 183 S. W. 109; McLean v. Breen (Civ. App.) 183 S. W. 394; E. Alkemeyer Co. v. McCardell (Civ. App.) 183 S. W. 416; Texas & P. Ry. Co. v. McMillen (Civ. App.) 183 S. W. 773; Thatcher v. Matthews (Civ. App.) 183 S. W. 810; Grand Prairie Gravel Co. v. Joe B. Wills Co. (Civ. App.) 188 S. W. 680; Houston Electric Co. v. Pearce (Civ. App.) 192 S. W. 558; Bright v. Briscoe (Civ. App.) 193 S. W. 156; Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Cheeves (Civ. App.) 193 S. W. 1091.

26. — **On trial without a jury.**—Swan v. Price (Civ. App.) 162 S. W. 994; Half Co. v. Jones (Civ. App.) 169 S. W. 906; United States Fidelity & Guaranty Co. v. Hall (Civ. App.) 173 S. W. 892; Cline v. Booty (Civ. App.) 175 S. W. 1081; Gulf, C. & S. F. Ry. Co. v. Bogy (Civ. App.) 178 S. W. 577; Lawson v. Port Arthur Canal & Dock Co. (Civ. App.) 185 S. W. 600; American Nat. Ins. Co. v. Thompson (Civ. App.) 186 S. W. 254; Keeling v. Poindexter (Civ. App.) 188 S. W. 1018; Wells Fargo & Co. v. Long (Civ. App.) 190 S. W. 530; Wadsworth v. Powell (Civ. App.) 191 S. W. 169.

27. **Exclusion of evidence—Prejudicial effect in general.**—Anderson v. Ryder (Civ. App.) 159 S. W. 1017; Hill v. Neese (Civ. App.) 160 S. W. 314; Hartfield v. Greber (Civ. App.) 160 S. W. 603; Houston Oil Co. of Texas v. Jones (Civ. App.) 161 S. W. 92; Modern Order of Prætorians v. Nelson (Civ. App.) 162 S. W. 17; Rushing v. Citizens' Nat. Bank of Plainview (Civ. App.) 162 S. W. 460; Maxey v. Franklin Life Ins. Co. (Civ. App.) 164 S. W. 438; Carver v. Power State Bank (Civ. App.) 164 S. W. 892; Witt v. Teat, 167 S. W. 302; Owens v. First State Bank of Bronte (Civ. App.) 167 S. W. 798; Gulf, C. & S. F. Ry. Co. v. Boger (Civ. App.) 169 S. W. 1093; Houston & T. C. R. Co. v. Corsicana Fruit Co. (Civ. App.) 170 S. W. 849; Missouri, K. & T. Ry. Co. of Texas v. Dellmon (Civ. App.) 171 S. W. 799; Jefferson Cotton Oil & Fertilizer Co. v. Fridgen & Congleton (Civ. App.) 172 S. W. 739; Texarkana & Ft. S. Ry. Co. v. Terrell (Civ. App.) 172 S. W. 742; Texas & P. Ry. Co. v. Spann (Civ. App.) 173 S. W. 600; McCullough v. Hurt (Civ. App.) 175 S. W. 781; Weatherford, M. W. & N. W. Ry. Co. v. Thomas (Civ. App.) 175 S. W. 822; Dunn v. Epperson (Civ. App.) 175 S. W. 837; Cline v. Booty (Civ. App.) 175 S. W. 1081; Wells Fargo & Co. Express v. Powell (Civ. App.) 177 S. W. 988; Gibson v. Dickson (Civ. App.) 178 S. W. 44; West Texas Supply Co. v. Duniyan (Civ. App.) 182 S. W. 425; Clopton v. Flowers (Civ. App.) 183 S. W. 68; Lester v. Hutson (Civ. App.) 184 S. W. 268; Burchett v. Bristow (Civ. App.) 185 S. W. 349; Appelbaum v. Spinner-Hay Co. (Civ. App.) 186 S. W. 810; Fox v. Houston & T. C. R. Co., 186 S. W. 852; Wentzell v. Chester (Civ. App.) 189 S. W. 304.

28. — **Facts otherwise established.**—Houston Belt & Terminal Ry. Co. v. Dooley (Civ. App.) 160 S. W. 594; Good v. Texas & P. Ry. Co. (Civ. App.) 166 S. W. 670; La Grange & Lockhart Compress Co. v. Hart (Civ. App.) 169 S. W. 373; Neville v. Miller (Civ. App.) 171 S. W. 1109; Hamilton Compress Co. v. Lawson (Civ. App.) 175 S. W. 474; Kell v. Ross (Civ. App.) 175 S. W. 752; Moody v. Chesser (Civ. App.) 183 S. W. 23; Alexander v. Conley (Civ. App.) 187 S. W. 254; Kennedy v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 192 S. W. 1114.

29. — **Same or similar evidence otherwise admitted.**—Kelly v. Dallas Consol. Electric St. Ry. Co. (Civ. App.) 158 S. W. 221; Chicago, R. I. & G. Ry. Co. v. Oliver (Civ. App.) 159 S. W. 853; Hill v. Neese (Civ. App.) 160 S. W. 314; Missouri, K. & T. Ry. Co. of Texas v. McCormick (Civ. App.) 160 S. W. 429; Lane v. Volz & Falwell (Civ. App.) 164 S. W. 20; Houston Belt & Terminal Ry. Co. v. Wilson (Civ. App.) 165 S. W. 560; Texarkana & Ft. S. Ry. Co. v. Terrell (Civ. App.) 172 S. W. 742; King County v. Martin (Civ.

App.) 173 S. W. 960, judgment affirmed on rehearing 173 S. W. 1200; Glens Falls Ins. Co. of Glens Falls, N. Y., v. Melott (Civ. App.) 174 S. W. 700; Missouri, K. & T. Ry. Co. v. Craddock (Civ. App.) 174 S. W. 965; McCullough v. Hurt (Civ. App.) 175 S. W. 781; Turner v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 177 S. W. 204; Foster v. Atliir (Civ. App.) 181 S. W. 520; McGraw v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 182 S. W. 417; Galveston, H. & S. A. Ry. Co. v. Reinhart (Civ. App.) 182 S. W. 436; Yeatts v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 184 S. W. 636; St. Louis Southwestern Ry. Co. of Texas v. Kerr (Civ. App.) 184 S. W. 1058; Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 184 S. W. 1070; Fox v. Houston & T. C. Ry. Co. (Civ. App.) 186 S. W. 852; Houston Oil Co. of Texas v. Stepney (Civ. App.) 187 S. W. 1078; Missouri, K. & T. Ry. Co. of Texas v. Cornelius (Civ. App.) 188 S. W. 34; Wilson v. J. W. Crowds Drug Co. (Civ. App.) 190 S. W. 194; Brotherhood of American Yeomen v. Hickey (Civ. App.) 191 S. W. 162; Kennedy v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 192 S. W. 1114; Missouri, K. & T. Ry. Co. of Texas v. Johnson (Civ. App.) 193 S. W. 728; North American Accident Ins. Co. v. Miller (Civ. App.) 193 S. W. 750.

30. — Error cured by instructions to jury.—Harris v. Wagnon (Civ. App.) 162 S. W. 2.

31. Arguments and conduct of counsel.—Banner v. Thomas (Civ. App.) 159 S. W. 102; Yellow Pine Paper Mill Co. v. Lyons (Civ. App.) 159 S. W. 909; International & G. N. Ry. Co. v. Williams (Civ. App.) 160 S. W. 639; Texas Midland R. R. v. Wiggins (Civ. App.) 161 S. W. 445; Missouri, K. & T. Ry. Co. of Texas v. Burk (Civ. App.) 162 S. W. 457; Southwestern Telegraph and Telephone Co. v. Coffey (Civ. App.) 163 S. W. 112; St. Louis Southwestern Ry. Co. of Texas v. McNatt (Civ. App.) 166 S. W. 89; Gulf, T. & W. Ry. Co. v. Culver (Civ. App.) 168 S. W. 514; Texas & P. Ry. Co. v. Moody (Civ. App.) 169 S. W. 1057; W. R. Case & Sons Cutlery Co. v. Folsom (Civ. App.) 170 S. W. 1066; Anderson & Day v. Darsey (Civ. App.) 171 S. W. 1089; Texarkana & Ft. S. Ry. Co. v. Terrell (Civ. App.) 172 S. W. 742; Kansas City, M. & O. Ry. Co. v. Cave (Civ. App.) 174 S. W. 872; Southwestern Telegraph & Telephone Co. v. Andrews (Civ. App.) 178 S. W. 574; Decatur Cotton Seed Oil Co. v. Belew (Civ. App.) 178 S. W. 607; Horne v. Stockton (Civ. App.) 178 S. W. 962; St. Louis Southwestern Ry. Co. of Texas v. Aston (Civ. App.) 179 S. W. 1128; San Antonio & A. P. Ry. Co. v. Jaramilla (Civ. App.) 180 S. W. 1126; San Antonio & A. P. Ry. Co. v. Littleton (Civ. App.) 180 S. W. 1194; Galveston, H. & S. A. Ry. Co. v. Brune (Civ. App.) 181 S. W. 547; Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 182 S. W. 7; E. Alkemyer Co. v. McCardell (Civ. App.) 183 S. W. 416; Southwestern Telegraph & Telephone Co. v. Long (Civ. App.) 183 S. W. 421; Wolnitzek v. Lewis (Civ. App.) 183 S. W. 819; St. Louis, B. & M. Ry. Co. v. Green (Civ. App.) 183 S. W. 829; Galveston, H. & S. A. Ry. Co. v. Marti (Civ. App.) 183 S. W. 846; Houston, E. & W. T. Ry. Co. v. Hooper (Civ. App.) 184 S. W. 347; Houston Oil Co. of Texas v. Jones (Civ. App.) 184 S. W. 611; La Grone v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 189 S. W. 99; Galveston, H. & S. A. Ry. Co. v. Packard (Civ. App.) 193 S. W. 397; Varn v. Gonzales (Civ. App.) 193 S. W. 1132; Chicago, R. I. & G. Ry. Co. v. Faulkner (Civ. App.) 194 S. W. 651.

32. Demurrer to evidence, dismissal, nonsuit, or direction of verdict.—Citizens' Planing Mill Co. v. Tunstall (Civ. App.) 160 S. W. 424; Senter v. Teague (Civ. App.) 164 S. W. 1045; San Antonio Traction Co. v. Cox (Civ. App.) 154 S. W. 722; Tyler Box & Lumber Mfg. Co. v. City Nat. Bank of Paris (Civ. App.) 185 S. W. 352.

33. Submission of issues or questions to jury.—Atchison, T. & S. F. Ry. Co. v. Word (Civ. App.) 159 S. W. 375; Cooper Cotton Oil Co. v. Cooper Gin Co. (Civ. App.) 160 S. W. 401; Sullivan v. Fant (Civ. App.) 160 S. W. 612; Tinkham v. Wright (Civ. App.) 163 S. W. 615; Wood v. J. M. Radford Grocery Co. (Civ. App.) 164 S. W. 1070; Texas Power & Light Co. v. Bird (Civ. App.) 165 S. W. 8; Smith v. Bogle (Civ. App.) 165 S. W. 35; Paris & G. N. R. Co. v. Flanders (Civ. App.) 165 S. W. 98; International & G. N. Ry. Co. v. Walters (Civ. App.) 165 S. W. 525, reversing judgment on rehearing 161 S. W. 916; Trinity & B. V. Ry. Co. v. Dodd (Civ. App.) 167 S. W. 238; Gosch v. Vrana (Civ. App.) 167 S. W. 757; Texas Co. v. Alamo Cement Co. (Civ. App.) 168 S. W. 62; J. M. Guffey Petroleum Co. v. Dinwiddie (Civ. App.) 168 S. W. 439; Funk v. House (Civ. App.) 168 S. W. 481; Zucht v. San Antonio School Board (Civ. App.) 170 S. W. 840; Martinez v. Gutierrez's Heirs (Civ. App.) 172 S. W. 766; Gordon Jones Const. Co. v. Lopez (Civ. App.) 172 S. W. 987; Galveston, H. & S. A. Ry. Co. v. Roemer (Civ. App.) 173 S. W. 229; Morris v. Brown (Civ. App.) 173 S. W. 265; Texas & P. Ry. Co. v. Key (Civ. App.) 175 S. W. 492; Texas & P. Ry. Co. v. Eddleman (Civ. App.) 175 S. W. 775; International & G. N. Ry. Co. v. Bartek (Civ. App.) 177 S. W. 137; Hamilton v. Fireman's Fund Ins. Co. (Civ. App.) 177 S. W. 173; Krenz v. Strohmeyer (Civ. App.) 177 S. W. 178; Turner v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 177 S. W. 204; Travelers' Ins. Co. v. Harris (Civ. App.) 178 S. W. 816; Bullock v. Galveston, H. & H. R. Co. (Civ. App.) 178 S. W. 826; King v. Collins (Civ. App.) 179 S. W. 899; San Antonio & A. P. Ry. Co. v. Jaramilla (Civ. App.) 180 S. W. 1126; Petty v. City of San Antonio (Civ. App.) 181 S. W. 224; Galveston, H. & S. A. Ry. Co. v. Watts (Civ. App.) 182 S. W. 412; Wilson v. Avery Co. of Texas (Civ. App.) 182 S. W. 884; Moody v. Chesser (Civ. App.) 183 S. W. 23; Kansas City, M. & O. Ry. Co. v. Cole (Civ. App.) 183 S. W. 137; Half Co. v. Waugh (Civ. App.) 183 S. W. 839; Currie v. Glasscock County (Civ. App.) 183 S. W. 1193; Missouri, K. & T. Ry. Co. of Texas v. Norris (Civ. App.) 184 S. W. 261; Houston, E. & W. T. Ry. Co. v. Hooper (Civ. App.) 184 S. W. 347; St. Louis Southwestern Ry. Co. of Texas v. Rutherford (Civ. App.) 184 S. W. 700; Briggs-Weaver Machinery Co. v. Pratt (Civ. App.) 184 S. W. 732; Wolfe City Milling Co. v. Ward (Civ. App.) 185 S. W. 663; Galveston, H. & S. A. Ry. Co. v. Fred (Civ. App.) 185 S. W. 896; Thornton v. Goodman (Civ. App.) 185 S. W. 926; San Antonio & A. P. Ry. Co. v. Schwethelm (Civ. App.) 186 S. W. 414; Alexander v. Conley (Civ. App.) 187 S. W. 254; Kansas City, M. & O. Ry. Co. of Texas v. Durrett (Civ. App.) 187 S. W. 427; Pullman Co. v. Franks (Civ. App.) 187 S. W. 501; Houston Oil Co. of Texas v. Stepney (Civ. App.) 187 S. W. 1078; Jenkins v. Morgan (Civ. App.) 187 S. W. 1091; Pecos & N. T. Ry. Co. v. McMeans (Civ. App.) 188 S. W. 692; Frigid Fluid Co. v. Sid Westheimer Co. (Civ. App.) 189 S. W. 334; Branham v. Hallam (Civ. App.) 191 S. W. 158; St. Louis Southwestern Ry. Co. of Texas v. McMichael (Civ. App.) 191 S. W. 186; Fleck v. Missouri, K. & T. Ry. Co. of Texas

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34. **Instructions to jury—Prejudicial effect in general.**—Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 155 S. W. 678, judgment reversed 106 Tex. 190, 163 S. W. 13; Bowman v. Farmersville Mill & Light Co. (Civ. App.) 158 S. W. 200; Gotoskey v. Grawunder (Civ. App.) 158 S. W. 249; Paris & G. N. R. Co. v. Germany (Civ. App.) 158 S. W. 1037; Jones v. Montague (Civ. App.) 158 S. W. 1053; Texas Cent. R. Co. v. Mallard (Civ. App.) 158 S. W. 1183; Douthitt v. Farrar (Civ. App.) 159 S. W. 182; Sargent v. Barnes (Civ. App.) 159 S. W. 366; Missouri Pac. Ry. Co. v. Cheek (Civ. App.) 159 S. W. 427; Webb v. Harding (Civ. App.) 159 S. W. 1029; Englefield v. International & G. N. Ry. Co. (Civ. App.) 159 S. W. 1033; Texas Cent. R. Co. v. Neill (Civ. App.) 159 S. W. 1180; Dryden v. Makey (Civ. App.) 160 S. W. 302; Cooper Cotton Oil Co. v. Cooper Gin Co. (Civ. App.) 160 S. W. 401; Missouri, K. & T. R. Co. of Texas v. Perryman (Civ. App.) 160 S. W. 406; Benton v. Kuykendall (Civ. App.) 160 S. W. 438; Missouri, K. & T. Ry. Co. of Texas v. Burk (Civ. App.) 160 S. W. 629; T. A. Hill & Son v. Patton & Schwartz (Civ. App.) 160 S. W. 1155; Missouri, K. & T. Ry. Co. of Texas v. Leabo (Civ. App.) 161 S. W. 382; Texas Cent. Ry. Co. v. Rose (Civ. App.) 161 S. W. 387; Ellerd v. Campfield (Civ. App.) 161 S. W. 392; St. Louis Southwestern Ry. Co. of Texas v. Martin (Civ. App.) 161 S. W. 405; Hales v. Peters (Civ. App.) 162 S. W. 386; Missouri, K. & T. Ry. Co. v. Burton (Civ. App.) 162 S. W. 479; Peden Iron & Steel Co. v. Jaimes (Civ. App.) 162 S. W. 965; Missouri, K. & T. Ry. Co. of Texas v. Cooper (Civ. App.) 162 S. W. 1179; Mackay Telegraph-Cable Co. v. Bain (Civ. App.) 163 S. W. 98; Southwestern Telegraph and Telephone Co. v. Coffey (Civ. App.) 163 S. W. 112; Ft. Worth & R. G. Ry. Co. v. Keith (Civ. App.) 163 S. W. 142; Missouri, K. & T. Ry. Co. of Texas v. Stogner (Civ. App.) 163 S. W. 319; Texas & N. O. Ry. Co. v. Siwert (Civ. App.) 163 S. W. 624; Glover v. 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W. 199, judgment reversed (Sup.) 173 S. W. 208, motion to retax costs granted (Sup.) 177 S. W. 954; Iowa City State Bank v. Friar (Civ. App.) 167 S. W. 261; Voigt v. Hunt (Civ. App.) 167 S. W. 745; Funk v. House (Civ. App.) 168 S. W. 481; International & G. N. Ry. Co. v. Isaacs (Civ. App.) 168 S. W. 872; Paschal v. Hudson (Civ. App.) 169 S. W. 911; Norton v. Lea (Civ. App.) 170 S. W. 267; Miller v. Campbell (Civ. App.) 171 S. W. 251; Beard v. International & G. N. Ry. Co. (Civ. App.) 171 S. W. 553; Bulloch v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 171 S. W. 808; Moore v. Cooper Mfg. Co. (Civ. App.) 171 S. W. 1034; Alamo Oil & Refining Co. v. Richards (Civ. App.) 172 S. W. 159; Royal Indemnity Co. v. Schwartz (Civ. App.) 172 S. W. 581; Barrow v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 172 S. W. 724; Rodgers v. Texas & P. Ry. Co. (Civ. App.) 172 S. W. 1117; Sands v. Sedwick (Civ. App.) 174 S. W. 894; Houston & T. C. R. Co. v. Gant (Civ. App.) 175 S. W. 745; Liverpool & London & Globe Ins. Co. v. Lester (Civ. App.) 176 S. W. 602; Rinker v. Galveston-Houston Electric Ry. Co. (Civ. App.) 176 S. W. 737; Southern Pac. Co. v. W. T. Meadors & Co. (Civ. App.) 176 S. W. 882; International & G. N. Ry. Co. v. Bartek (Civ. App.) 177 S. W. 137; Rich v. Park (Civ. App.) 177 S. W. 184; Decatur Cotton Seed Oil Co. v. Belew (Civ. App.) 178 S. W. 607; Wichita Valley Ry. Co. v. Somerville (Civ. App.) 179 S. W. 671; King v. Collins (Civ. App.) 179 S. W. 899; Buchanan v. Houston & T. C. R. Co. (Civ. App.) 180 S. W. 625; Smith v. Texas Traction Co. (Civ. App.) 180 S. W. 933; Consumers' Lignite Co. v. Grant (Civ. App.) 181 S. W. 202; Talley v. Bailey (Civ. App.) 181 S. W. 230; Southern Gas & Gasoline Engine Co. v. Richolson (Civ. App.) 181 S. W. 529; Panhandle & S. F. Ry. Co. v. Jones (Civ. App.) 182 S. W. 1; Tenneskeit v. Galveston Electric Co. (Civ. App.) 182 S. W. 72; Farmers' & Merchants' Nat. Bank of Abilene v. Ivey (Civ. App.) 182 S. W. 706; McLean v. Breen (Civ. App.) 183 S. W. 394; First Texas State Ins. Co. v. Bell (Civ. App.) 184 S. W. 277; Worden v. Kroeger (Civ. App.) 184 S. W. 583; Texas & P. Ry. Co. v. Baker (Civ. App.) 184 S. W. 664; Carver Bros. v. Merrett (Civ. App.) 184 S. W. 741; St. Louis Southwestern Ry. Co. of Texas v. Kerr (Civ. App.) 184 S. W. 1058; Stafford v. Patterson & Nelson (Civ. App.) 184 S. W. 1095; Kolp v. S. F. Scattergood & Co. (Civ. App.) 185 S. W. 329; Burchett v. Bristow (Civ. App.) 185 S. W. 349; Missouri, K. & T. Ry. Co. of Texas v. Whitsett (Civ. App.) 185 S. W. 406; Thornton v. Daniel (Civ. App.) 185 S. W. 585; Galveston Electric Co. v. Hanson (Civ. App.) 187 S. W. 533; Meyer v. Monnig Dry Goods Co. (Civ. App.) 189 S. W. 80; Ft. Worth & D. C. Ry. Co. v. Atterberry (Civ. App.) 190 S. W. 1133; Home Benefit Ass'n of Angelina County v. Jordan (Civ. App.) 191 S. W. 725; Nussbaum & Scharff v. Trinity & B. V. Ry. Co. (Sup.) 194 S. W. 1099.

35. — **Applicability to issues and evidence.**—Texas Midland R. Co. v. Geron (Civ. App.) 162 S. W. 471; Missouri, K. & T. Ry. Co. of Texas v. Barber (Civ. App.) 163 S. W. 116; Weisner v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 164 S. W. 405; Home Ins. Co. v. Peterman (Civ. App.) 165 S. W. 103; Texas & P. Ry. Co. v. White (Civ. App.) 174 S. W. 953; McKinney Ice, Light & Coal Co. v. Montgomery (Civ. App.) 176 S. W. 767; Galveston, H. & S. A. Ry. Co. v. Reinhart (Civ. App.) 182 S. W. 436; San Antonio & A. P. Ry. Co. v. Shankle & Lane (Civ. App.) 183 S. W. 115; Baker v. Drake (Civ. App.) 185 S. W. 879; Ft. Worth & D. C. Ry. Co. v. Yantis (Civ. App.) 185 S. W. 969; Dallas Fair Park Amusement Ass'n v. Barrantine (Civ. App.) 187 S. W. 710; McDonald v. Aetna Life Ins. Co. of Hartford, Conn. (Civ. App.) 187 S. W. 1005; Panhandle & S. F. Ry. Co. v.

Bell (Civ. App.) 189 S. W. 1097; Magnolia Motor Sales Corp. v. Chaffee (Civ. App.) 192 S. W. 562; Scott v. Shine (Civ. App.) 194 S. W. 964; Auto Sales Co. v. Bland (Civ. App.) 194 S. W. 1021.

36. — **Fallure or refusal to charge.**—Pate v. Vardeman (Civ. App.) 158 S. W. 1183; Quanah, A. & P. Ry. Co. v. Johnson (Civ. App.) 159 S. W. 406; Scott v. Townsend (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138; Carter v. South Texas Lumber Yard (Civ. App.) 160 S. W. 626; Stephenville N. & S. T. Ry. Co. v. Walton (Civ. App.) 160 S. W. 651; Staten Auto Co. v. Hogg (Civ. App.) 160 S. W. 982; Ft. Worth & D. C. Ry. Co. v. Taylor (Civ. App.) 162 S. W. 967; Gulf, C. & S. F. Ry. Co. v. Stewart (Civ. App.) 164 S. W. 1059; Kansas City, M. & O. Ry. Co. of Texas v. Treadwell & Wilkison (Civ. App.) 164 S. W. 1089; Luckenbach v. Thomas (Civ. App.) 166 S. W. 99; Cleburne St. Ry. Co. v. Barnes (Civ. App.) 168 S. W. 991; Commonwealth Bonding & Casualty Co. v. Hendricks (Civ. App.) 168 S. W. 1007; Texas Midland R. R. v. Ray (Civ. App.) 168 S. W. 1013; Gulf, C. & S. F. Ry. Co. v. Vashbinder (Civ. App.) 172 S. W. 763; Collier v. Harbour (Civ. App.) 174 S. W. 686; McKinney Ice, Light & Coal Co. v. Montgomery (Civ. App.) 176 S. W. 767; Unknown Heirs of Buchanan v. Creighton-McShane Oil Co. (Civ. App.) 176 S. W. 914; Occident Fire Ins. Co. v. Linn (Civ. App.) 179 S. W. 523; Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin (Civ. App.) 179 S. W. 541; Wichita Valley Ry. Co. v. Somerville (Civ. App.) 179 S. W. 671; Pecos & N. T. Ry. Co. v. Winkler (Civ. App.) 179 S. W. 691; Rainey v. Old (Civ. App.) 180 S. W. 923; Texas & Pacific Coal Co. v. Gibson (Civ. App.) 180 S. W. 1134; Taylor v. Jackson (Civ. App.) 180 S. W. 1142; Cleburne St. Ry. Co. v. Barber (Civ. App.) 180 S. W. 1176; Consumers' Lignite Co. v. Grant (Civ. App.) 181 S. W. 202; Wyatt v. Chambers (Civ. App.) 182 S. W. 16; Shipp v. Cartwright (Civ. App.) 182 S. W. 70; International & G. N. Ry. Co. v. Landa & Storey (Civ. App.) 183 S. W. 384; International & G. N. Ry. Co. v. Vogel (Civ. App.) 184 S. W. 229; Lester v. Hatson (Civ. App.) 184 S. W. 268; Houston, E. & W. T. Ry. Co. v. Hooper (Civ. App.) 184 S. W. 347; Amend v. Jahns (Civ. App.) 184 S. W. 729; Kolp v. S. F. Scattergood & Co. (Civ. App.) 185 S. W. 329; San Antonio, U. & G. R. Co. v. Galbreath (Civ. App.) 185 S. W. 901; Condit v. Galveston City Co. (Civ. App.) 186 S. W. 395; Wentzell v. Chester (Civ. App.) 189 S. W. 304; Panhandle & S. F. Ry. Co. v. Vaughn (Civ. App.) 191 S. W. 142; Roscoe, S. & P. Ry. Co. v. Taylor (Civ. App.) 191 S. W. 1175; McIntosh v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 192 S. W. 285; North American Accident Ins. Co. v. Miller (Civ. App.) 193 S. W. 750; Cameron v. First Nat. Bank (Civ. App.) 194 S. W. 469.

37. — **Error cured by verdict or judgment.**—Willett v. Herrin (Civ. App.) 161 S. W. 26; Good v. Texas & P. Ry. Co. (Civ. App.) 166 S. W. 670; Charles B. Smith & Co. v. Duncan (Civ. App.) 167 S. W. 233; Richard Cocke & Co. v. New Era Gravel & Development Co. (Civ. App.) 168 S. W. 988; Taylor v. Butler (Civ. App.) 168 S. W. 1004; Darden v. Southern Traction Co. (Civ. App.) 172 S. W. 200; Ft. Worth & D. C. Ry. Co. v. Firestone (Civ. App.) 173 S. W. 919; Houston Chronicle Pub. Co. v. Wegner (Civ. App.) 182 S. W. 45; Jackson v. Home Nat. Bank of Baird (Civ. App.) 185 S. W. 893; Pecos & N. T. Ry. Co. v. Chatten (Civ. App.) 185 S. W. 911; Kansas City, M. & O. Ry. Co. of Texas v. Oates (Civ. App.) 185 S. W. 1014; Nanny v. Vaughn (Civ. App.) 187 S. W. 499; Pecos & N. T. Ry. Co. v. McMeans (Civ. App.) 188 S. W. 692; Land v. Johnson (Civ. App.) 189 S. W. 337; Tyler v. McChesney (Civ. App.) 190 S. W. 1115; Ford v. Sims (Civ. App.) 190 S. W. 1165; Kirby Lumber Co. v. Bratcher (Civ. App.) 191 S. W. 700; Brown v. Fisher (Civ. App.) 193 S. W. 357; Varn v. Gonzales (Civ. App.) 193 S. W. 1132; First Nat. Bank v. Mangum (Civ. App.) 194 S. W. 647.

38. **Conduct and deliberations of jury.**—Maddox v. Clark (Civ. App.) 163 S. W. 309; Franklin v. International & G. N. Ry. Co. (Civ. App.) 174 S. W. 333; Texas & N. O. R. Co. v. Turner (Civ. App.) 182 S. W. 357; Trinity & B. V. Ry. Co. v. Lunsford (Civ. App.) 183 S. W. 112; Pridgen v. Cook (Civ. App.) 184 S. W. 713; Wichita Falls Traction Co. v. Berry (Civ. App.) 187 S. W. 415.

39. **Verdict.**—Ft. Worth Belt Ry. Co. v. Perryman (Civ. App.) 158 S. W. 1181; Zucht v. San Antonio School Board (Civ. App.) 170 S. W. 840; International & G. N. Ry. Co. v. Jones (Civ. App.) 175 S. W. 488; Hanover Fire Ins. Co. of New York v. Huff (Civ. App.) 175 S. W. 465; Texas & P. Ry. Co. v. Eddleman (Civ. App.) 175 S. W. 775; Aetna Accident & Liability Co. v. White (Civ. App.) 177 S. W. 162; Bullock v. Galveston, H. & H. R. Co. (Civ. App.) 178 S. W. 826; Stephenville North & South Texas Ry. Co. v. Grier (Civ. App.) 178 S. W. 984; Foster v. Bennet (Civ. App.) 178 S. W. 1001; Petty v. City of San Antonio (Civ. App.) 181 S. W. 224; Lofland v. Greenwood (Civ. App.) 181 S. W. 517; J. M. Guffey Petroleum Co. v. Dinwiddie (Civ. App.) 182 S. W. 444; Zavala Land & Water Co. v. Tolbert (Civ. App.) 184 S. W. 523; Lone Star Ins. Union v. Brannan (Civ. App.) 184 S. W. 691; Kansas City, M. & O. Ry. Co. of Texas v. Oates (Civ. App.) 185 S. W. 1014; Riedel v. Wenzel (Civ. App.) 186 S. W. 386; Condit v. Galveston City Co. (Civ. App.) 186 S. W. 395; W. T. Carter & Bro. v. Collins (Civ. App.) 192 S. W. 316; Andrews v. Wilding (Civ. App.) 193 S. W. 192; Vaky v. Phelps (Civ. App.) 194 S. W. 601.

40. **Findings by court or referee.**—Treadwell v. Walker County Lumber Co. (Civ. App.) 161 S. W. 397; Fitzgerald v. Fitzgerald (Civ. App.) 168 S. W. 452; Missouri, K. & T. Ry. Co. of Texas v. Interstate Chemical Co. (Civ. App.) 169 S. W. 1120; Rogers v. Harris (Civ. App.) 171 S. W. 809; Bushong v. Scrimshire (Civ. App.) 172 S. W. 155; Overton v. Colored Knights of Pythias (Civ. App.) 173 S. W. 472; Flynn v. J. M. Radford Grocery Co. (Civ. App.) 174 S. W. 902; Schofield v. Texas Bank & Trust Co. (Civ. App.) 175 S. W. 506; Talley v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 176 S. W. 65; Barfield v. Emery (Sup.) 177 S. W. 952, reversing judgment Emery v. Barfield (Civ. App.) 156 S. W. 311; Bogart v. Cowboy State Bank & Trust Co. (Civ. App.) 182 S. W. 678; Houston Belt & Terminal Ry. Co. v. Lee (Civ. App.) 185 S. W. 393; Taylor v. Ullmann, Stern & Krause (Civ. App.) 188 S. W. 746; Ehlinger v. Speckels (Civ. App.) 189 S. W. 348; Boynton Lumber Co. v. Houston Oil Co. of Texas (Civ. App.) 189 S. W. 749; Thomas v. Kean (Civ. App.) 190 S. W. 847; Farmers' & Merchants' Nat. Bank of Nocona v. H. C. London & Sons (Civ. App.) 194 S. W. 635.

41. **Decisions on motion for new trial or rehearing.**—Diamond v. Duncan (Sup.) 177 S. W. 955, denying rehearing (Sup.) 172 S. W. 1100; Northcutt v. Hume (Civ. App.) 174 S. W. 974; Cunningham v. Gaines (Civ. App.) 176 S. W. 148; Peck v. Murphy & Bolanz (Civ. App.) 184 S. W. 542; Goodson v. Houston & T. C. R. Co. (Civ. App.) 189 S. W. 82.

42. **Judgment or order.**—Renshaw v. Arnett (Civ. App.) 158 S. W. 1197; Payne v. Ellwood (Civ. App.) 163 S. W. 93; Cornelius v. Harris (Civ. App.) 163 S. W. 346; Texas Bldg. Co. v. Reed (Civ. App.) 169 S. W. 211; International Travelers' Ass'n v. Branum (Civ. App.) 169 S. W. 389; Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co. (Civ. App.) 173 S. W. 222; Potka v. Carter (Civ. App.) 175 S. W. 812; Freeman v. W. B. Walker & Sons (Civ. App.) 175 S. W. 456, 1133; French v. De Moss (Civ. App.) 180 S. W. 1105; Oliver v. Oliver (Civ. App.) 181 S. W. 705; Ayers v. Snowball (Civ. App.) 181 S. W. 827; Ft. Worth Belt Ry. Co. v. Jones (Civ. App.) 182 S. W. 1184; St. Louis, B. & M. Ry. Co. v. Green (Civ. App.) 183 S. W. 829; Earl v. Baker (Civ. App.) 184 S. W. 297; Coward v. Sutfin (Civ. App.) 185 S. W. 378; Foos Gas Engine Co v. Fairview Land & Cattle Co. (Civ. App.) 185 S. W. 382; Texas Bldg. Co. v. Collins (Civ. App.) 187 S. W. 404; Mitchell v. Porter (Civ. App.) 194 S. W. 981.

43. **Proceedings after judgment.**—Smith v. McDaniel (Civ. App.) 170 S. W. 1070; Lockney State Bank v. Bolin (Civ. App.) 184 S. W. 553; Schaefer v. First Nat. Bank, Bay City (Civ. App.) 189 S. W. 556.

44. **Parties entitled to allege error.**—Fawcett v. Mayfield (Civ. App.) 183 S. W. 111.

### Art. 1629. [1024] Affirmance with damages in case of delay.

Cited, Lloyd v. American Nat. Bank (Civ. App.) 158 S. W. 785.

**Damages for delay.**—Merely because the questions presented by an appeal were not difficult and the appellate court believed that appellant's counsel did not have confidence in some of the assignments will not authorize an imposition of damages for vexatious appeal. Missouri, K. & T. Ry. Co. of Texas v. Pitkin (Civ. App.) 153 S. W. 1035.

Damages will not be awarded to the defendant in error on the ground that the writ of error was for delay, where the defendant, who failed to answer, in an action to foreclose a vendor's lien note, assigned as error the failure of the petition to properly allege that the plaintiff had exercised his option to declare the note due. Shearer v. Chambers County (Civ. App.) 159 S. W. 999.

This article does not authorize the court to award damages on an appeal by plaintiff from a judgment dissolving a temporary injunction obtained by him. Hicks v. Murphy (Civ. App.) 162 S. W. 925.

Damages for the taking of an appeal for delay will not be awarded, unless it appears that there was absolutely no just cause for the appeal. W. A. Leyhe Piano Co. v. American Multigraph Sales Co. (Civ. App.) 171 S. W. 494.

Ground of appeal, that petition of payee of notes should allege it is the owner and holder thereof, held not frivolous, as regards damages for appeal for delay. Bryan v. Wharton Bank & Trust Co. (Civ. App.) 174 S. W. 827.

A writ of error held sued out for delay, justifying affirmance of judgment with damages. Broocks v. Guilmartin (Civ. App.) 175 S. W. 794.

Where a writ of error was taken solely for delay and without sufficient cause, a judgment of affirmance for want of prosecution should include as damages 10 per cent. on the amount of the original judgment. Houston Transp. Co. v. Allien (Civ. App.) 178 S. W. 1005.

Where the question raised by appellant was so well settled that there was no reasonable ground for the appeal, the court, believing it brought for delay, in affirming, would assess the appellant 10 per cent. damages. Texas & P. Ry. Co. v. Erwin (Civ. App.) 180 S. W. 662.

Under this article and Court of Appeals rule 43 (142 S. W. xiv), plaintiff in error not appearing, and a case of delay being suggested, and appearing from the record, judgment will be affirmed, with 10 per cent. damages. First Texas State Ins. Co. v. Pipe (Civ. App.) 184 S. W. 278.

Under this article, where judgment was rendered November 10, 1914, writ of error sued out and supersedeas bond filed April 30, 1915, and record filed August 6, 1915, there being no statement and the record containing no assignments of error, etc., judgment will be affirmed, with damages. Matthews v. Mitchell Bros. (Civ. App.) 186 S. W. 256.

Under this article damages will not be allowed unless grounds of alleged error are so frivolous that there could have been no reasonable expectation of reversal. Commonwealth Bonding & Casualty Ins. Co. v. Hendricks (Civ. App.) 187 S. W. 698.

### Art. 1630. [1024] Remittitur.

**Remission of part of recovery.**—Where, in a personal injury action, recovery for medicines is erroneously allowed, a remittitur of the amount recovered cures the error. Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 155 S. W. 678, judgment reversed 106 Tex. 190, 163 S. W. 13.

Where the verdict is wholly based on a void oral contract, a remittitur of a part will not cure the error therein. St. Louis, I. M. & S. Ry. Co. v. West Bros. (Civ. App.) 159 S. W. 142.

Where the evidence on appeal from justice court authorized a verdict for the wages sued for, judgment allowing attorney's fees under art. 2173, and punitive damages without evidence to support such allowance, would be modified by permitting remittitur of the fees and punitive damages. Trinity County Lumber Co. v. Conner (Civ. App.) 176 S. W. 911.

Where a verdict allows an excessive amount for medical attendance, the error may be cured by plaintiff's filing a remittitur so as to conform the amount to that supported by the evidence. Pecos & N. T. Ry. Co. v. Winkler (Civ. App.) 179 S. W. 691.

Where the charge on measure of damages was incorrect, a remittitur of the amount of judgment for the repairs will be accepted. Pecos & N. T. Ry. Co. v. McMeans (Civ. App.) 188 S. W. 692.

**Costs.**—Where, after appeal, appellee remitted damages improperly awarded, the judgment, under art. 2014, will be affirmed, though the costs will be taxed against the appellee. *Atchison, T. & S. F. Ry. Co. v. Boyce* (Civ. App.) 171 S. W. 1094.

### Art. 1631. [1029a] Suggestion of remittitur.

Cited, *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 172 S. W. 750.

**Directing remittitur in general.**—Where verdict for defendant on plea of reconvention showed that jury allowed part of a claim, which should not have been submitted, held, that the judgment would be reversed unless the entire amount of such claim was remitted. *Gillispie v. Ambrose* (Civ. App.) 161 S. W. 937.

Where, though the verdict is for the proper party, it is excessive, the judgment will be reversed, unless a remittitur be entered. *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809.

In an action for libel, error in submitting elements of special damages was harmless, where the appellate court required plaintiff to file a remittitur before affirmance. *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45.

On error by the trial court, probably or possibly causing rendition of an excessive verdict, when it is impossible for appellate court to mathematically determine the excess erroneously found, this article does not apply, and the entire judgment will be reversed, and the cause remanded for another trial. *Id.*

When it can be determined by the appellate court what excessive amount has been found by the jury by reason of an erroneous instruction, the court is authorized to cure such error by requiring a remittitur. *Id.*

Under this article, where judgment should be reversed only for excessive verdict, in action for personal injuries, Court of Civil Appeals improperly reversed and remanded the case on ground alone that verdict was excessive. *Wilson v. Freeman* (Sup.) 185 S. W. 993.

Where the facts are undisputed, held, that error in rendering judgment for an excessive amount may be corrected by Court of Civil Appeals without new trial. *Barton v. McGuire* (Civ. App.) 189 S. W. 317.

In action for delay in shipment of live stock that verdict is excessive to extent of improvement in selling appearance of cattle on Thursday when they were sold, over Wednesday the day when they arrived, at most only required a remittitur. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

**Amount of recovery indicating passion or prejudice.**—Under this article Court of Civil Appeals held not precluded from reversing and remanding for excessive verdict, without indicating the excess and allowing a remittitur, where amount was so grossly excessive as to show it was the result of passion and prejudice. *Galveston, H. & S. A. R. Co. v. Craighead* (Civ. App.) 175 S. W. 1199, denying rehearing 175 S. W. 453.

Where in a personal injury action argument of plaintiff's counsel was prejudicially erroneous and the verdict of the jury was large, the Court of Civil Appeals cannot, under this article, determine the amount of the excess and allow a remittitur. *Texas & P. Ry. Co. v. Rasmussen* (Civ. App.) 181 S. W. 212.

**Trivial excess.**—The excess of \$1.50 in judgment for \$578.50 in a suit on a fire policy for \$500, because of excessive allowance of interest, held too trivial to call for remittitur or to justify reformation of judgment. *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

In action for delay in shipment of live stock, error in verdict in that it left undetermined only question of 25 cents per hundredweight on 470 pounds, due to decline in market from Tuesday to Thursday, was too small to even require a remittitur. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

### Art. 1633. [1029] Mandate issued when.

**Recalling mandate to amend judgment.**—An appellant prevailing on appeal has 30 days after filing record to ask certiorari to correct it so that on a motion to retax costs after that time, in effect a motion for certiorari to correct judgment, court will not recall its mandate and amend judgment. *Houston & T. C. R. Co. v. Montgomery* (Civ. App.) 189 S. W. 350.

## CHAPTER TEN

### CONCLUSIONS OF FACT AND LAW

<p>Art. 1636. Conclusions of law and fact to be filed, when.</p> <p>1638. Supplemental findings, motion for refusal assignable as error.</p>	<p>Art. 1639. Court shall decide all issues of fact or law, and announce conclusions.</p>
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### Article 1636. [1039] Conclusions of fact and law to be filed, when.

**Construction and application.**—Art. 1639, when considered in connection with this article, does not require the Courts of Civil Appeals to file written opinions in affirmed cases, of which the Supreme Court has no jurisdiction of an application for writ of error. *Fink v. San Augustine Grocery Co.* (Civ. App.) 167 S. W. 35.

**Conclusions of fact and law.**—The Supreme Court will not entertain a case on writ of error to a Court of Civil Appeals, where it has not made a statement of the facts, but refers to the opinion of the Court of Civil Appeals of another district. *St. Louis Southwestern Ry. Co. of Texas v. Alexander*, 106 Tex. 518, 172 S. W. 709, affirming judgment (Civ. App.) 141 S. W. 135.

The Court of Civil Appeals will not answer questions in seriatim as a jury is required to do in a special verdict. *National Ry. of Mexico v. Ligarde* (Civ. App.) 172 S. W. 1140.

The Court of Appeals cannot, on the preponderance of evidence, make a finding of fact on an issue not passed on by the trial court. *Nalle & Co. v. Costley* (Civ. App.) 174 S. W. 625.

Where there is evidence to support a finding that will support the judgment below and submission of the issue to the jury was not requested, the Court of Appeals must make such finding. *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224.

An oversight of undisputed facts by the Court of Civil Appeals does not constitute prejudicial error, since the Supreme Court may consider such facts without a finding as to the same. *Cattlemen's Trust Co. of Ft. Worth v. Turner* (Civ. App.) 182 S. W. 438.

**Conclusiveness of findings.**—Finding of fact by Court of Civil Appeals that intestate was engaged in interstate commerce at time of injury is binding upon this court, in absence of evidence to contrary. *Geer v. St. Louis, S. F. & T. Ry. Co.* (Sup.) 194 S. W. 939.

**Opinion.**—Where plaintiff's supplementary petition contained a general demurrer to defendant's answer, to the overruling of which plaintiff excepted, the opinion of the Court of Civil Appeals on appeal by the defendant from a judgment against him, where no cross-appeal was taken by plaintiff, need not state that the demurrer was filed and overruled. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

**Art. 1638. Supplemental findings, motion for; refusal assignable as error.**

**Additional findings.**—It is not the duty of the Court of Civil Appeals, on a motion for additional findings of fact, to find facts that are undisputed, or recite evidence which may conflict with findings made. *Order of United Commercial Travelers of America v. Roth* (Civ. App.) 159 S. W. 176.

**Art. 1639. Court shall decide all issues of fact or law, and announce conclusions.**

**1. Scope of review in general.**—The question as to the right of plaintiff to foreclose an instrument will not be reviewed, where the issue was not raised by the pleadings. *Allen v. Allen* (Civ. App.) 158 S. W. 1049.

A writ of error did not bring the case up as to defendants who were not complaining, and whose title was not connected with that of defendants in error, where defendants in error upon another trial would not be entitled to a judgment against such other defendants or no judgment on retrial could be less onerous on defendants in error if the other defendants were continued as parties. *State v. Dayton Lumber Co.* (Civ. App.) 164 S. W. 48.

An objection to the validity of a deed which was not raised in the pleadings, nor in any matter brought to the attention of the trial court, cannot be urged for the first time on appeal. *Cooper v. Marek* (Civ. App.) 166 S. W. 53.

The Court of Civil Appeals is not required to rule specifically on each assignment of error, especially where the appellant makes no request for such rulings. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

On an appeal by plaintiff from a judgment on a verdict directed for defendant, the plaintiff's evidence must be taken as true. *Dawson v. King* (Civ. App.) 171 S. W. 257.

Under this article, and in view of rule 101 for district and county courts (159 S. W. xi), defendants in trespass to try title, who failed to file any cross-assignments of error on appeal, were in no position to complain of court's charge and its refusal to charge. *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

**2. — Matters considered in determining question.**—Opinion evidence on a subject not requiring expert testimony, the admission of which was held harmless, could not be considered by the appellate court in passing on the sufficiency of the evidence. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

In determining the propriety of the overruling of defendant's general demurrer, the evidence cannot be considered. *International & G. N. Ry. Co. v. Owens* (Civ. App.) 166 S. W. 412.

The evidence offered in support of a pleading after a demurrer thereto has been overruled cannot be looked to by an appellate court to test the sufficiency of the pleading. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

Facts in evidence, not pleaded, cannot be considered. *Murray Co. v. Deal* (Civ. App.) 175 S. W. 718.

On appeal, the pleadings of both parties may be considered in determining their sufficiency to support the judgment rendered. *Webb v. Wessell* (Civ. App.) 178 S. W. 696.

Where the court improperly admitted a statement of facts on a former appeal to prove the testimony on former trial of a deceased witness, the appellate court will consider such testimony in determining whether the verdict was against the evidence. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

**3. — Questions considered.**—The court reversing a judgment will not pass on a question which will not arise on a subsequent trial. *Pearce v. Heyman* (Civ. App.) 158 S. W. 242.

An improper adjudication of costs is substantive error affecting the principal judgment, and is not merely a collateral matter, to be determined independently of the litigation in which the judgment is rendered. *Nail v. Wolfe City Nat. Bank* (Civ. App.) 158 S. W. 1166.

Whether plaintiff in trespass to try title can recover by showing estoppel where an affirmative answer is interposed, need not be considered, where the jury found that there was no estoppel. *Penn. v. Briscoe County* (Civ. App.) 162 S. W. 916.

Where the jury, in trespass to try title, made no finding on the issue of five years' limitation, assignments raising that question were immaterial. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

Where the trial court sustained a general demurrer and also special exceptions to the petition, and the appellate court reverses the ruling on the demurrer, it need not consider the rulings on the exceptions. *Moody v. Chesser* (Civ. App.) 173 S. W. 917.

Where appellee's brief concedes reversible errors pointed out in appellant's brief, the court will reverse and remand without passing in detail on the assignments. *Floyd v. Floyd* (Civ. App.) 174 S. W. 715.

An appellate court has no authority to consider the excessiveness of the verdict, if no complaint is made thereof by the party affected. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

The question of error in submitting the right of a materialman to apply payments by the contractor to other accounts is abstract, where the jury specially found an express promise by the owner to pay the account. *Grant v. Alfalfa Lumber Co.* (Civ. App.) 177 S. W. 536.

It is the policy of appellate courts to consider whether contracts between carriers and others are void as tending to stifle competition and work undue discrimination, whether presented in the trial or appellate court. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

Where a judgment must be reversed in any event, an appellate court will not itself undertake to estimate the amount of excess damages in the judgment. *Donada v. Power* (Civ. App.) 184 S. W. 793.

In view of the finding of the jury that a defendant was chargeable with notice of the true character of a deed under which his grantor held title, the admission of testimony tending to show that he did not have notice or the refusal of a special instruction on this issue is immaterial, and will not be considered. *Harris v. Hamilton* (Civ. App.) 185 S. W. 409.

Since property taken by condemnation may be used for the purposes for which it was taken only, and the owners may use it until needed for that purpose, it is immaterial whether the right acquired by the condemnation proceedings is called a base fee or an easement. *Lawson v. Port Arthur Canal & Dock Co.* (Civ. App.) 185 S. W. 600.

In action against initial and connecting carriers of live stock, where judgment was in favor of connecting road, and no complaint made, admissibility of testimony of plaintiff that he signed, without reading, written contract, limiting initial carrier's liability for damages to injuries sustained on own line, became immaterial and unnecessary to be decided. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

Where reversal is necessitated by other error, the court on appeal need not consider alleged error in giving undue emphasis to a certain issue, which error can easily be remedied on the new trial. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

Where a judgment in an action for damages was reversed on other grounds, the question of the inadequacy of the damages need not be determined. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 186 S. W. 383.

An appellate court will not decide questions unnecessary to the affirmance, reversal, or rendition of a judgment. *Uhr v. Lambert* (Civ. App.) 188 S. W. 946.

Where a case is reversed and remanded on other grounds, assignments of error attacking the sufficiency of evidence will not be discussed. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 191 S. W. 599.

Where appellees are the record owners of real estate, it is unnecessary to pass upon their claim by adverse possession. *W. T. Carter & Bro. v. Collins* (Civ. App.) 192 S. W. 316.

In action against part owner by abandoned wife of other owner for fraudulently securing the entire ownership, it is unnecessary to decide whether plaintiff wife could maintain the action where her allegations are insufficient to establish fraud. *Baugh v. Houston* (Civ. App.) 193 S. W. 242.

Where a defendant surety was discharged by extension of a note without his consent, it is unnecessary to decide whether failure to sue thereon within a certain time also discharged him. *Cruse v. Gau* (Civ. App.) 193 S. W. 405.

In stockholder's suit, where decree expressly denied plaintiffs any relief by way of enjoining corporation from acquiring property in California, proposition that so much of petition as sought such injunction was fatally defective presented an academic question. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

4. — **Theory and grounds of decision of lower court.**—A judgment being correct, though for a different reason than stated by the court, should be affirmed. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796; *Hamilton Compress Co. v. Lawson* (Civ. App.) 175 S. W. 474; *Ashley v. Holland* (Civ. App.) 180 S. W. 635; *Bullock v. Crutcher* (Civ. App.) 180 S. W. 940; *Texas & Pacific Coal Co. v. Gibson* (Civ. App.) 180 S. W. 1134; *Ludtke v. Smith* (Civ. App.) 186 S. W. 266.

In an action to establish the boundary of plaintiff's land with reference to a public road, where all the parties and the court treated a particular corner as the beginning corner of the survey, a judgment based on that theory will be affirmed in the absence of error of law. *Penn v. Briscoe County* (Civ. App.) 162 S. W. 916.

Judgment cannot be sustained on appeal on a theory which was not submitted to the jury. *Galveston, H. & S. A. Ry. Co. v. Walker* (Civ. App.) 163 S. W. 1038.

A judgment for plaintiff predicated solely on an unconstitutional statute cannot be sustained on the theory that the petition showed a common-law right of recovery. *Galveston, H. & S. A. Ry. Co. v. King* (Civ. App.) 174 S. W. 335.

The Court of Civil Appeals will affirm the correct judgment below on special exception to the petition, though the trial court assigned the wrong reason therefor. *Dublin Fruit Co. v. Neely* (Civ. App.) 182 S. W. 406.

Where plaintiff in separate counts urged defendant's liability on the theories of agency and of partnership, the question on appeal, whether the evidence sustained the finding as to partnership, was immaterial, where it did sustain the finding as to agency. *Dagget v. Avis Hardware Co.* (Civ. App.) 183 S. W. 20.

A judgment which can be supported by any reasonable theory as to the evidence must be affirmed, where there are no conclusions of fact and law. *Coker v. Mott* (Civ. App.) 190 S. W. 747.



Where cause was tried by jury, and judgment is sustained by pleadings and proof, it should be affirmed by appellate court, though trial court gave erroneous reasons therefor. *Speed v. Sadberry* (Civ. App.) 190 S. W. 781.

In trespass to try title, judgment for plaintiff who deraigned title from the state will be affirmed, although the trial court based its decision upon an erroneous ground. *Vann v. George* (Civ. App.) 191 S. W. 585.

The fact that several reasons are given by the court for the verdict rendered, and that some of them are not supported by the record, will not render the judgment bad if it can be sustained by other reasons given. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

Where, because of trial court's failure to file findings of fact, appellate court cannot say upon which of two theories court based judgment, decision will be affirmed where there is sufficient testimony upon which to base decision on either theory. *Houston E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 194 S. W. 642.

**5. Facts undisputed.**—Where the evidence is without conflict, the Court of Civil Appeals may render the proper judgment, but where there is any conflict on a material issue, it may not substitute its findings for those of the trial court. *Post v. State*, 106 Tex. 500, 171 S. W. 707, reversing judgment *State v. Post* (Civ. App.) 169 S. W. 401.

**6. Issues determined on prior appeal.**—A decision of the Court of Appeals that the evidence was not sufficient to show that the railroad agent had misrouted a shipment is the law of the case on a subsequent appeal, where the evidence at the second trial was substantially the same as at the first. *St. Louis, B. & M. Ry. Co. v. True Bros.* (Civ. App.) 159 S. W. 152.

In trespass to try title, a holding on appeal that the evidence was sufficient to support a verdict for plaintiff did not prevent a holding on a subsequent appeal that the evidence on that trial was sufficient to support a finding that defendants had title by limitations. *Dryden v. Makey* (Civ. App.) 160 S. W. 302.

Assignments of error determined on a former appeal adversely to appellant taking a second appeal will be overruled. *Harris v. Wagnon* (Civ. App.) 162 S. W. 2.

Where, on appeal, the court held that the case should have been submitted to the jury, the holding is conclusive on a subsequent appeal in the same case, where the facts and issues are practically the same. *Coca-Cola Co. v. Williams* (Civ. App.) 164 S. W. 1032.

A decision on a former appeal of a case is the law of the case on a subsequent appeal. *Kelley v. Fain* (Civ. App.) 168 S. W. 869.

The holding on appeal that a general allegation of negligence in the petition is permissible, is the law of the case on a subsequent appeal. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545.

Although on a prior appeal, a question was decided on review of the court's action in sustaining demurrers to the petition, the decision will not be disturbed on appeal from a judgment on trial of the issues, where the evidence did not differ materially from the allegations of the petition. *Southwestern Surety Ins. Co. v. Stein Double Cushion Tire Co.* (Civ. App.) 180 S. W. 1165.

Decision of question on former appeal is not *res judicata*, preventing review of same question on subsequent appeal; subsequent review being in the discretion of the court. *Houston Oil Co. of Texas v. Davis* (Civ. App.) 181 S. W. 851.

Contention that award of punitive damages is excessive should not be sustained, a greater amount having, on a prior appeal, been held not excessive. *St. Louis Southwestern Ry. Co. of Texas v. Thompson* (Civ. App.) 192 S. W. 1095.

A determination of the Court of Civil Appeals in a former appeal in the same case which was upheld by the Supreme Court becomes the law of the case. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

Where Court of Civil Appeals has in a previous decision in same case passed upon identical question now before it, even if it was dictum, and appellant having urged upon Supreme Court identical question on motion for writ of error which was refused, judgment will be affirmed. *Houston E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 194 S. W. 642.

Unless very clearly erroneous, rulings made upon a former appeal should be deemed the law of the case in all subsequent proceedings. *First Nat. Bank v. Mangum* (Civ. App.) 194 S. W. 647.

**7. Issues not passed on by court or jury.**—An assignment that the court erred in overruling a motion to suppress the deposition of a witness would not be reviewed, where the record did not show that the motion was called to the attention of or ruled on by the trial court. *Sanders v. Dunn* (Civ. App.) 158 S. W. 1041.

Where the trial court made no ruling, the point is not reviewable on appeal. *Hicks v. Murphy* (Civ. App.) 162 S. W. 925.

Where there is a total failure to state a cause of action, or of some fact essential to it, the defect may be taken advantage of on appeal, though defendant's general demurrer has not been ruled on by the trial court. *City of San Antonio v. Bodeman* (Civ. App.) 163 S. W. 1043.

An assignment to the overruling of a plea setting up the pendency of a suit in another county on the same cause cannot be sustained, where it does not appear that any action was taken by the trial court on the plea, and the transcript does not show any exception with relation thereto. *United Benevolent Ass'n of Texas v. Lawson* (Civ. App.) 166 S. W. 713.

Where the appeal record fails to show any ruling on the pleadings, error in alleged rulings thereon will not be reviewed, except where the petition is fatally defective. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

Where neither the appellant's statement under an assignment nor the record shows that the court sustained an exception to any part of his petition, the assignment of error to the sustaining of an exception thereto need not be considered. *City of Ft. Worth v. Morgan* (Civ. App.) 168 S. W. 976.

Error in overruling special demurrer cannot be considered where record fails to show any demurrer presented or acted upon or exceptions taken. *Allen v. Reed* (Civ. App.) 179 S. W. 544.

Assignments of error complaining of the court's overruling of exceptions cannot be considered where the record did not show that the court made any ruling. *Oliver v. Oliver* (Civ. App.) 181 S. W. 705.

Where material error has been committed and the jury has decided the issues submitted contrary to the testimony, the appellate court cannot affirm the judgment because there was testimony which might have supported a finding for the successful party upon another issue, which was not submitted to the jury. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

In an action to foreclose a chattel mortgage, held that there being no plea presented or request for a finding that defendants acted upon agreement of plaintiff's agent to release the mortgage, so as to estop plaintiff from claiming full payment, the question will not be considered on appeal. *Lee v. Clay Robinson & Co.* (Civ. App.) 185 S. W. 1061.

In an action for trespass to try title and for damages for cutting timber, where no questions of the amount or value of timber cut are submitted to the jury, these issues on appeal will be treated as having been waived. *Moore v. Reid* (Civ. App.) 186 S. W. 245.

Where pleas of misjoinder, in the form of special exceptions, were not acted upon by the court, they will be regarded by the appellate court as having been waived. *Baber v. Galbraith* (Civ. App.) 186 S. W. 345.

There is nothing to consider under an assignment complaining of failure to sustain a demurrer, the record not showing the demurrer was presented to or acted on by the court. *Anderson v. Gammon* (Civ. App.) 189 S. W. 798.

In landowner's suit against city, for price of land sold for reservoir and to foreclose implied lien, where general demurrer to petition, which did not affirmatively show that no provision had been made by city to provide for payment of the debt, as required by Const. art. 11, §§ 5, 7, was not called to attention of, or acted on, by court below, demurrer was waived. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

**8. Review of facts—Power and duty to review.**—In the absence of any findings of fact or conclusions of law by the trial court, the Court of Civil Appeals must look to the record to see if under the pleadings, there is evidence to sustain the judgment entered by the trial court. *Childs v. McGrew* (Civ. App.) 171 S. W. 566.

The appellate court may set aside verdict and award new trial when the evidence is of that force and character as to make such action necessary and proper. *St. Louis Southwestern Ry. Co. of Texas v. Sterling* (Civ. App.) 178 S. W. 665.

It is the duty of a Court of Civil Appeals to sustain the jury's verdict and the judgment below when it can be done upon a reasonable interpretation of the findings and facts. *Lofland v. Greenwood* (Civ. App.) 181 S. W. 517.

Where error is assigned to the refusal of a new trial because the jury received material communications, the exact character of which was unknown to the appellants, the court, on appeal, could not review the order, since review would necessarily be based on speculation. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

On appeal from directed verdict for contestee and proponent, the court is not to determine whether a verdict for contestant should be permitted to stand, but, whether the evidence was sufficient to require a submission of issue of undue influence to jury. *Rounds v. Coleman* (Civ. App.) 189 S. W. 1086.

Whether operation of interurban electric cars imposes an additional servitude on the street, not contemplated in its dedication, is a question of law and decision thereon, not conclusive, but reviewable. *Galveston-Houston Electric Ry. Co. v. Jewish Literary Society* (Civ. App.) 192 S. W. 324.

Upon appeal, the evidence should be considered as a whole in determining whether a verdict was justified. *Panhandle & S. F. Ry. Co. v. Harp* (Civ. App.) 193 S. W. 438.

The appellate court cannot look to the evidence, unless it is uncontradicted, to see what jury ought to have found in order to determine what they did find, but when a verdict is apparently not clear, it may look to evidence to determine that it is in fact ambiguous. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

**9. — Extent of review in general.**—The appellate court must reject all evidence favorable to appellant and consider only the facts tending to sustain the verdict, and, if the verdict has been arrived at in an honest and impartial effort to reach the truth, cannot set it aside. *Farmers' and Merchants' Gin Co. v. Simmons* (Civ. App.) 178 S. W. 621.

In reviewing a verdict for plaintiff for negligence, all evidence tending to show he was guilty of contributory negligence must be given the construction most favorable to him. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

**10. — Number of witnesses.**—A verdict on conflicting evidence will not be disturbed merely because it is contrary to the testimony of the greater number of the witnesses. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

The jury's finding on conflicting evidence that arbitrators had considered the merits of defendant's claim for damages, though opposed to the testimony of two of the three arbitrators, could not be interfered with on appeal. *Slaughter v. Crisman & Nesbit* (Civ. App.) 178 S. W. 1.

The mere fact that more witnesses gave evidence on one side than on the other does not authorize the Court of Civil Appeals to disturb a jury's finding. *Koch v. Noster* (Civ. App.) 182 S. W. 372.

The Court of Civil Appeals will not set aside a judgment rendered by the lower court simply on a matter of a preponderance of evidence, which is not the number of witnesses, but the weight and value that is given to the evidence by the jury or by the trial court. *Andrews v. Fuller* (Civ. App.) 186 S. W. 275.

**11. — Credibility of witnesses.**—Upon trial before the court without a jury the credibility of witnesses was for the court. *Turner v. Ontiberos* (Civ. App.) 193 S. W. 1089; *Webb v. Wessell* (Civ. App.) 178 S. W. 696; *Emery v. Barfield* (Civ. App.) 183 S. W. 386; *Derry v. Harty* (Civ. App.) 187 S. W. 343; *Boerger v. Vandegrift* (Civ. App.) 188 S. W. 948.

The Supreme Court will not determine the credibility of witnesses or the weight of their testimony. *Shaw v. Faires* (Civ. App.) 165 S. W. 501.

Damages awarded for personal injuries, authorized if plaintiff's testimony and that of his physicians is true, cannot be disturbed. *Galveston, H. & S. A. Ry. Co. v. Dickens* (Civ. App.) 170 S. W. 835.

The weight of the testimony and the credibility of the witnesses is exclusively for the jury, and the appellate court will not set aside their findings where the evidence is reasonably sufficient to support it. *Farmers' & Merchants' Gin Co. v. Simmons* (Civ. App.) 178 S. W. 621.

A verdict on conflicting testimony justifying a verdict either way, according to which witnesses are believed, will not be disturbed on appeal. *Thomas v. Abbott* (Civ. App.) 182 S. W. 19.

Credibility of witnesses giving testimony supporting plaintiff's allegations held for the jury, and not for an appellate court. *Galveston, H. & S. A. Ry. Co. v. Moses* (Civ. App.) 184 S. W. 327.

In suit on policy defended on the ground of nonliability by reason of failure to pay assessments, the credibility of the witnesses and the weight to be given their conflicting testimony was for the jury, and its verdict could not be disturbed. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

The fact that the trial judge accepted testimony of defendant alone as against that of plaintiff and his witnesses is not ground for a reversal. *Coker v. Mott* (Civ. App.) 190 S. W. 747.

Credibility of testimony of defendant's alleged agent as to existence of agency and authority of witness, held question for jury, not for appellate court to determine. *Alamo Live Stock Commission Co. v. Heimer* (Civ. App.) 192 S. W. 591.

12. — **Probative force of evidence.**—The trial court is the judge of the weight of the evidence. *Emery v. Barfield* (Civ. App.) 183 S. W. 386.

13. — **Conclusiveness of verdicts in general.**—A verdict based on sufficient evidence is conclusive. *Hughes v. Hughes* (Civ. App.) 191 S. W. 742; *Dunman v. McKinney* (Civ. App.) 158 S. W. 1053; *Hammel v. Benton* (Civ. App.) 162 S. W. 34; *Vickrey v. Dockray* (Civ. App.) 158 S. W. 1160; *Times Pub. Co. v. Rood* (Civ. App.) 163 S. W. 1037; *Mutual Life Ins. Ass'n of Donley County v. Rhoderick* (Civ. App.) 164 S. W. 1067; *Cattlemen's Trust Co. v. Beck* (Civ. App.) 167 S. W. 753; *Guitar v. Commercial Nat. Bank of Abilene* (Civ. App.) 168 S. W. 477; *Hutchinson v. Murray* (Civ. App.) 169 S. W. 640; *Paul Stone Co. v. Saucedo* (Civ. App.) 171 S. W. 1038; *Ft. Worth Horse & Mule Co. v. Burnett* (Civ. App.) 171 S. W. 1076; *Scarborough v. Wheeler* (Civ. App.) 172 S. W. 196; *Frith v. Wright* (Civ. App.) 173 S. W. 453; *Texas & P. Ry. Co. v. Marrujo* (Civ. App.) 172 S. W. 588; *National Surety Co. v. Silberberg Bros.* (Civ. App.) 176 S. W. 97; *O'Neil v. Gibson* (Civ. App.) 177 S. W. 183; *Knights of the Maccabees of the World v. Parsons* (Civ. App.) 179 S. W. 78, judgment reversed (Sup.) 182 S. W. 672; *Houston Oil Co. of Texas v. Jones* (Civ. App.) 184 S. W. 611; *Matthews v. Kirkland* (Civ. App.) 186 S. W. 423; *Houston Belt & T. Ry. Co. v. Price* (Civ. App.) 192 S. W. 359; *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

Where the appellate court is unable to say that the jury were wrong, the verdict will not be disturbed. *Missouri, K. & T. Ry. Co. of Texas v. Leabo* (Civ. App.) 161 S. W. 382; *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

The Court of Appeals can only interfere with a verdict where there is no evidence to support it, or where the evidence is insufficient to support it, or where the evidence is conflicting but the verdict is manifestly unjust and against the weight of the evidence. *Slaughter v. Crisman & Nesbit* (Civ. App.) 178 S. W. 1.

14. — **Sufficiency of evidence in support of verdicts.**—Where there is any evidence to support a verdict it cannot be disturbed on appeal. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445; *St. Louis Southwestern Ry. Co. of Texas v. Cole* (Civ. App.) 159 S. W. 146; *Texas & P. Ry. Co. v. Stevens* (Civ. App.) 173 S. W. 629; *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025; *Manning v. Beaumont, S. L. & W. Ry. Co.* (Civ. App.) 181 S. W. 687; *Dudley & Orr v. Hawkins* (Civ. App.) 183 S. W. 776; *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 184 S. W. 523; *Kersh v. Matthews* (Civ. App.) 186 S. W. 783; *Houston Belt & Terminal Ry. Co. v. Hardin Lumber Co.* (Civ. App.) 189 S. W. 518; *Southern Pac. Co. v. Gordon* (Civ. App.) 193 S. W. 471.

On the question of contributory negligence in a railroad employé's action for personal injuries under the federal Employers' Liability Act, the Appellate Court will only examine the evidence to determine whether there was any evidence from which the jury could reasonably have found a verdict for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Rentz* (Civ. App.) 162 S. W. 959.

Where the issues of negligence and contributory negligence were fully and fairly submitted, and it could not be said that the jury's findings in relation thereto were without substantial evidence to support them, the appellate court was not warranted in disturbing the verdict. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 166 S. W. 702.

Where there was evidence to support the findings on the controlling issues, the verdict cannot be disturbed, although the evidence was not conclusive. *W. A. Leyhe Piano Co. v. American Multigraph Sales Co.* (Civ. App.) 171 S. W. 494.

A verdict reasonably supported by evidence will not be disturbed. *El Paso & Southwestern Co. v. La Londe* (Civ. App.) 173 S. W. 890, writ of error denied (Sup.) 184 S. W. 498; *Flynn v. J. M. Radford Grocery Co.* (Civ. App.) 174 S. W. 902.

A verdict supported by substantial evidence will not be disturbed. *Southern Traction Co. v. Hulbert* (Civ. App.) 177 S. W. 551.

In suit upon an oral lease of pasture land for six months, where defendant denied the contract pleaded, the verdict for defendant will not be disturbed by reason of defendant's admission that he had put cattle in the pasture, and that he owed pasturage for some cattle. *White v. Barrow* (Civ. App.) 182 S. W. 1154.

Mere preponderance of evidence against a finding will not, under the rules, authorize a reversal, but where the statement of facts shows that the preponderance of the evidence is such as to indicate that the jury have not been governed thereby, appellate courts are authorized to reverse. *Eureka Ice Co. v. Buckloo* (Civ. App.) 188 S. W. 510.

The finding of the jury as to the reasonable value of an attorney's fees in partition

suit cannot be disturbed on appeal, though differing greatly from defendants' opinion of their value. *Branham v. Hallam* (Civ. App.) 191 S. W. 158.

Assignment of error that court erred in rendering judgment for defendant by reason of jury finding that defendant violated federal Safety Appliance Act cannot be sustained where there is neither pleading nor evidence of such violation. *McIntosh v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 192 S. W. 285.

In passing upon whether there is sufficient evidence to sustain a verdict, the appellate court must reject all evidence favorable to the defendant, and consider only that favorable to the verdict, in which case, if the jury might have reached the verdict they did, it cannot be set aside. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 193 S. W. 392.

The verdict of the jury finding that a settlement of a claim, under an accident insurance policy, was procured by fraud, will not be disturbed, where the evidence discloses suspicious circumstances of the character to induce belief that artifice has been practiced or that confidence has been abused. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

15. — **Opposed to opinion of appellate court.**—The verdict of a jury when sustained by evidence cannot be disturbed, no matter what the appellate court may think as to the relative standing and reputation of the witnesses for truth and veracity. *Dryden v. Makey* (Civ. App.) 160 S. W. 302; *Texas Midland R. R. v. Becker & Cole* (Civ. App.) 171 S. W. 1024; *Just v. Herry* (Civ. App.) 174 S. W. 1012; *Hudgins v. Hammers* (Civ. App.) 178 S. W. 986; *T. W. Marse & Co. v. Flockinger* (Civ. App.) 189 S. W. 1017.

Where the case was left to the trial judge under an agreement that he should instruct a verdict, the appellate court must find the facts to uphold the judgment if there is any evidence to support such a finding, even though it might itself have decided the facts otherwise. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

Verdict for plaintiff, in an action to reform a policy by inserting his name as mortgagee and payee, brought on the ground of mistake in writing the policy, in which the evidence was required to be clear and convincing, will not be rejected on appeal merely because the reviewing court would have found otherwise on the question of the credibility of the witnesses. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

16. — **Verdicts on conflicting evidence.**—A verdict on conflicting evidence will not be disturbed. *Camp v. Smith* (Civ. App.) 166 S. W. 22; *Stevens v. Crosby* (Civ. App.) 166 S. W. 62; *Copeland v. Porter* (Civ. App.) 169 S. W. 915; *Thomas v. Barthold* (Civ. App.) 171 S. W. 1071; *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082; *Elliott v. Clark* (Civ. App.) 172 S. W. 560; *Citizens' State Bank v. McShan* (Civ. App.) 172 S. W. 565; *Glover v. Phillips* (Civ. App.) 174 S. W. 657; *Thompson v. Pennington* (Civ. App.) 174 S. W. 944; *Houston & T. C. R. Co. v. Bukowsky* (Civ. App.) 175 S. W. 477; *Knight v. England* (Civ. App.) 175 S. W. 480; *Smith v. Guerre* (Civ. App.) 175 S. W. 1093; *Houston East & West Texas Ry. Co. v. Houston Packing Co.* (Civ. App.) 176 S. W. 63; *Lone Star Canal Co. v. Broussard* (Civ. App.) 176 S. W. 649; *Gibson v. Dickson* (Civ. App.) 178 S. W. 44; *Webb v. Harding* (Civ. App.) 159 S. W. 1029; *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145; *Missouri, K. & T. Ry. Co. of Texas v. Scott* (Civ. App.) 160 S. W. 432; *Ebersole v. Sapp* (Civ. App.) 160 S. W. 1137; *Beaumont & G. N. R. Co. v. Gonzales* (Civ. App.) 163 S. W. 619; *Bond v. Hancock* (Civ. App.) 163 S. W. 660; *Iowa Mfg. Co. v. Walcovich* (Civ. App.) 163 S. W. 1054; *Malcolm v. Sims-Thompson Motor Car Co.* (Civ. App.) 164 S. W. 924; *Shaw v. Faibles* (Civ. App.) 165 S. W. 501; *Fonda v. Colquitt* (Civ. App.) 165 S. W. 1195; *Mills v. Belden* (Civ. App.) 162 S. W. 368; *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426; *Slover v. Goode* (Civ. App.) 163 S. W. 333; *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28; *Camden Fire Ins. Ass'n of Camden, N. J., v. Puett* (Civ. App.) 164 S. W. 418; *Watson v. Rice* (Civ. App.) 166 S. W. 106; *Jackson v. Biggerstaff & Perkins* (Civ. App.) 168 S. W. 42; *Murray Gin Co. v. Putman* (Civ. App.) 170 S. W. 806; *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880; *Fidelity & Casualty Co. v. Joiner* (Civ. App.) 178 S. W. 806; *Knights of the Maccabees of the World v. Parsons* (Civ. App.) 179 S. W. 78, judgment reversed (Sup.) 182 S. W. 672; *Hughes v. Colbert* (Civ. App.) 179 S. W. 443; *Same v. Butler* (Civ. App.) 179 S. W. 443; *Smith v. Webb* (Civ. App.) 181 S. W. 814; *Lucas v. Harrison* (Civ. App.) 182 S. W. 74; *Texas & N. O. R. Co. v. Turner* (Civ. App.) 182 S. W. 357; *Newman v. Davis* (Civ. App.) 184 S. W. 1078; *Behles v. Blum* (Civ. App.) 182 S. W. 386; *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846; *Crosby v. Stevens* (Civ. App.) 184 S. W. 705; *White v. Peters* (Civ. App.) 185 S. W. 659; *Texas Midland R. Co. v. Truss* (Civ. App.) 186 S. W. 249; *Townsend v. Pilgrim* (Civ. App.) 187 S. W. 1021; *Chapman v. Witherspoon* (Civ. App.) 192 S. W. 281; *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Civ. App.) 194 S. W. 1128.

Special findings by the jury on questions of fact are binding on the appellate court, though there is evidence to the contrary. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140; *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 168 S. W. 28; *Stark v. Brown* (Civ. App.) 193 S. W. 716.

A verdict establishing the location of a boundary line on conflicting evidence will not be set aside. *Clemmons v. Johnson* (Civ. App.) 167 S. W. 1103; *Stewart v. Williams* (Civ. App.) 167 S. W. 761.

On reviewing the refusal to direct a verdict for defendant, the court will determine whether the evidence of plaintiff sustains the verdict for him, and, if so, will not consider the conflicting evidence. *Lisle-Dunning Const. Co. v. McCall* (Civ. App.) 167 S. W. 810.

On appeal from a judgment for plaintiff the Court of Civil Appeals in deference to the verdict must take plaintiff's testimony as true. *Wick v. McLennan* (Civ. App.) 186 S. W. 847.

It is no objection to answers of the jury on conflicting evidence that it apparently gave more credit to witnesses of appellee than those of appellant. *Walter v. Rowland* (Civ. App.) 189 S. W. 981.

On review of evidence to support a verdict for plaintiff in deference to verdict, evidence most favorable to plaintiff must be accepted as true. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

17. — **Deposition evidence.**—Where the testimony of a witness was by deposition, the finding of the jury on the issue, as to which his was the only evidence, was not entitled to the conclusive force it otherwise might have been. *State Mut. Life Ins. Co. of Rome, Ga., v. Long* (Civ. App.) 178 S. W. 778.

18. — **Verdicts against weight of evidence.**—A judgment will be reversed if the verdict is so against the weight and preponderance of the evidence as to be manifestly wrong. *Wofford v. Strickland* (Civ. App.) 160 S. W. 623; *Kanaman v. Hubbard* (Civ. App.) 160 S. W. 304; *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445; *Kohlberg v. Awbrey & Semple* (Civ. App.) 167 S. W. 828; *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.) 173 S. W. 273; *American Nat. Ins. Co. v. Fulghum* (Civ. App.) 177 S. W. 1008; *Blair & Hughes Co. v. Watkins & Kelley* (Civ. App.) 179 S. W. 530; *Texas & N. O. R. Co. v. Jones* (Civ. App.) 187 S. W. 717.

A verdict will not be set aside unless palpably against the weight of the evidence. *Horton v. Texas Midland R. R.* (Civ. App.) 171 S. W. 1023; *Rodgers v. Texas & P. Ry. Co.* (Civ. App.) 172 S. W. 1117; *Virginia Fire & Marine Ins. Co. v. St. Louis Southwestern Ry. Co.* (Civ. App.) 173 S. W. 487; *Shaw v. Garrison* (Civ. App.) 174 S. W. 942; *French v. De Moss* (Civ. App.) 180 S. W. 1105; *Koch v. Noster* (Civ. App.) 182 S. W. 372.

On appeal a verdict cannot be disturbed because against the greater preponderance of the evidence. *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229; *Lisle-Dunning Const. Co. v. McCall* (Civ. App.) 167 S. W. 810; *Benford Lumber Mfg. Co. v. Knox* (Civ. App.) 168 S. W. 32; *Thomas v. Barthold* (Civ. App.) 171 S. W. 1071; *Lofland v. Greenwood* (Civ. App.) 181 S. W. 517; *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867.

In trespass to try title where defendants claimed constructive possession of the entire tract, a finding that they had possession of only 2½ acres held not so palpably against the evidence as to authorize the appellate court in setting it aside. *Dupont v. Texas & N. O. R. Co.* (Civ. App.) 158 S. W. 195.

Where there is more than a scintilla of evidence, the appellate court cannot determine that a verdict would be so against the weight of evidence as to require it to be set aside. *Jones v. First Nat. Bank* (Civ. App.) 160 S. W. 126.

An implied finding depending on the giving of credit to plaintiff's testimony, rather than to that of two others, as to how he was walking at the time of the accident, cannot be said to be so against the great weight of the evidence as to be manifestly wrong. *Texas & N. O. Ry. Co. v. Siewert* (Civ. App.) 163 S. W. 624.

In an action to determine boundaries, the jury are the judges of the weight of the testimony. *Thatcher v. Matthews* (Civ. App.) 183 S. W. 810.

In action to recover money on oral contract, where testimony of parties is in direct conflict, and neither is corroborated by other witnesses or circumstances, verdict will not be set aside as contrary to weight of evidence. *Chapman v. Witherspoon* (Civ. App.) 192 S. W. 281.

19. — **Amount of verdict.**—Where it did not appear the result of passion or prejudice, an award of damages in a personal injury action will not be disturbed. *Smith v. Webb* (Civ. App.) 181 S. W. 814; *Trinity & B. V. Ry. Co. v. Dodd* (Civ. App.) 167 S. W. 238; *Galveston, H. & S. A. Ry. Co. v. Webb* (Civ. App.) 182 S. W. 424; *Foster Lumber Co. v. Rodgers* (Civ. App.) 184 S. W. 761.

That the amount of a verdict is against the preponderance of the evidence does not authorize the appellate court to set it aside as excessive. *Houston Belt & Terminal Ry. Co. v. Lee* (Civ. App.) 185 S. W. 393; *Kanaman v. Hubbard* (Civ. App.) 160 S. W. 304.

The judgment of an impartial jury on the measure of damages for physical and mental suffering must be accepted. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

Where a verdict for physical and mental suffering is so large as to indicate that it was not the judgment of an impartial jury, but was based upon prejudice, the court should not hesitate to correct the verdict. *Id.*

The right to interfere with a verdict on the ground that excessive damages are awarded is controlled by the rules governing the right to disturb any other issue of fact found by the jury. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 685.

The evidence as to the character and permanency of plaintiff's injuries being conflicting and sufficient to justify the conclusion that they were serious and permanent, a verdict for \$5,000 would not be set aside on appeal as excessive. *Missouri, O. & G. Ry. Co. of Texas v. Love* (Civ. App.) 169 S. W. 922.

Unless a verdict is manifestly unjust, inadequate, or contrary to the evidence, it cannot be disturbed. *Shaw v. Garrison* (Civ. App.) 174 S. W. 942.

Where a railroad and its employé were engaged in interstate commerce when the latter was injured, and the jury found the amount to which the employé's negligence contributed to his injuries, which was deducted from his damages by the court, the issue of contributory negligence is disposed of. *Kansas City, M. & O. Ry. Co. of Texas v. Finke* (Civ. App.) 190 S. W. 1143.

20. — **Approval of verdict by trial court.**—Where the trial court has sustained a verdict based on conflicting evidence, it will not be disturbed on appeal. *Scott v. Northern Texas Traction Co.* (Civ. App.) 190 S. W. 209; *Texas Cent. R. Co. v. Rose* (Civ. App.) 172 S. W. 756.

21. — **Successive verdicts.**—In an action for damages for failure of the seller to properly set up gin machinery, where the juries in three trials found that plaintiff was entitled to recover damages, which verdicts the trial court approved, the appellate court on a third appeal will not set aside the verdict. *Murray Gin Co. v. Putman* (Civ. App.) 170 S. W. 806.

22. — **Conclusiveness of findings of court in general.**—Findings of trial court amply supported by evidence will not be disturbed on appeal. *Adams v. Boren* (Civ. App.) 194 S. W. 619; *B. W. McMahan & Co. v. State Nat. Bank of Shawnee* (Civ. App.) 160 S.

W. 403; Bone v. Smith (Civ. App.) 164 S. W. 922; Post v. State, 106 Tex. 500, 171 S. W. 707, reversing judgment State v. Post (Civ. App.) 169 S. W. 401; Texas Midland R. R. v. Kaufman County Imp. Dist. No. 1 (Civ. App.) 175 S. W. 482; Stockton v. Jones (Civ. App.) 175 S. W. 859; Houston Oil Co. of Texas v. Davis (Civ. App.) 178 S. W. 669; Fisher v. Crescent Oil Co. (Civ. App.) 178 S. W. 905; Harper v. Stewart (Civ. App.) 179 S. W. 277; Ashley v. Holland (Civ. App.) 180 S. W. 635; Broussard v. Le Blanc (Civ. App.) 182 S. W. 78; Whitley v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 183 S. W. 36; Mayfield Co. v. Harlan & Harlan (Civ. App.) 184 S. W. 313; Crews v. Powers (Civ. App.) 184 S. W. 363; City of Marlin v. Holloway (Civ. App.) 192 S. W. 623; Houston E. & W. T. Ry. Co. v. Cavanaugh (Civ. App.) 194 S. W. 642.

Findings of trial judge are treated on appeal as are verdicts. McDougle, Cameron & Webster v. Pennington (Civ. App.) 194 S. W. 657; Moore v. Rabb (Civ. App.) 159 S. W. 85; Ara v. Rutland (Civ. App.) 172 S. W. 993; Texas & N. O. R. Co. v. Weems (Civ. App.) 184 S. W. 1103.

Where newspaper market quotations were offered in evidence to prove the market value of cattle in a city upon a certain date, an issue of fact for determination by the trial court was made as to whether the quotations were credible. Houston Packing Co. v. Griffith (Civ. App.) 164 S. W. 431.

Mere conclusions or inferences from facts which are not findings of fact upon conflicting evidence as contemplated by statute will not be approved. Cattlemen's Trust Co. of Ft. Worth v. Turner (Civ. App.) 182 S. W. 438.

Findings not being attacked, the evidence will not be looked to, on appeal, to give them other than their apparent meaning. Hamlin v. J. M. Radford Grocery Co. (Civ. App.) 182 S. W. 716.

In action against corporation as maker of notes, where issue as to authority of its officers was not submitted to jury, and no request for submission made, a finding of court that such authority existed, necessarily included in the judgment, must be sustained if there is any evidence to support it. Galveston-Houston Interurban Land Co. v. Dow (Civ. App.) 193 S. W. 353.

24. — **Sufficiency of evidence in support of court's findings.**—The findings of the trial court will be sustained if there is any evidence to support them. Corrigan v. Goss (Civ. App.) 160 S. W. 652; Campbell v. Gibbs (Civ. App.) 161 S. W. 430; Schumm v. Anderson (Civ. App.) 172 S. W. 1121; International Fire Insurance Co. v. Black (Civ. App.) 179 S. W. 534; Red River Nat. Bank v. Sproles (Civ. App.) 180 S. W. 660; Kanaman v. Gahagan (Civ. App.) 185 S. W. 619; Missouri, K. & T. Ry. Co. of Texas v. Stearnes (Civ. App.) 185 S. W. 646; Derry v. Harty (Civ. App.) 187 S. W. 343; Jenkins v. Guaranty State Bank of Palestine (Civ. App.) 189 S. W. 314; Collin County School Trustees v. Stiff (Civ. App.) 190 S. W. 216; Lane v. Herring (Civ. App.) 190 S. W. 778; Turner v. Ontiveros (Civ. App.) 193 S. W. 1039.

In determining whether the trial court erred in finding a fact, the evidence must be viewed in the light most favorable to the appellee. Clemenger v. Flesher (Civ. App.) 185 S. W. 304; Rudolph S. Blome Co. v. Herd (Civ. App.) 185 S. W. 53.

In an action tried by the court, where unreasonable delay in transportation of live stock is not so clearly shown that reasonable minds would not differ thereon, the finding will not be disturbed. Blackwell v. St. Louis, B. & M. Ry. Co. (Civ. App.) 168 S. W. 52.

Where title to land is claimed by adverse possession, and there is no evidence but fact of possession, and an admission to effect that possession was in subordination to claim of owner, a finding that possession was not adverse must be upheld on appeal. Nerio v. Christen (Civ. App.) 189 S. W. 1038.

25. — **Court's findings on conflicting evidence.**—A finding of the court on conflicting evidence will not be disturbed. Eubank v. Bostick (Civ. App.) 194 S. W. 214; Neblett v. Barron (Civ. App.) 160 S. W. 1167; Deggs v. Loving (Civ. App.) 162 S. W. 9; Galveston, H. & H. R. Co. v. Copley (Civ. App.) 176 S. W. 665; Ford v. Warner (Civ. App.) 176 S. W. 885; Ramsey v. Farmers' & Citizens' Savings Bank (Civ. App.) 177 S. W. 209; Missouri, K. & T. Ry. Co. of Texas v. Attaway (Civ. App.) 180 S. W. 1151; Dawson v. Falfurrias State Bank (Civ. App.) 181 S. W. 553; Southern Wells Sales Co. v. Eastham (Civ. App.) 181 S. W. 698; Thrift & Edwards v. Holland (Civ. App.) 183 S. W. 1189; Carter v. Smith (Civ. App.) 184 S. W. 244; Rudolph S. Blome Co. v. Herd (Civ. App.) 185 S. W. 53; Yates v. Watson (Civ. App.) 187 S. W. 548; Roberts v. Atwood (Civ. App.) 188 S. W. 1014; Barton v. McGuire (Civ. App.) 189 S. W. 317; McKay v. McKay (Civ. App.) 189 S. W. 520; Boynton Lumber Co. v. Houston Oil Co. of Texas (Civ. App.) 189 S. W. 749; Jones v. Bartlett (Civ. App.) 189 S. W. 1107; Wells Fargo & Co. v. Long (Civ. App.) 190 S. W. 530; Coker v. Mott (Civ. App.) 190 S. W. 747; Galveston-Houston Electric Ry. Co. v. Jewish Literary Society (Civ. App.) 192 S. W. 324; Cochran v. Williams (Civ. App.) 193 S. W. 255; Doran v. Campbell (Civ. App.) 194 S. W. 674.

In determining whether finding of fact is supported by evidence, testimony erroneously excluded cannot be considered, since trial court might have reached same conclusion with evidence admitted. Richards v. Hartley (Civ. App.) 194 S. W. 478.

26. — **Findings of court against weight of evidence.**—The Court of Civil Appeals is not authorized to set aside the judgment of a trial court merely because it is apparently against the weight and preponderance of the testimony, but in order to do this the judgment must be so manifestly against the weight and preponderance of the evidence as to be clearly wrong. Edwards v. Youngblood (Civ. App.) 162 S. W. 1164; Holbrook v. Thornton (Civ. App.) 166 S. W. 7; American Surety Co. of New York v. Hardwick (Civ. App.) 186 S. W. 804; Galveston-Houston Electric Ry. Co. v. Jewish Literary Society (Civ. App.) 192 S. W. 324; Evans v. Williams (Civ. App.) 194 S. W. 181.

27. — **Amount of recovery in court's findings.**—Where the finding of the value of an automobile, struck by a train, was sustained by evidence, the finding would not be disturbed as excessive. Galveston, H. & H. R. Co. v. Copley (Civ. App.) 176 S. W. 665.

29. — **Questions of fact on motions or other interlocutory or special proceedings.**—As the appellate court may consider the evidence in reviewing denial of a continuance, held, that denial of continuance for absence of witnesses, whom evidence at trial disclosed were not conversant with facts they were expected to prove, was not error. Hazelrigg v. Naranjo (Civ. App.) 184 S. W. 316.

30. **Written opinions.**—This article, when considered in connection with article 1636, does not require the Courts of Civil Appeals to file written opinions in affirmed cases, of which the Supreme Court has no jurisdiction of an application for writ of error. *Fink v. San Augustine Grocery Co.* (Civ. App.) 167 S. W. 35.

## CHAPTER ELEVEN

### REHEARING

**Article 1641. [1030] Motion for rehearing; requisites and notice of.**

**Rehearing in general.**—The Court of Civil Appeals cannot consider facts stated in the motion for rehearing, but not shown by the record. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746; *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

The Court of Civil Appeals will overrule a motion for rehearing after awaiting a decision of the Supreme Court in another case for a long time, if satisfied of the correctness of its original opinion, though the Supreme Court has not delivered an opinion. *Spiller v. Hollinger* (Civ. App.) 172 S. W. 175, denying rehearing 148 S. W. 338.

Where the fact that appellant had become a bankrupt was not shown by the record, it could not be considered on an application for rehearing. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 937.

The reformation of a judgment by the Court of Civil Appeals will not be reviewed in the absence of an objection in that court by motion for rehearing and application for a writ of error on that ground. *Maddox v. Clark* (Sup.) 175 S. W. 1053, affirming judgment (Civ. App.) 163 S. W. 309.

The briefs filed having been lost, judgment overruling appellant's motion for a rehearing will be set aside on the court's own motion and case continued until following term to give parties an opportunity to file copies of their briefs. *Jeans v. Liquid Carbonic Co.* (Civ. App.) 178 S. W. 1020.

Where appellee's motion for rehearing contains much abusive and vituperative language referring to appellant, it will be dismissed with leave to file another. *Pye v. Cardwell* (Civ. App.) 179 S. W. 633.

Under this article Court of Civil Appeals for the Ninth Judicial District, to which Supreme Court transferred a case from the First District, could not consider appellant's motion to vacate the judgment of the court of the First District, entered eight months before filing, striking appellant's bills of exceptions. *Padgett v. H. P. Pratt & Son* (Civ. App.) 180 S. W. 317.

A motion to vacate the opinion and judgment of a Court of Civil Appeals in a case of which it had jurisdiction, made in such court nine years after such judgment was rendered, must be overruled. *Kruegel v. Rawlins* (Civ. App.) 182 S. W. 705.

Motion to set aside a judgment of affirmance, on the ground that the trial court's judgment was not final, and that therefore the appellate court never acquired jurisdiction, may be made at a subsequent term. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

Where case was regularly set on docket of Court of Civil Appeals for submission, and was on the date orally presented, appellant was not entitled to have oral reargument after special associate justice was appointed by Governor to sit in place of justice recused. *Boynton Lumber Co. v. Houston Oil Co. of Texas* (Civ. App.) 189 S. W. 749.

**Grounds for rehearing and requisites of motion.**—Where Court of Civil Appeals refused to consider assignments of error, motion for rehearing and petition to Supreme Court for writ of error held not defective because they complained only of the "overruling" of the assignments. *Chicago, R. I. & G. Ry. Co. v. Pemberton*, 106 Tex. 463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652. Rehearing denied 106 Tex. 463, 168 S. W. 126.

A motion for rehearing, which made no complaint of the opinion on the merits, the only complaint being the refusal to dismiss because appellant's briefs had not been properly filed, will be overruled; it not appearing that appellees were prejudiced. *Alexander v. Garcia* (Civ. App.) 168 S. W. 376.

A motion for rehearing containing irrelevant and impertinent matter may be stricken from the files. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Where the Court of Civil Appeals reversed holding that the order of delivery of certain deeds was a jury question, it would not change its decision by reason of a stipulation, filed in connection with a motion for rehearing, agreeing on the order of delivery of such deeds. *Rayner v. Posey* (Civ. App.) 173 S. W. 246.

Where appellate court reversed on two theories, one at issue below, the other not so at issue, error in reversing on latter theory was harmless. *Taylor v. First State Bank of Hawley* (Civ. App.) 178 S. W. 35.

Error of the appellate court in finding that the evidence showed without controversy that the defendant insurer received and retained the dues of the insured, held no ground for rehearing under evidence showing the receipt, though controverted. *Grand Fraternity v. Mulkey* (Civ. App.) 185 S. W. 582.

Where suit to foreclose a chattel mortgage on cattle was instituted before the cattle were paid for, though not until the day after the sale, an inaccuracy in opinion stating that it was instituted before the sale held immaterial. *Lee v. Clay Robinson & Co.* (Civ. App.) 185 S. W. 1061.

Where the case was thoroughly discussed by all members of the court, and those who heard the argument fully concurred in the disposition of the appeal, rehearing will not be granted because the writer of the original opinion did not hear the oral argument. *Qualis v. Fowler* (Civ. App.) 186 S. W. 256.

An appellant may probably amend a motion for rehearing, if done within the time limit. *Id.*

In case of amendment of motion for rehearing, the original motion will be dismissed, and only the amended motion considered. *Id.*

The inaccuracy, if any, of a statement in the appellate court's finding that parties entered "into a written contract" on a certain date was not ground for rehearing, where the evidence shows that the agreement mentioned was actually made in terms set forth in the instrument reduced to writing on that date. *King v. Diffey* (Civ. App.) 192 S. W. 262.

**Objections not previously urged.**—An objection to an instruction in a libel action that it erroneously submitted certain publications as a ground for recovery because the petition did not justify such submission cannot be first raised in a motion for rehearing on appeal. *Autrey v. Collins* (Civ. App.) 161 S. W. 413.

Where, on original hearing, appellee did not object to consideration of an assignment of error that evidence on an issue was insufficient to sustain verdict, such appellee could not object to a consideration of the assignment on motion for rehearing. *Taylor v. First State Bank of Hawley* (Civ. App.) 178 S. W. 35.

Objections to instructions, not contained in appellants' brief, but attempted to be set up in a motion for rehearing, held waived. *Levy v. Dunken Realty Co.* (Civ. App.) 179 S. W. 679, denying rehearing *Levy v. Duncan Realty Co.*, 178 S. W. 984.

In suit by appellant railroad company to enjoin judgment against it in state court, contention that it was a foreign corporation not doing business in state, and so was not suable, cannot for first time be raised on motion for rehearing, not being presented by pleadings or urged below. *Union Pac. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 358.

**Time for filing and excuse for delay.**—Application of appellant for leave to file motion for rehearing after time limited by this article. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.



## TITLE 33

## COURT OF CRIMINAL APPEALS

Chap.

1. Judges of the court of criminal ap-  
peals.

Chap.

3. Jurisdiction of the court of criminal  
appeals.

## CHAPTER ONE

## JUDGES OF THE COURT OF CRIMINAL APPEALS

**Article 1652. [1044] Number of judges, qualifications, compensation, and what constitutes a quorum.**

**Title to office.**—The title of a judge of the Court of Criminal Appeals to office cannot be questioned in a collateral proceeding. *Marta v. State* (Cr. App.) 193 S. W. 323.

## CHAPTER THREE

## JURISDICTION OF THE COURT OF CRIMINAL APPEALS

Art.

1659. Jurisdiction of the court.

Art.

1660. Writs of habeas corpus, etc., power  
to issue.

**Article 1659. [1052] Jurisdiction of the court.**

See Code Cr. Proc. Arts. 68, 86, 87, and notes thereunder.

**In general.**—Evidence on a trial for entering on “the Commons” of a county under the control of the mayor of a city and removing, without consent, earth and sand therefrom held to raise a question of title which cannot be tried in the criminal courts. *Haworth v. State*, 168 S. W. 859, 74 Tex. Cr. R. 488.

**Conclusiveness of decisions of civil courts.**—Since the Legislature has given the civil courts exclusive jurisdiction to determine the validity of stock law elections, and taken such question from the criminal courts, the decisions of the civil courts as to such questions are binding upon the criminal courts, in preference to their own previous decisions. *Bishop v. State*, 167 S. W. 363, 74 Tex. Cr. R. 214.

**Art. 1660. [1053] Writs of habeas corpus, etc., power to issue.**

See notes under Code Cr. Proc. Arts. 69, 70.

## TITLE 34

## COURTS—DISTRICT

Chap.

1. The judge of the district court.
2. The clerk of the district court.
3. The powers and jurisdiction of the district court and of the judge thereof.

Chap.

4. The terms of the district court.
5. Miscellaneous provisions relating to the district court.

## CHAPTER ONE

## THE JUDGE OF THE DISTRICT COURT

Art.

1671. Election, qualifications and residence.  
 1672. Term of office.  
 1675. Disqualification, causes of.

Art.

1676. Disqualification; exchange of district judges; or special judge agreed upon, when; appointment by governor.  
 1678. Special judge elected.

**Article 1671. [1064] [1086] District judge, election of; qualification; residence.**

Appointment of special judge.—Under Const. art. 5, § 7, the Legislature could not provide for the appointment of a special judge after the death of the regular judge. *Glover v. Albrecht* (Civ. App.) 173 S. W. 504.

**Art. 1672. [1065] [1087] Term of office.**

Provision mandatory.—Const. art. 16, § 17, and this article held mandatory, so that after resignation of judge, and before appointment of his successor, special judge was authorized to sit until completion of any business before the court. *El Paso & S. W. R. Co. of Texas v. Ankenbauer* (Civ. App.) 175 S. W. 1090.

**Art. 1675. [1068] [1090] Disqualification, causes of.**

Criminal cases, see Crim. Proc. Art. 617 et seq. and notes.

**Interest in subject matter—In general.**—Pecuniary interest of judge's father-in-law in proceeding to have person adjudged of unsound mind, because father-in-law was named as executor of such person's will, held too contingent and uncertain to disqualify the judge. *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819.

— **Interest as taxpayer.**—Under Dallas Charter, art. 2, § 5, in suit to determine whether ordinance authorizing the issuance of bonds was legally adopted, taxpayers of Dallas held disqualified to sit as judges, in view of Const. art. 5, § 11, whether the ordinance was submitted to the electors under the initiative and referendum provisions of the charter (article 8) or not. *Holland v. Cranfill* (Civ. App.) 167 S. W. 308.

In taxpayers' suit to enjoin county officials from making contract with paving company, trial judge held not disqualified for interest as taxpayer. *Orndorff v. McKee* (Civ. App.) 188 S. W. 432.

**Interest as former counsel.**—Under Const. art. 5, § 11, and this article, that a trial judge has been of counsel between the parties in a different case does not disqualify him. *Stockwell v. Glaspey* (Civ. App.) 160 S. W. 1151.

If a judge has been of counsel in case in behalf of one party, he is disqualified to try case, and his order dismissing it was void. *Kruegel v. Williams* (Civ. App.) 194 S. W. 683.

**Relationship to party.**—A judge is related to his wife's first cousin by affinity, although not to the husband of such cousin, and, where a judgment against the husband would adversely affect the community interest of his wife's cousin, he is disqualified. *Seabrook v. First Nat. Bank of Port Lavaca* (Civ. App.) 171 S. W. 247.

Persons unnamed in a suit by plaintiffs suing for themselves and in behalf of others interested, are not "parties" within Const. art. 5, § 11, disqualifying judge related to parties. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

Judge held not disqualified because proceeding was instigated by his father-in-law, unless the father-in-law had a direct pecuniary interest in the result of the trial. *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819.

**Objections.**—The question of the disqualification of the trial judge may be raised by a motion for new trial. *Seabrook v. First Nat. Bank of Port Lavaca* (Civ. App.) 171 S. W. 247.

**Acts of disqualified judge.**—A disqualified judge cannot enter a decree or order agreed to by the parties, and any judgment rendered by him must be reversed. *Seabrook v. First Nat. Bank of Port Lavaca* (Civ. App.) 171 S. W. 247.

An order extending the time for filing the statement of facts and bills of exception, made by a judge who is disqualified to sit on account of having represented one of the parties in the action, is void. *Dolsons v. Sheridan Stove Mfg. Co.* (Civ. App.) 178 S. W. 663.

That judge in garnishment proceedings is related to garnishee, or is in some way connected with, or interested in, subject-matter of proceedings, does not render void

judgment in original suit against defendant. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

Where judge who dismissed cause was disqualified by having acted as counsel, motion filed at subsequent term to set aside judgment should have been granted. *Kruegel v. Williams* (Civ. App.) 194 S. W. 683.

**Art. 1676. [1069] Disqualification; exchange of district judges; special judge agreed upon, when; appointment by governor.**—Whenever any case or cases, civil or criminal, are pending in which the district judge is disqualified from trying the same, no change of venue shall be made necessary thereby; but the judge presiding shall immediately certify that fact to the Governor, whereupon the Governor shall designate some district judge in an adjoining district to exchange and try such case or cases, and the Governor shall notify both of said judges of such order; and it shall be the duty of said judges to exchange districts for the purpose of disposing of such case or cases, and, in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsels shall have the right to select or agree upon an attorney of the court for the trial thereof; and, in the event the district judges shall be prevented from exchanging districts and the parties and their counsels shall fail to select or agree upon an attorney of the court for the trial thereof, which fact shall be certified to the Governor by the district judge or the special judge, whereupon the Governor shall appoint a person legally qualified to act as judge in the trial of the case. [Acts 1879, p. 1; Acts 1897, S. S. p. 39; Act March 12, 1915, ch. 45.]

Took effect 90 days after adjournment of legislature on March 20, 1915.

**Construction and operation in general.**—Where the Governor fails to designate an adjoining district judge in accordance with this article to try a case in which the regular judge is disqualified, the bar may, under section 1678, select a special judge. *Webb v. Reynolds* (Civ. App.) 160 S. W. 152.

Rev. Civ. St. 1911, art. 1676, does not deprive district judges of the power granted by Const. art. 5, § 11, and Rev. Civ. St. 1911, art. 1715, of holding court for one another, and a disqualified judge may on his own motion call in a judge of an adjoining district to preside for him. *Connellee v. Blanton* (Civ. App.) 163 S. W. 404.

A special judge does not derive his authority from the regular judge, and can continue to act after the death of the regular judge. *Glover v. Albrecht* (Civ. App.) 173 S. W. 504.

This article, as amended by Acts 34th Leg. c. 45, the only statute authorizing appointment of a special judge where sickness or other reasons render it impossible for the disqualified judge to exchange with regular judge, permits an appointment only when the exchange is impossible in fact. The disqualified judge's desire to try other cases is not a reason rendering an exchange impossible. *Cohn v. Saenz* (Civ. App.) 194 S. W. 685.

**Selection by parties.**—Selection of a special judge by agreement of the parties, in a case where the regular judge was not disqualified merely by his absence, was a nullity, and the acts of the special judge were void. *Pickett v. Michael* (Civ. App.) 187 S. W. 426.

**Acts of improperly selected judge.**—A special judge's want of authority to act affects the jurisdiction of the court, and is therefore a fundamental error, which may be first raised on appeal. *Dunn v. Home Nat. Bank* (Civ. App.) 181 S. W. 699.

In a suit in the district court against the principal and surety on a note, where the principal made no appearance, and did not participate in the ineffective agreement by which a special judge acted in the case without authority, the judgment against such principal was a nullity. *Id.*

Where appointment of a special judge was unauthorized, orders made by him, including a judgment based thereon, were void. *Cohn v. Saenz* (Civ. App.) 194 S. W. 685.

### **Art. 1678. [1071] [1094] Special judge, when and how elected.**

**In general.**—Where the parties elect a special judge, where the regular judge is not disqualified but is absent from any cause, they are not estopped from denying his jurisdiction. *Pickett v. Michael* (Civ. App.) 187 S. W. 426; *Dunn v. Home Nat. Bank* (Civ. App.) 181 S. W. 699.

Where the Governor fails to designate an adjoining district judge in accordance with art. 1676, to try a case in which the regular judge is disqualified, the bar may, under this section, select a special judge. *Webb v. Reynolds* (Civ. App.) 160 S. W. 152.

Where a member of the bar is selected by a majority of the practicing lawyers for a special judge, the fact that he voted for himself will not invalidate the election. *Id.*

Under this article members of the bar from adjoining counties who practice in that district and are present have the same rights to vote as the resident lawyers. *Id.*

A member of the bar, who is also a member of the Legislature, is not thereby disqualified from acting as special judge in case of the disability or disqualification of the regular judge. *Id.*

The death of the regular judge during a term, held by a special judge previously elected under Const. art. 5, § 7, and this article does not end the term. *Glover v. Albrecht* (Civ. App.) 173 S. W. 504.

By Code Cr. Proc. 1911, arts. 93, 94, and this article, special terms of district court and election of special judges are provided for, and an indictment, found at a special term presided over by a special judge, held valid. *De Arman v. State* (Cr. App.) 189 S. W. 145.

## CHAPTER TWO

## THE CLERK OF THE DISTRICT COURT

<p>Art. 1687. District clerk pro tem., appointed, when.</p>	<p>Art. 1694. Shall keep a record of proceedings of court, judgments, etc. 1701. Indexes to all judgments.</p>
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**Article 1687. [1080] District clerk pro tem., appointed, when.**

**Motion for appointment.**—On appeal from an order denying a motion for the appointment of a clerk pro tem., an allegation in the motion that the clerk was a party to the suit held insufficient to constitute a finding of that fact of record on appeal. *Kruegel v. Williams* (Civ. App.) 158 S. W. 1052.

**Art. 1694. [1087] [1107] Shall keep a record of proceedings, judgments and executions.**

**Clerk's record—Effect of failure to enter.**—The assent of the trial court to the dismissal of an action for want of prosecution, without any entry either on the docket or the minutes, does not effect a dismissal. *William Finck & Co. v. Nacogdoches Mercantile Co.* (Civ. App.) 163 S. W. 590.

**Art. 1701. [1094] [1113] Indexes to all judgments.**

**Index.**—Where an abstract of judgment was alphabetically indexed according to the statute, initial and marginal letters did not constitute a part of the index. *Bowles v. Belt* (Civ. App.) 159 S. W. 885.

## CHAPTER THREE

## THE POWERS AND JURISDICTION OF THE DISTRICT COURT AND OF THE JUDGE THEREOF

<p>Art. 1705. Original jurisdiction. 1706. Jurisdiction in probate matters. 1707. Motions against officers. 1708. To punish contempts. 1712. To hear and determine all cases of legal and equitable cognizance.</p>	<p>Art. 1713. To grant all remedial writs. 1714. Judge may exercise all powers, etc., in vacation by consent of parties, except, etc. 1715. Judges may alternate, etc.</p>
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**Article 1705. [1098] [1117] Original jurisdiction of the district court.**

Cited, *Quanah, A. & P. Ry. Co. v. R. D. Jones* (Civ. App.) 178 S. W. 858; *Waples v. Gilmore* (Civ. App.) (in dissenting opinion) 189 S. W. 122.

**1. Jurisdiction in general.**—A satisfaction of a lessor's action for the possession of the property brought in the district court, or a satisfaction of his action of forcible detainer brought in the justice court, would be a satisfaction as to both remedies. *Hartzog v. Seeger Coal Co.* (Civ. App.) 163 S. W. 1055.

**3. Title to land.**—Any district court has jurisdiction of the subject-matter of a suit to cancel patents to public lands. *Sullivan v. State* (Civ. App.) 164 S. W. 1120.

Evidence on a trial for entering on "the Commons" of a county under the control of the mayor of a city and removing, without consent, earth and sand therefrom held to raise a question of title which cannot be tried in the criminal courts. *Haworth v. State*, 168 S. W. 859, 74 Tex. Cr. R. 488.

The district court, to the exclusion of the county court, has jurisdiction of an action of trespass to try title. *Benavides v. Benavides* (Civ. App.) 174 S. W. 293.

The county court held without jurisdiction, in view of Const. art. 5, § 8, over a proceeding to set aside a compromise agreement, whereby a surviving widow conveyed to the executors her claimed interest in her husband's realty and personalty. *McMahan v. McMahan* (Civ. App.) 175 S. W. 157.

Under Bankruptcy Act, § 23, the district court of a county held to have sole jurisdiction to determine the respective rights of plaintiff and a trustee in bankruptcy in timber land in constructive possession of plaintiff, under a contract between the bankrupt and plaintiff. *Bennette v. Lewis* (Civ. App.) 176 S. W. 660.

Where contestants opposing the application of one to be appointed administrator de bonis non claimed that the only property of the estate, a homestead, was bought with their money, the respective claims of title were of a nature to be decided in the district court. *Kimmons v. Abraham* (Civ. App.) 176 S. W. 671.

A suit to divest title out of defendants held one to try title to land, within the jurisdiction of the district court, under Rev. St. 1911, art. 1705. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

**4. Liens on land—In general.**—See *Brophy v. Kelly*, 211 Fed. 22, 128 C. C. A. 382; note under art. 1830, subd. 12.

Action on note for \$200 and to foreclose vendor's lien, in which party having possession, claiming to own note, was made party, held within district court's jurisdiction. *Buckholts State Bank v. Harris* (Civ. App.) 194 S. W. 961.

**7. Value in controversy—In general.**—In trespass to try title, the court held to have jurisdiction of a cross-bill for rent of the land involved in plaintiff's cause of action, although the amount of the rent was below the court's jurisdiction. *Sachs v. Goldberg* (Civ. App.) 159 S. W. 92.

Though the amount of plaintiff's claim, \$500, is insufficient to give the district court jurisdiction of the action, defendant's cross-action for a greater amount gave it jurisdiction. *Joyce v. Hagelstein* (Civ. App.) 163 S. W. 356.

Under Const. art. 5, § 8, the district court does not lose jurisdiction of an action brought in good faith to foreclose a lien on land because it develops on trial there is no lien and the amount involved is less than \$500. *Earl v. Baker* (Civ. App.) 184 S. W. 297.

**8. — Particular actions.**—Under Const. art. 5, § 8, and Rev. St. 1911, art. 4643, relating to the jurisdiction of the district court, such court has jurisdiction to restrain trespass and the cutting of timber, regardless of the value of the timber. *Poe v. Ferguson* (Civ. App.) 168 S. W. 459.

Under Const. art. 5, § 8, the district court has jurisdiction of a suit to set aside a void assessment as a cloud on title, though the amount of the assessment was not sufficient in itself to give the district court jurisdiction. *Ingraham v. City of Nacogdoches* (Civ. App.) 169 S. W. 1134.

District court had no jurisdiction of county treasurer's suit against a county commissioner to recover \$120 unlawfully collected; the amount being below its jurisdiction. *Slaughter v. Knight* (Civ. App.) 184 S. W. 539.

Under Const. art. 5, §§ 8, 16, district court held not to have jurisdiction to issue mandamus to compel payment by school district to teacher of less than \$500. *Jones v. Dodd* (Civ. App.) 192 S. W. 1134.

On school board's breach of teaching contract for period of eight months, teacher suing at the end of seven months could recover only the contract wage for the seven months; and, the amount being less than \$500, district court had no jurisdiction. *Id.*

**12. — Allegation of amount.**—A petition in an action on certain notes and to foreclose a chattel mortgage, in a court the jurisdiction of which depended on the amount in controversy, failing to allege the value of the property, was insufficient to confer jurisdiction. *Wilson v. Ford* (Civ. App.) 159 S. W. 73.

The filing of an amended petition entirely supplants the original petition, and it cannot thereafter be looked to, to ascertain whether the amount in controversy is sufficient to give the court jurisdiction. *L. Grief & Bro. v. Texas Cent. R. Co.* (Civ. App.) 163 S. W. 245.

It is not the evidence, but the pleadings, which determine whether the amount in controversy is within the jurisdiction of a court. *Texas & N. O. R. Co. v. Marshall & Marshall* (Civ. App.) 184 S. W. 643.

When it appears from specific allegations of pleading that the amount recoverable is below the jurisdiction invoked, unsupported general allegations of a greater sum do not confer jurisdiction. *Martin v. Goodman* (Civ. App.) 187 S. W. 689.

That body of petition does not state amount of damages, except for medicine and medical treatment, does not limit amount in controversy to sum stated, where prayer sufficiently alleges general damages. *Canyon Power Co. v. Gober* (Civ. App.) 192 S. W. 802.

**13. — Pleadings reducing amount.**—In an action against a railroad company for the value of goods, where exceptions were sustained to the allegations seeking a recovery of interest and attorney's fees, the petition is properly dismissed, where the amount thereafter remaining was less than \$200. *L. Grief & Bro. v. Texas Cent. R. Co.* (Civ. App.) 163 S. W. 345.

A cause held within the jurisdiction of the court under cl. 4 of this article, where the written petition showed jurisdiction, though, according to an amendment, the amount involved would not have been sufficient. *Wood v. J. M. Radford Grocery Co.* (Civ. App.) 164 S. W. 1070.

Where the petition pleaded facts which if true justified a recovery of \$750, but in another count pleaded a subsequent agreement barring the original claim and authorizing recovery of \$500, it was for the recovery of the lesser sum, although it pleaded the alternative demands. *Robinson v. Lingner* (Civ. App.) 183 S. W. 850.

**14. — Recovery of less than jurisdictional amount.**—In the absence of an allegation that the amount sued for was fraudulently alleged in order to give the court jurisdiction, jurisdiction will be determined by the allegations of plaintiff's petition, regardless of the fact that the evidence may show that the amount which the plaintiff is entitled to recover is below the jurisdiction of the court. *J. C. Stewart Produce Co. v. Hamilton-Turner Grocery Co.* (Civ. App.) 163 S. W. 1000.

That plaintiff was entitled to recover less than the jurisdictional amount would not defeat the jurisdiction once acquired, unless the jurisdictional allegation was fraudulently made. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

**15. — Exaggerated claim.**—Where plaintiff, after exceptions had been sustained to some items of damage laid in its original petition, filed an amended petition, alleging greater damages, defendant could then plead in abatement that plaintiff fraudulently misstated the amount of the damage to give the court jurisdiction, notwithstanding its previous answer to the original petition. *L. Grief & Bros. v. Texas Cent. R. Co.* (Civ. App.) 163 S. W. 345.

**16. — Joining claims.**—Where the amount in controversy in a suit to cancel two notes is enough to give jurisdiction, the court is not deprived thereof by elimination of one of the notes by default judgment thereon in a subsequent action. *Cattlemen's Trust Co. v. Blasingame* (Civ. App.) 184 S. W. 574.

**17. — Inclusion of interest.**—The district court has jurisdiction of a suit for recovery of \$500 agreed to be paid as broker's commission on an exchange of realty, the interest on such sum being in the nature of damages for wrongful detention of the money, and not interest on an open account or a written contract, as provided for in Rev. St. 1911, arts. 4977, 4978. *Robinson v. Lingner* (Civ. App.) 183 S. W. 850.

20. — **Incidental relief.**—A district court, acquiring jurisdiction of a garnishment suit, has jurisdiction of a cross-action below the jurisdictional amount. *Heidemann v. Martinez* (Civ. App.) 173 S. W. 1166.

22. **Contested elections.**—Const. art. 5, § 8, as amended in 1891, giving district courts jurisdiction to try contested elections, is not self-executing. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

The constitutional provision conferring jurisdiction over contested elections upon the district court is exclusive, and a district judge has no jurisdiction to determine an election contest in vacation. *Barker v. Wilson* (Civ. App.) 189 S. W. 748.

### Art. 1706. [1099] [1118] Jurisdiction in matters of probate.

Cited, *Dubose v. Woods* (Civ. App.) 162 S. W. 3; *Poe v. Ferguson* (Civ. App.) 168 S. W. 459.

**Settlement of estates.**—The district court has jurisdiction of a suit by heirs against the administrator of decedent in actual possession, and denying the right of the heirs and asserting an adverse and hostile claim to the property, because title to land is involved within Const. art. 5, § 8. *Key v. Key* (Civ. App.) 167 S. W. 173.

Under Const. art. 5, § 8, the district court has original jurisdiction of a suit by heirs against an administratrix guilty of mismanagement of the estate, and neglecting for many years to settle the same, and praying for a determination of title as to community property and for an accounting and partition. *Id.*

District courts have no jurisdiction of suits against estates in administration unless the claim has been first presented to and rejected by the administrator, and unless the claimant has some legal or equitable right connected with his claim, and the powers of the probate court are inadequate. *Ralston v. Stainbrook* (Civ. App.) 187 S. W. 413.

The probate court has exclusive, original jurisdiction in a pending administration of claims and liens against the estate, and the remedy upon the administrator's rejection of a lien is in that court, and the district courts have no jurisdiction over the management of the estate, except on appeal. *Id.*

The Constitution confers, not only general probate jurisdiction upon the county court, but also an auxiliary and ancillary equity jurisdiction upon the district court over questions affecting administration. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

**Wills.**—Where title to personal property or the construction of a will is involved, it is proper to invoke the jurisdiction of the district court to adjudicate the questions. *Key v. Key* (Civ. App.) 167 S. W. 173.

**Appellate jurisdiction.**—Where trial court has no jurisdiction, appellate court has none. *Goodman v. Schwind* (Civ. App.) 186 S. W. 282.

**Control over minors.**—Under Const. art. 5, § 8, giving general control over minors to district courts, such courts would have power to dispose of the custody of a minor for its best interest, even by depriving the parents of such custody, though neither had relinquished custody. *Long v. Smith* (Civ. App.) 162 S. W. 25.

Notwithstanding Const. art. 5, § 16, the probate court does not acquire jurisdiction of a trust for a minor because the original testamentary trustee died, but the district court has jurisdiction and will appoint a trustee to carry out the purpose of the trust. *Kent v. McDaniel* (Civ. App.) 178 S. W. 1006.

District court had only appellate jurisdiction to revise, declare void, or set aside orders of county court, sitting in probate, relative to sale of land of minors on their guardian's application, and had no authority to consider facts of innocent purchasers, question of title, etc. *Goodman v. Schwind* (Civ. App.) 186 S. W. 282.

### Art. 1707. [1100] [1119] Motions against sheriffs, attorneys, etc.

**Demurrer to motion.**—Upon allegations in motion against sheriff and sureties to reverse judgment on ground of sheriff's refusal to levy and return execution, general demurrer held properly sustained. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

Trial court's sustaining of demurrer to appellant's motion against a sheriff and his sureties, without hearing appellant's reply argument and its refusal to allow appellant to argue his exceptions to the special answer, held within its discretion. *Id.*

### Art. 1708. [1101] [1120] To punish contempts.

**Acts constituting contempt.**—Where language, contained in a brief for writ of error which was filed in the district court in vacation, was improper and intemperate, as applied to the judge of the district court, the contempt was constructive only. *Ex parte Duncan* (Cr. App.) 182 S. W. 313.

**Proceedings to punish.**—Where the contemptuous language appeared in a brief for a writ of error, a copy of which was filed in the district court, held, that the district court could not summarily punish the attorney on order to show cause, where the petition of opposing counsel was unverified and no affidavit of charges was filed. *Ex parte Duncan* (Cr. App.) 182 S. W. 313.

**Punishment.**—Where a court imposed a fine for contempt in excess of the amount permitted by this article, the contemner will not be released on habeas corpus proceedings until he has paid the amount that could be lawfully imposed. *Ex parte Ellerd* (Cr. App.) 158 S. W. 1145.

### Art. 1712. [1106] [1122] To hear and determine all cases of legal or equitable cognizance.

See art. 7730½, post, establishing statutory rule as to situs of actions based on wrongful acts committed outside of state and resulting in death or personal injury.

**In general.**—Defendant, liable to plaintiff, held not relieved of liability by plaintiff's assurance that he was being sued merely to give jurisdiction to the courts of a particular county over another party. *Merchants' & Planters' Nat. Bank of Mt. Vernon v. Jones* (Civ. App.) 173 S. W. 606.

Where a dam extended beyond the thread of a stream toward the Texas side, the Texas courts have complete jurisdiction of an action for damages from an overflow caused by the dam. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

Jurisdiction may be conferred on a court by necessary implication as effectually as by express terms. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

The "jurisdiction" of a court is the power to consider and decide one way or the other as the law may require. *Auto Transit Co. v. City of Ft. Worth* (Civ. App.) 182 S. W. 685.

**Courts of concurrent jurisdiction.**—Where a case may be brought in either of two courts, the one first obtaining jurisdiction will retain it, and this extends to cases in the courts of sister states. *Wade v. Crump* (Civ. App.) 173 S. W. 538; *Blassingame v. Cattlemen's Trust Co.* (Civ. App.) 174 S. W. 900.

A suit against a railroad company purchasing under a decree of a federal court the property and franchises of another railroad company, to enforce a contractual obligation, is within the jurisdiction of a state court. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

Pending a receivership in the federal court, a state court may determine a claim against the railroad company whose property was so impounded, if it does not interfere with the receiver's custody of the property. *Kansas City, M. & O. Ry. Co. of Texas v. Latham* (Civ. App.) 182 S. W. 717.

After discharge of a receiver appointed by the federal court, and during the pendency of the receivership suit, a state court may appoint a receiver who can hold the property to the exclusion of the power of the federal court to appoint a second receiver for it. *Id.*

Two courts, having concurrent jurisdiction, will not, at the same time, entertain a suit between the same parties over the same subject-matter; but the court which first obtains jurisdiction will hold it to the exclusion of the other. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

Possession of property through its receiver by a court of equity having jurisdiction is exclusive of the jurisdiction of other courts. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

**Non-resident parties.**—A Texas court in an action for conversion, having acquired jurisdiction of the person of defendant, a Mexican corporation, had jurisdiction of the subject-matter also. *Banco Minero v. Ross*, 172 S. W. 711, 106 Tex. 522.

German corporation's cause of action against resident of Mexico on open account for goods, wares, and merchandise was transitory, and courts of Texas had jurisdiction over subject-matter of litigation. *Russek v. Wind, Ems & Co.* (Civ. App.) 192 S. W. 584.

Courts of Texas held to have jurisdiction of minority stockholders' suit against West Virginia corporation doing business in Texas, and its officers, to recover unlawful payments of salary made to officers out of corporate funds, etc. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

**Causes of action arising outside of state.**—An action against a Mexican bank for conversion of a deposit is transitory, and can be maintained in any court obtaining jurisdiction of defendant's person. *Banco Minero v. Ross*, 172 S. W. 711, 106 Tex. 522.

Where jurisdiction of defendant is obtained, a resident of New Mexico may sue here for malicious prosecution arising out of an alleged theft in Kansas; since the action is transitory in its nature. *Missouri, K. & T. Ry. Co. v. Craddock* (Civ. App.) 174 S. W. 965.

Jurisdiction in one state of a cause of action arising in another state in transitory causes of action is exercised upon principles of comity. *El Paso & S. W. Co. v. Chisholm* (Civ. App.) 180 S. W. 156.

In an action to recover on a promise to pay for wheat raised in the republic of Mexico and taken from plaintiffs, where defendant appeared in court, the Texas courts had jurisdiction. *Mendiola v. Garza Bros.* (Civ. App.) 185 S. W. 391.

An action on a county contractor's bond is transitory, and may be brought in the county in which the materialmen and the principal resided in a state where the surety was doing business under a permit, though the building was constructed in another state. *American Surety Co. v. Huey & Philp Hardware Co.* (Civ. App.) 191 S. W. 617.

— **Personal injuries.**—A state court may take jurisdiction of an action for personal injuries suffered by a citizen of the state in another state. *El Paso & S. W. Co. v. Chisholm* (Civ. App.) 180 S. W. 156.

An action for personal injuries is transitory, and may be maintained wherever a court is found that has jurisdiction of the parties and of the subject-matter. *Atchison, T. & S. F. Ry. Co. v. Stevens* (Civ. App.) 192 S. W. 304.

— **Actions concerning chattels.**—An action for damages to personalty is transient and not local. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

The courts of Texas are not without jurisdiction of an action for conversion merely because the conversion was in Mexico. *Mendiola v. Gonzales* (Civ. App.) 185 S. W. 389.

A citizen of Mexico there converting to his own use property of a citizen of Texas, and then coming to the state, is there amenable to the state citizen for the wrong. *Id.*

— **Effect of foreign laws.**—The laws of another state will be given that construction and effect which is given them by the courts of final resort in the state where they were enacted. *American Express Co. v. North Ft. Worth Undertaking Co.* (Civ. App.) 179 S. W. 903.

Decisions of state courts generally are not laws controlling the courts of other states, except in so far as they construe the statute law of their respective states. *Friedman v. Sampson* (Civ. App.) 181 S. W. 779.

A county building contractor's bond and a foreign state statute under which it was given held not to prevent the bringing of a suit on the bond for materials furnished and already used in the building before the completion of the building. *American Surety Co. v. Huey & Philp Hardware Co.* (Civ. App.) 191 S. W. 617.

**Interstate commerce—Interstate shipments.**—An action against an initial carrier to enforce liability under the Carmack amendment to the Interstate Commerce Law for loss of goods by a connecting carrier is within the jurisdiction of a state court, and not within the exclusive jurisdiction of the federal tribunals. *St. Louis, B. & M. Ry. Co. v. Gould* (Civ. App.) 165 S. W. 13.

Under Act Cong. March 2, 1833, and Act Cong. Feb. 23, 1887, property introduced from without the United States and in the possession of a carrier for transportation in bond, is beyond the jurisdiction of the state courts. *Galveston, H. & S. A. Ry. Co. v. Terrazas* (Civ. App.) 171 S. W. 303.

Interstate Commerce Act, preserving by section 22 the common law and statutory remedies, does not deprive state court of jurisdiction of action for conversion of interstate shipment. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

**Actions affecting lands outside of state.**—The courts are without jurisdiction to set aside a deed of a deceased person to land located in a foreign country or to decree partition of such land. *Holt v. Guerguin*, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136, reversing judgment (Civ. App.) 156 S. W. 581.

Where a wing dam built by defendant extended beyond the middle of a river dividing Texas and New Mexico, the Texas courts had jurisdiction of an action for the flooding of New Mexico land. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

**Waiver or consent.**—Jurisdiction of the subject-matter cannot be conferred by the consent of parties, but where the court has jurisdiction of the subject-matter, the parties may by consent confer jurisdiction over their persons. *Josey v. Masters* (Civ. App.) 179 S. W. 1134; *Hunt v. Johnson*, 171 S. W. 1125, 106 Tex. 509, dismissing appeal (Civ. App.) 141 S. W. 1060.

Parties cannot, independently of constitutional or statutory provisions, confer judicial authority, and where it is attempted to be done the judgment of the appointee is a nullity. *Dunn v. Home Nat. Bank* (Civ. App.) 181 S. W. 699; *Reinertsen v. E. W. Bennett & Sons* (Civ. App.) 185 S. W. 1027.

#### Art. 1713. [1107] [1123] To grant all remedial writs.

**Mandamus.**—District court held to have jurisdiction of petition for mandamus against county judge to compel him to order election to determine whether town should incorporate for free school purposes only. *Ferguson v. Leigh* (Civ. App.) 193 S. W. 206.

As both Constitution and statutes authorize district courts and judges thereof to issue writs of mandamus, district judges may, where facts are undisputed, issue writs of mandamus in vacation. *Roberts v. Munroe* (Civ. App.) 193 S. W. 734.

In view of Constitution Bill of Rights, declaring that jury trial shall remain inviolate, and article 5, § 10, held, that district judge, though authorized to issue a writ of mandamus in vacation, cannot issue a writ where facts are disputed and jury trial is demanded. *Id.*

**Habeas corpus.**—The district court has jurisdiction to issue habeas corpus upon application of a complaining parent and to determine the right to custody of child. *Ex parte Garcia* (Civ. App.) 187 S. W. 410.

#### Art. 1714. Judge may exercise all powers, etc., in vacation, by consent of parties, except, etc.

**Exercise of power in vacation.**—The district court in vacation may entertain a motion to strike out a bill of exceptions. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

The constitutional provision conferring jurisdiction over contested elections upon the district court is exclusive, and a district judge has no jurisdiction to determine an election contest in vacation. *Barker v. Wilson* (Civ. App.) 189 S. W. 748.

**Right of appeal.**—Pronouncement of sentence by the judge in vacation is not authorized, so that sentence so pronounced is not a final judgment on which an appeal may be rested. *Dodd v. State* (Cr. App.) 179 S. W. 564.

So far as right of appeal from final judgment perpetuating injunction was concerned, held, that it was immaterial that it was rendered outside the county, especially in view of this article. *Trayhan v. State* (Civ. App.) 180 S. W. 646; *Anderson v. Same* (Civ. App.) 180 S. W. 648.

#### Art. 1715. [1108] [1124] May alternate, etc.

**Presiding in other districts.**—Art. 1676 does not deprive district judges of the power granted by Const. art. 5, § 11, and this article of holding court for one another, and a disqualified judge may on his own motion call in a judge of an adjoining district to preside for him. *Connellee v. Blanton* (Civ. App.) 163 S. W. 404.

## CHAPTER FOUR

### THE TERMS OF THE DISTRICT COURT

Art.		Art.	
1718.	Terms of court.	1724.	Juries, how summoned, business transacted, etc.
1720.	Special terms may be held, when; time; jury commissioners; grand and petit juries, etc.	1726.	Extension of term of court, when, etc., effect as to term in another county.
1723.	No new civil cases to be brought to special term.		

#### Article 1718. [1111] [1127] Terms of court.

See *Chant v. State*, 73 Cr. R. 345, 166 S. W. 513; note under art. 1720.

#### Art. 1720. Special terms may be held, when; time; jury commissioners; grand and petit juries, etc.

Authority of judge to call special term.—The district court, under arts. 1718-1726, has authority to call a special term for the trial of a murder case. *Chant v. State*, 166 S. W. 513, 73 Tex. Cr. R. 345.



This article authorizes the district judge to call a special term to try cases in which the public welfare is involved. *Browder v. Memphis Independent School Dist.* (Civ. App.) 172 S. W. 152, judgment affirmed (Sup.) 180 S. W. 1077.

Under Code Cr. Proc. 1911, art. 94, and this article, a judge had authority to call a special term for the trial of cases. *Vasquez v. State*, 76 Tex. Cr. R. 37, 172 S. W. 225.

**Matters which may be considered.**—See *Browder v. Memphis Independent School Dist.* (Sup.) 180 S. W. 1077, affirming judgment (Civ. App.) 172 S. W. 152; note under art. 1723.

#### **Art. 1723. [1117] No new civil cases to be brought to special term.**

**Application.**—Art. 1723 does not apply to a suit brought before a special term of the district court has been called. *Browder v. Memphis Independent School Dist.* (Civ. App.) 172 S. W. 152, judgment affirmed (Sup.) 180 S. W. 1077.

**Voluntary appearance.**—Under arts. 1720, 1723, 1724, and 1852, held, that the district court had jurisdiction at a special term of a suit just begun and returnable to a succeeding term; the defendant having voluntarily appeared and requested such term. *Browder v. Memphis Independent School Dist.* (Sup.) 180 S. W. 1077, affirming judgment (Civ. App.) 172 S. W. 152.

#### **Art. 1724. [1118] Juries, how summoned, business transacted, etc.**

See *Browder v. Memphis Independent School Dist.* (Sup.) 180 S. W. 1077, affirming judgment (Civ. App.) 172 S. W. 152; note under art. 1723.

#### **Art. 1726. Extension of term of court, when, etc., effect as to term in another county.**

**Validity and construction in general.**—Where the trial was not completed by the time the regular term would have expired by law, the court could extend the term until the conclusion of the trial under this article. *Sharp v. State*, 71 Tex. Cr. R. 633, 160 S. W. 369.

This article is a valid exercise of legislative power, and authorizes such extension to receive a verdict and enter judgment in a pending case. *Brown v. State*, 169 S. W. 437, 74 Tex. Cr. R. 356.

Under Rev. St. 1911, art. 1726, the judge has absolute power to extend the term pending trial of a cause, even though the extension might destroy the succeeding term, so that during extension of December term, when the February term convened, the judgment in the cause rendered on the extended term was valid. *Cory v. Richardson* (Civ. App.) 191 S. W. 568.

The statute should be used only in cases of necessity, and not for the convenience of the trial judge, or for purposes of advisement on the case. *Id.*

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## CHAPTER FIVE

### MISCELLANEOUS PROVISIONS RELATING TO THE DISTRICT COURT

#### SPECIAL DISTRICT COURTS

The Criminal district courts created for a number of the counties in the state are, in some instances, given jurisdiction of divorce cases, and of some other minor civil matters. The text of the acts creating the courts are set forth in Vernon's Code of Criminal Procedure as arts. 97a to 97½i.

Provisions relating to succession to jurisdiction of Special District Court for El Paso county are contained in Act Feb. 25, 1915, set forth under art. 30, subdivision 65.

## TITLE 35

## COURTS—COUNTY

Chap.		Chap.	
1. The county judge.			county court and of the judge thereof.
2. The clerk of the county court.		4.	The terms of the county court for civil and probate business.
3. The powers and jurisdiction of the			

## CHAPTER ONE

## THE COUNTY JUDGE

Art.		Art.	
1732. Oath of office.		1739.	Governor to appoint by telegram.
1736. Disqualification, causes of.		1740.	Minutes of court to show proceedings.
1738. Governor to appoint special county judge.		1741.	Special judges, when and how elected; powers.

**Article 1732. [1125] [1134] Oath of office.**

Cited, *Bray-Robinson-Curry Woolen Mills v. W. F. Walker & Son* (Civ. App.) 165 S. W. 107.

**Art. 1736. [1129] [1138] Disqualification; causes of.**

Cited, *Dolsons v. Sheridan Stove Mfg. Co.* (Civ. App.) 178 S. W. 663.

**Interest.**—Where a judge of the county court was made a party in case by allegations of a cross-action of a suit in the justice court, he should have held himself disqualified to sit in case on appeal to county court. *First Nat. Bank v. Herrell* (Civ. App.) 190 S. W. 797.

**Relationship to surety.**—A judge who presided at trial of cause, who was related within third degree to a surety on appellant's bond, should have excused himself as disqualified, and declined to make any order in case. *First Nat. Bank v. Herrell* (Civ. App.) 190 S. W. 797.

**Art. 1738. [1131] Governor to appoint special county judge, etc.**

**Failure of appointee to qualify.**—Special county judge elected by members of bar under art. 1741 held to have jurisdiction to try case, though Governor had appointed special judge, who had not qualified, to try such case under this article. *Ford v. Simmons* (Civ. App.) 171 S. W. 1077.

**Nature of office of special judge.**—The appeal bond in probate proceedings is payable to the county judge, as such, and hence the fact that an appeal bond was made payable to the county judge of the county, who was disqualified to try a probate case instead of to the special judge appointed in his place, was immaterial, since the special judge would be held to be the "county judge." *Wolnitzek v. Lewis* (Civ. App.) 162 S. W. 963.

**Art. 1739. [1132] Governor to appoint by telegram.**

Cited, *Ford v. Simmons* (Civ. App.) 171 S. W. 1077.

**Art. 1740. [1132a] Minutes of court to show proceedings.**

**Record of selection.**—By applying for continuance to make new parties, failure to make entries in the minutes of the disqualification of the regular judge and the taking of oath by the special judge is waived. *Heidelberg Amusement Club v. Mercedes Lumber Co.* (Civ. App.) 180 S. W. 1133.

**Art. 1741. Special judges when and how elected; powers.**

**Effect of appointment by governor.**—Special county judge elected by members of bar under this article held to have jurisdiction to try case, though Governor had appointed special judge, who had not qualified, to try such case under article 1738. *Ford v. Simmons* (Civ. App.) 171 S. W. 1077.

**Authority of special judge.**—A special county judge elected by the members of the bar in the absence of the county judge under this article may try cases in which the county judge would be disqualified. *Ford v. Simmons* (Civ. App.) 171 S. W. 1077.

## CHAPTER TWO

## THE CLERK OF THE COUNTY COURT

Art. 1745. Clerk pro tem. appointed when.	Art. 1749. Oath and powers of deputies.
1746. County clerk pro tem. to qualify and give bond.	1753. Ex officio clerk of commissioners' court.
1747. Bond and oath.	1758. Other dockets, indexes, etc.
1748. May appoint deputies.	

**Article 1745. [1135] County clerk pro tem. appointed, when.**

**Construction and operation.**—Where the county court, sitting in probate, made orders relative to sale of wards' realty at time after their guardian, the applicant, had been elected and was clerk of the court, no clerk pro tem, having been appointed pursuant to arts. 1745 and 1746 such orders were void. *Goodman v. Schwind* (Civ. App.) 186 S. W. 282.

In suit to declare such orders void, district court could not infer from silence of record of county court that a clerk pro tempore was appointed. *Id.*

Arts. 1745 and 1746 relate to county clerks both in their capacity as such and in their capacity of probate clerks. *Id.*

**Art. 1746. [1136] County clerk pro tem. to qualify and give bond.**

See *Goodman v. Schwind* (Civ. App.) 186 S. W. 282; notes under art. 1745.

**Art. 1747. [1137] [1144] Bond and oath.**

**Liability on bond.**—Bondsmen on official bonds are liable for any abuse of the authority vested in the principal. Under Const. art. 5, § 20, Rev. St. 1911, arts. 1747-1749, 1753, the issuance of warrants without previous authority of the commissioners' court held an official act within the bond of the county clerk. The act of the deputy county clerk in issuing fictitious warrants and selling them to third persons who received payment thereon was also within the county clerk's bond. *Myers v. Colquitt* (Civ. App.) 173 S. W. 993.

**Art. 1748. [1138] [1145] May appoint deputies.**

See *Myers v. Colquitt* (Civ. App.) 173 S. W. 993; note under art. 1747.

**Art. 1749. [1139] [1146] Oath and power of deputies.**

See *Myers v. Colquitt* (Civ. App.) 173 S. W. 993; note under art. 1747.

**Art. 1753. [1143] [1150] Ex officio clerk of commissioners' courts.**

See *Myers v. Colquitt* (Civ. App.) 173 S. W. 993; note under art. 1747.

**Art. 1758. [1148] [1155] Other dockets, indexes, etc.**

Cited, *Palacios v. Corbett* (Civ. App.) 172 S. W. 777.

## CHAPTER THREE

THE POWERS AND JURISDICTION OF THE COUNTY COURT  
AND OF THE JUDGE THEREOF

Art. 1763. Exclusive original jurisdiction.	Art. 1771. Both law and equity powers.
1764. Concurrent original jurisdiction.	1772. To grant remedial writs.
1766. Jurisdiction denied in certain cases.	1775. Changed jurisdiction recognized, eminent domain retained.
1767. Appellate jurisdiction.	
1769. Motions against certain officers.	

**Article 1763. [1154] [1161] Exclusive original jurisdiction.**

**Historical.**—Under Act Jan. 20, 1839 (2 Gam. Laws, 91), providing that all process theretofore issued by the county courts in which the amount exceeded \$100 should be returned to the district court, the clerk of the district court was authorized to issue execution upon a judgment rendered in the county court. *Masterson Irr. Co. v. Foote* (Civ. App.) 163 S. W. 642.

**Nature and incidents of jurisdiction in general.**—Jurisdiction of a forcible detainer suit is in the justice's court and not in the county court. *Benavides v. Benavides* (Civ. App.) 174 S. W. 293.

**Requisite amount or value in controversy.**—The county court would not have jurisdiction of an action by a county against a canal company to recover a sum less than \$200 as reimbursement for repairs made to a bridge necessitated by the construction of the canal. *Cow Bayou Canal Co. v. Orange County* (Civ. App.) 158 S. W. 173.

A suit in the county court for mandamus to compel a justice of the peace allowing judgment for \$79.65 to grant an appeal and to make a transcript of the case to the county court, if treated as a suit invoking the original jurisdiction of the county court, is not within its jurisdiction. *Knight v. Armstrong* (Civ. App.) 162 S. W. 448.

In garnishment it is error to exclude proof by garnishee of claim against fund on ground that such claim is less than jurisdictional amount of suits in county court, since garnishee has right to prove all claims, regardless of amount, and may interplead all claimants. *National Fire Ins. Co. of Hartford, Conn., v. McEvoy Furniture Co.* (Civ. App.) 192 S. W. 270.

— **Set off or counterclaim.**—Defendant by reconvening and praying for damages of \$274 conferred jurisdiction on the county court to determine all issues involved in the suit. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

— **Injunction.**—The county court had no jurisdiction to determine the validity of a justice court judgment for less than \$200 in a suit to enjoin its collection. *Eppler v. Hilley* (Civ. App.) 166 S. W. 87; *Smith Bros. Grain Co. v. Jenson* (Civ. App.) 174 S. W. 981.

Where a justice court judgment in a garnishment case, including costs and attorney's fees, exceeded \$200, and was less than \$500, the county court had jurisdiction to determine its validity in a suit to enjoin its collection. *Eppler v. Hilley* (Civ. App.) 166 S. W. 87.

The county court has jurisdiction of a suit to restrain a breach of contract and thereby prevent damages in the sum of \$500. *Tomlin v. Clay* (Civ. App.) 167 S. W. 204.

The county court has no jurisdiction to restrain trespass and the cutting of timber, where the petition contains no allegation as to the value of the subject-matter. *Poe v. Ferguson* (Civ. App.) 168 S. W. 459.

— **Pleading.**—Though the jurisdiction of the county court must appear on the face of the petition, yet, when it appears therefrom that the amount sought to be recovered is within the jurisdiction of the court and no other fact is alleged from which it affirmatively appears that the court is without jurisdiction, the jurisdiction appears on the face of the petition. *Cantrell v. Cawyer* (Civ. App.) 162 S. W. 919.

The petition to foreclose a chattel mortgage in the county court must allege that the value of the property upon which the foreclosure is sought, is an amount within the jurisdiction of the county court. *Randals v. Pecos Valley State Bank* (Civ. App.) 162 S. W. 1190.

In suit in county court on note for \$150 and to foreclose chattel mortgage, failure to allege value of property on which foreclosure is sought was fatal to jurisdiction. *Reeves v. Faris* (Civ. App.) 186 S. W. 772.

— **Amount claimed or value of property.**—A petition which shows that the amount sought is within the jurisdiction of the court, and which seeks to foreclose a chattel mortgage on property, the value of which is not disclosed, states a cause of action within the jurisdiction of the county court. *Cantrell v. Cawyer* (Civ. App.) 162 S. W. 919.

Where, in an action in the county court to foreclose a chattel mortgage on horses and cotton worth together in excess of the amount of the jurisdiction of the court, it appeared that the cotton had been sold before the institution of the suit, and the court, without objection, submitted the issue of foreclosure as to the horses worth about \$225, the court had jurisdiction. *Id.*

The jurisdiction of county courts in suits to foreclose chattel mortgages is governed by the amount of the debt, where the value of the mortgaged property is less than the debt, but where the value of the property exceeds the debt, such value fixes the jurisdiction. *Marshall v. G. A. Stowers Furniture Co.* (Civ. App.) 167 S. W. 230.

Where the debt sued for is less than the minimum prescribed to give jurisdiction, and the value of the property upon which a chattel mortgage is sought to be foreclosed is not alleged, the petition fails to show that the court has jurisdiction. *Id.*

In a suit on a note and to foreclose a chattel mortgage, the jurisdiction of the county court is determined by the alleged value of the chattels upon which foreclosure is desired. *Reeves v. Faris* (Civ. App.) 186 S. W. 772.

— **Principal, interest, and attorney's fees.**—Attorney's fees sought to be recovered under art. 2178 are not merely costs, but are a part of the "amount in controversy." *Houston Packing Co. v. McDonald* (Civ. App.) 175 S. W. 806; *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 171 S. W. 245; *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 180 S. W. 1146.

In a suit for conversion of a bank deposit amounting to \$200 and interest amounting to \$11.80, the amount in controversy was within the jurisdiction of a district court to which the jurisdiction of the county court had been transferred, on the face of the pleadings. *Young v. Bundy* (Civ. App.) 158 S. W. 566.

Suit for \$200 for a horse killed and for interest until commencement of the suit held within the county court's jurisdiction. *International & G. N. Ry. Co. v. Feldman* (Civ. App.) 170 S. W. 133.

The county court has jurisdiction of an action on a note for \$190, which provided for attorney's fees of 10 per cent. in case of suit, the total sued for being therefore in excess of \$200. *Horton v. Lee* (Civ. App.) 180 S. W. 1169.

In suit against sheriff for conversion of \$198.70 and for \$14 damages, the \$14 would not be treated as "interest" within meaning of the Constitution, but as damages, so that suit was for sum in excess of \$200, exclusive of interest, and within jurisdiction of county court. *Sanders v. Waghalter* (Civ. App.) 192 S. W. 1083.

— **Original amount affected by payments or reduction from other cause.**—As regards jurisdiction of the county court, defendants' plea that one of the notes sued on had been paid did not of itself lessen the amount put in controversy by plaintiff's petition. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

Jurisdiction of county court held not defeated merely because one of the notes sued on had been paid, and the other was for less than \$200. *Id.*

The amount sued for being enough to give the trial court jurisdiction, elimination of one of the items by the judgment on appeal will not affect the jurisdiction of the trial court on a new trial as to remaining item. *Panhandle & S. F. Ry. Co. v. Bell* (Civ. App.) 189 S. W. 1097.

A suit for a balance of \$60 due is below jurisdiction of the county court. *American Disinfecting Co. v. Freestone County* (Civ. App.) 193 S. W. 440.

**Objections to Jurisdiction.**—Where, in an action in the county court, the petition sought to recover an amount within the jurisdiction of the court, and sought to foreclose a chattel mortgage without disclosing the value of the property, the defendant to avail himself of want of jurisdiction of the court must allege and prove that the property was of value in excess of jurisdiction. *Cantrell v. Cawyer* (Civ. App.) 162 S. W. 919.

Where the amount in controversy is below jurisdiction of the county court, the action will be dismissed upon the plea in abatement of only one of the defendants that plaintiff fraudulently misstated the amount so as to give the court jurisdiction. *L. Grief & Bro. v. Texas Cent. R. Co.* (Civ. App.) 163 S. W. 345.

#### Art. 1764. [1155] [1162] Concurrent original jurisdiction.

**Amount or value in controversy—Principal, interest, and attorney's fees.**—Where plaintiff sued on five notes aggregating \$942.75 with 10 per cent. interest and 10 per cent. attorney's fees, demanding judgment for the amount of the notes and fees, the amount in controversy exceeded the jurisdiction of the county court. *Belle Springs Creamery Co. v. Marshall* (Civ. App.) 165 S. W. 61.

The county court, under Const. art. 5, § 16, is without jurisdiction of an action for damages for the destruction of cattle, where their value plus the interest which accrued between the date of the destruction and the bringing of the suit exceeded \$1,000. *Ft. Worth Stockyards Co. v. Witherspoon* (Civ. App.) 166 S. W. 502.

Where a shipment of live stock was damaged to an amount of \$970 the shipper became immediately entitled to 6 per cent. interest on such amount, and after the lapse of more than a year the county court was without jurisdiction of his action; the amount in controversy exceeding \$1,000. *Ft. Worth & R. G. Ry. Co. v. Mathews* (Civ. App.) 169 S. W. 1052.

Since interest is not allowable on personal injury claims prior to the date of judgment unless plaintiff prays for the same, none can be included in the judgment so as to affect the jurisdictional amount. *Gulf, C. & S. F. Ry. Co. v. White* (Civ. App.) 176 S. W. 790.

A prayer for judgment for \$1,000 and interest thereon held not to claim an amount in excess of the jurisdiction of the county court. *Chicago, R. I. & G. Ry. Co. v. Whaley* (Civ. App.) 177 S. W. 543.

Interest on damages demanded, being a part of the damages and not in fact "interest," the county court is without jurisdiction if the total demand, plus interest, demanded exceeds \$1,000. *St. Louis Southwestern Ry. Co. of Texas v. Herndon Produce Co.* (Civ. App.) 188 S. W. 278.

A cause of action does not exceed the jurisdiction of the court by the addition of interest as damages if, when the suit is filed, the amount in controversy falls within that court's jurisdiction. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 189 S. W. 765.

Where damages are laid at a certain sum, with interest thereon at the rate of 6 per cent., the interest is then accumulated as a part of the damages, and is to be included in the amount of recovery affecting the jurisdiction. *Id.*

A petition which alleged that the damage to a live stock shipment was \$977 and prayed for a recovery of that amount without interest does not show that the amount in controversy exceeds \$1,000, the limit of the county court's jurisdiction, as plaintiff can omit to sue for interest as element of damages. *Ft. Worth & R. G. Ry. Co. v. Mathews* (Sup.) 191 S. W. 559.

In action in the county court on a policy of fire insurance, where petition asked for judgment for \$1,000, amount of policy, and further general and special relief, held, that the county court had jurisdiction of the case. *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098.

— **Set-off, counterclaim, intervention, or cross action.**—In foreclosure of a chattel mortgage, a plea in intervention in the county court, seeking to recover against the same debtor on a note for \$1,521, and to enforce an alleged prior lien on the same property, was beyond the court's jurisdiction and a nullity, and the fact that it was on file was insufficient to prevent a judgment for plaintiff against the debtor from being final. *Nocona Nat. Bank v. Goin* (Civ. App.) 159 S. W. 189.

In an action between former partners, where defendant by counterclaim sought to recover the specific sum of \$990 alleged to have been received by the plaintiff, who refused payment thereof, the court was not called upon to adjudicate a partnership transaction of double that amount so as to exceed the jurisdiction of the court. *Reeves v. White* (Civ. App.) 161 S. W. 43.

A county court has no jurisdiction of a cross-action, in an action on an account, which asks specific performance of a contract by plaintiff to purchase, for \$1,000, land from defendant. *Melado Land Co. v. Field* (Civ. App.) 172 S. W. 1136.

Where, in action in county court on a note for \$300, defendant set up in cross-action claim for \$954, and in addition asked for cancellation of the note, such cross-action was in excess of the court's jurisdiction. *Billings v. Southern Supply Co.* (Civ. App.) 194 S. W. 1170.

— **Pleading.**—In an action to enjoin trespasses on real estate pending a suit to try title thereto, the county judge had no jurisdiction to grant a temporary injunction where the petition did not allege the value of the land involved. *Johnson v. Clemmons* (Civ. App.) 158 S. W. 797.

The allegations of the petition as to the amount in controversy determine the jurisdiction of the court unless the defendant specially plead and show by evidence that such amount so alleged was for the fraudulent purpose of giving the court jurisdiction, and the time to file such a plea is prior to the beginning of the trial. *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439.

Where the petition, in an action in the county court to foreclose a chattel mortgage, alleged that the property mortgaged was worth \$600 and the mortgage contained no recitation of value, a judgment of foreclosure was valid on the face of the record, and the county court alone could restrain execution on a showing that the property was worth an amount in excess of the jurisdiction of the county court. *Meyers v. Hambrick* (Civ. App.) 167 S. W. 84.

A petition to foreclose a chattel mortgage and for attorney's fees, together amounting to more than the jurisdictional amount of \$200, must affirmatively show that the value of the property at the time of suit is not above the jurisdictional maximum. *Marshall v. G. A. Stowers Furniture Co.* (Civ. App.) 167 S. W. 230.

Petition's failure to allege value of property on which lien foreclosure was sought, which might have been more than \$1,000 and not within court's jurisdiction, was fatal. *Richardson v. Hetchcock* (Civ. App.) 173 S. W. 1006.

Failure of petition in the county court to foreclose chattel mortgage to allege the value of the chattels held a fatal defect. *Lusk v. Hardin* (Civ. App.) 176 S. W. 787.

A petition seeking recovery on notes aggregating \$400, and foreclosure of a mortgage securing them on certain mules, is insufficient to show jurisdiction of the county court if it fails to allege the value of the mules. *Glasscock v. Sinks* (Civ. App.) 185 S. W. 405.

— **Amendment after remand from appellate court.**—Where the county court acquired jurisdiction under an original petition in which the damages alleged with interest, were less than \$1,000, the maximum jurisdiction of court, held, that it retained jurisdiction over an amended petition on remand asking for an amount including interest in excess of \$1,000. *Gulf Coast Transp. Co. v. Dillard* (Civ. App.) 187 S. W. 975.

— **Waiver of part of demand.**—Where plaintiffs' cause of action was in excess of \$1,000, the county court is without jurisdiction even though plaintiffs prayed judgment for a sum slightly less than \$1,000. *Ft. Worth & R. G. Ry. Co. v. Mathews* (Civ. App.) 169 S. W. 1052.

A controversy where the evidence shows the subject-matter to exceed \$1,000 in value, and therefore not within the jurisdiction of the county court, plaintiff could not in good faith amend so as to bring the case within the court's jurisdiction. *Glasscock v. Sinks* (Civ. App.) 185 S. W. 405.

### Art. 1766. [1157] [1164] Jurisdiction denied in certain cases.

**Involving title to land.**—Under Const. art. 5, § 16, providing that county courts shall have no jurisdiction of suits for the recovery of lands, and this article, declaratory thereof, held that the county court, canceling a contract of rental on shares, had no jurisdiction to issue a writ of possession to enforce its decree. *Coy v. Rowland* (Civ. App.) 164 S. W. 14.

Where a purchaser advanced \$700 as part of the price to the vendor, who executed a note therefor with an indorsement that if title could not be made good he would pay interest as specified and pay back the \$700, an action on the note was within the jurisdiction of the county court, for title to land was at most only incidentally involved. *Smith v. Adams* (Civ. App.) 167 S. W. 30.

In an action for rent in which plaintiff's ownership of the land was denied, the county court had jurisdiction to determine incidentally whether he or a third person was the owner of the land. *Robinson v. Clymer* (Civ. App.) 170 S. W. 107.

Where the county court in condemnation proceedings awarded a right of way, or easement, and provided that upon nonuser within two years it should revert to the owner of the fee, jurisdiction to determine the issue of reversion was in the district court and not in the county court. *St. Louis Southwestern Ry. Co. of Texas v. Temple Northwestern Ry. Co.* (Civ. App.) 170 S. W. 1073.

The district court, to the exclusion of the county court, has jurisdiction of an action of trespass to try title, and the county court, having no jurisdiction of forcible detainer suit or of trespass to try title, in action involving title or possession of land was without jurisdiction to enjoin defendant from building fence and cutting timber. *Benavides v. Benavides* (Civ. App.) 174 S. W. 293.

That defendant, in prosecution for unlawfully pulling down a fence on land in another's possession, claimed title to the land, held not to deprive the county court of jurisdiction. *Johns v. State*, 76 Cr. R. 303, 174 S. W. 610.

The county court held without jurisdiction, in view of Const. art. 5, § 8, over a proceeding to set aside a compromise agreement, whereby a surviving widow conveyed to the executors her claimed interest in her husband's realty and personalty. *McMahan v. McMahan* (Civ. App.) 175 S. W. 157.

The county court has exclusive jurisdiction in proceedings to recover the homestead or allowance in lieu thereof, and also to partition and distribute real estate. *Id.*

### Art. 1767. [1158] [1165] Appellate jurisdiction.

**Appellate jurisdiction—Limited by jurisdiction of justice.**—A judgment of the county court on appeal from a justice court's judgment, adding a penalty and items in excess of the amount within the jurisdiction of the justice court, was invalid; but it could be reformed and affirmed on appeal to the Court of Civil Appeals. *North American Ins. Co. v. Jenkins* (Civ. App.) 184 S. W. 307.

The jurisdiction of the justice of the peace over a claim for attached property can be questioned by assignment of error to the judgment of the county court on appeal from a justice of the peace. *Fuller Hanna & Co. v. Rogers* (Civ. App.) 184 S. W. 322.

— **Amount in controversy.**—See art. 2391 and notes.

**Bringing in new parties.**—Under Const. art. 5, §§ 16, 19, and Rev. St. 1911, arts. 1767, 2291, 6624, 6625, on appeal to county court in action against receiver of railroad, plaintiff held entitled to bring in purchaser of the railroad's property and franchises. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 456, 1133.

### Art. 1769. [1160] [1167] Motions against sheriffs and other officers.

**Remedy not exclusive.**—In spite of this article the remedy provided is not exclusive, but suit may be brought in any other court having jurisdiction. *Willis v. Keator* (Civ. App.) 181 S. W. 556.

### Art. 1771. [1162] [1169] Both law and equity powers.

Cited, *Wardlaw v. Savage* (Civ. App.) 191 S. W. 1176.

**Art. 1772. [1163] [1170] To grant remedial writs.**

Cited, *Wardlaw v. Savage* (Civ. App.) 191 S. W. 1176.

**Habeas corpus.**—County court should not entertain writ of habeas corpus raising only questions passed on by the Court of Criminal Appeals on appeal from conviction. *Ex parte McCallan*, 76 Tex. Cr. R. 509, 175 S. W. 1067.

**Art. 1775. [1166] Changed jurisdiction recognized; eminent domain retained.**

See Appendix at end of civil statutes for list of acts changing jurisdiction of county court in particular counties.

**Repeal.**—Act March 20, 1911 (Acts 32d Leg. c. 93), restoring the civil and criminal jurisdiction of the county court of Castro county, repeals Act April 26, 1893 (Act 23d Leg. c. 57), which diminished such jurisdiction, and conferred it upon the district court of the county. *Turnbow v. J. E. Bryant Co.* (Civ. App.) 159 S. W. 605.

**Effect of increase of jurisdiction.**—Under express provision of Act Thirty-Third Legislature increasing the civil jurisdiction of the county court of Stonewall county, such court had jurisdiction of an action for \$150, alleged to be due upon an oral lease of land with claim of a pasturer's lien. *White v. Barrow* (Civ. App.) 182 S. W. 1154.

**Jurisdiction in matters of eminent domain.**—A county court has jurisdiction in matters of eminent domain, such jurisdiction not being taken away by Acts 32d Leg. c. 24. *Balch v. San Antonio, F. & N. R. Co.* (Civ. App.) 161 S. W. 1091.

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## CHAPTER FOUR

### THE TERMS OF THE COUNTY COURT FOR CIVIL AND PROBATE BUSINESS

**Art.**  
1776. Terms of the county court.

**Art.**  
1777. Commissioners' court may fix.

**Article 1776. [1167] Terms of the county court.**

**Terms for civil and criminal business.**—Const. art. 5, § 29, requiring the county court to hold at least four terms annually for both civil and criminal business, as may be provided by the Legislature or commissioners' court, and such other terms each year as may be fixed by that court, abolishes separate terms of the county court for criminal business, so that terms fixed for civil business are also terms for criminal business, and an order of the commissioners' court fixing a separate term for criminal business is ineffective. *Wells Fargo & Co. Express v. Mitchell* (Civ. App.) 165 S. W. 139.

Such provision, being of later adoption, supersedes article 5, § 17, requiring the county court to hold a term for criminal business once every month. *Id.*

**Art. 1777. [1168] Commissioners' court may fix.**

**End of term for civil and probate business.**—Under an order of the commissioners' court, authorized by Const. art. 5, § 29, as to the terms of the county court, a term for civil and probate business held, regarding time for filing appeal bond, to end when the next term for criminal business began. *Wells Fargo & Co. Express v. Mitchell* (Civ. App.) 176 S. W. 818, reversing judgment on rehearing 165 S. W. 139.

## TITLE 36

## COURTS—COUNTY, AT LAW, ETC.

## Chap.

1. County court of Dallas county, at law.
2. County court of Tarrant county for civil cases.
4. County court of Bexar county for civil cases.
5. County court of Castro county.
6. County court of Deaf Smith, Parmer, Randall (Castro), and Lubbock counties and the unorganized counties of Bailey and Lamb.

## Chap.

7. County court at law of Harris county, Texas.
- 7a. County court at law, No. 2 of Harris county, Texas.
10. County court of Kendall county.
15. County court of Jefferson county at law.
16. El Paso county court at law.

## CHAPTER ONE

## COUNTY COURT OF DALLAS COUNTY, AT LAW

## Art.

1786. Creation of county court of Dallas county, at law.
1787. Jurisdiction of said court.
1788. Jurisdiction retained by county court of Dallas county.
- 1788a. County court of Dallas county, at law, No. 2, created.
- 1788b. Jurisdiction.
- 1788c. Courts how designated; transfer of cases.

## Art.

- 1798d. Jurisdiction of other county courts.
- 1798e. Power to issue writs.
- 1798f. Terms of court.
- 1798g. Judge; qualifications; salary.
- 1798h. Special judge.
- 1798i. Jurors.
- 1798j. Vacancy.
- 1798k. Fees.
- 1798l. Transfer of cases.

**Article 1786. Creation of county court of Dallas county, at law.**

Cited, *McFarland v. Hammond* (in dissenting opinion) 106 Tex. 579, 173 S. W. 645.

**Art. 1787. Jurisdiction of said court.**—The County Court of Dallas County at Law shall have original and concurrent jurisdiction with the County Court of Dallas County in all matters and causes, civil and criminal, original and appellate, over which, by the general laws of the State, county courts have jurisdiction, except as provided in Section 3 [Art. 1788] of this Act; but this provision shall not affect jurisdictions of the commissioners court, or of the county judge of Dallas county as the presiding officer of such commissioners court, as to roads, bridges, and public highways, and matters of eminent domain which are now within the jurisdiction of the commissioners court or the judge thereof. [Acts 1907, p. 115, § 2; Act March 28, 1917, ch. 115, § 2.]

**Explanatory.**—The act amends sec. 2 of an act creating the county court of Dallas county at law, passed at the first call session of the 30th Legislature and approved April 3, 1907. This section of the act referred to was carried into the Revised Civil Statutes of 1911 as art. 1787. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1788. Jurisdiction retained by county court of Dallas county.**—The County Court of Dallas County shall retain, as heretofore, the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators and guardians; transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons; and to apprentice minors as provided by law; and the said court, or the judge thereof, shall have the power to issue writs of injunction, mandamus, and all writs necessary to the enforcement of the jurisdiction of said court; and also to punish contempts under such provisions as are or may be provided by general law governing county courts throughout the State. The county judge of Dallas county shall be the judge of the County Court of



Dallas County. All ex officio duties of the county judge shall be exercised by the said judge of the County court of Dallas County except insofar as the same shall, by this Act, be committed to the judge of the County Court of Dallas County, at Law. [Acts 1907, p. 115, § 3; Act March 28, 1917, ch. 115, § 3.]

**Explanatory.**—The act amends sec. 3 of Act Creating County Court of Dallas County at Law, passed at first call session of 30th Legislature, approved April 3, 1907. This section of the act was carried into the Revised Civil Statutes of 1911 as art. 1788. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1798a. County Court of Dallas County, at Law, No. 2, created.**—There is hereby created a court to be held in Dallas county, Texas, to be known and designated as the "County Court of Dallas County, at Law, No. 2." [Act March 28, 1917, ch. 101, § 1.]

Became a law March 28, 1917.

**Art. 1798b. Jurisdiction.**—The County Court of Dallas County at Law, No. 2, shall have exclusive concurrent civil and criminal jurisdiction of all cases, original and appellate, over which by the laws of the State of Texas, the existing County Court of Dallas County at Law, of Dallas county, Texas, would have original and appellate jurisdiction; provided all civil and criminal cases appealed from the several justice's courts of Dallas county shall be by the county clerk, filed in the county Court of Dallas County, at Law, and the County Court of Dallas County, at Law, No. 2, alternately as said appealed cases are received by said clerk from the several justices of the peace in said county, except in cases wherein the judge of either of said courts, at law, has granted the writ of certiorari, in which case the same shall be docketed in the court so granting said writ, and shall not be transferred from said court. [Id., § 2.]

**Art. 1798c. Courts how designated; transfer of cases.**—The County Court of Dallas County at Law shall be known and designated as the "A" Court and the County Court of Dallas county at Law, No. 2, shall be known and designated as the "B" Court. The county clerk shall number consecutively all cases filed in said courts, affixing immediately following the number of all cases falling in the County Court of Dallas County, at Law, the letter "A," and immediately following the number of all cases falling in the County Court of Dallas County, at Law, No. 2, the letter "B," and he shall make up the trial docket of each of said courts with respect to said numbers. The judge of either of said courts shall have the power to transfer to the other court any case pending upon the docket of his court, except in cases where the writ of certiorari has been granted; provided there shall never be transferred from the docket of one of said courts to that of the other a sufficient number of cases to reduce the number of cases on the docket of the court from which said case was transferred to a less number than the number of cases pending upon the docket of the court to which the same is transferred, without the consent of the judge to which said case is transferred. It shall be the duty of the judge to whose court said case is transferred to receive and try the case, and he shall not have the power to retransfer the same back to the court from which it came except he be disqualified to try the same, in which case it shall be his duty to retransfer the said case. [Id., § 3.]

**Art. 1798d. Jurisdiction of other county courts.**—Nothing in this Act shall be construed as in anywise altering or changing the present jurisdiction provided by law of the County Court of Dallas County, at Law, nor of the County Court of Dallas County, except that the jurisdiction of the County Court of Dallas County at Law, is hereby made concurrent with the jurisdiction of the County Court of Dallas County, at Law, No. 2, as relates to the civil and criminal jurisdiction of said County Court of Dallas County at Law, as prescribed by the laws of the State of Texas. [Id., § 4.]

**Art. 1798e. Power to issue writs.**—The said County Court of Dallas County, at Law, No. 2, or the judge thereof, shall have the power to issue writs of injunction, sequestration, attachment, garnishment, certiorari, supercedeas, and all other writs and process necessary to the enforcement of its jurisdiction; and also power to punish for contempts under such provisions as are or may be provided by the general laws governing county courts throughout the State. [Id., § 5.]

**Art. 1798f. Terms of court.**—The terms of the County Court of Dallas County, at Law, No. 2, and the practice therein and appeals and writs of error therefrom, shall be as prescribed by the law relating to the county courts. The terms of the County Court of Dallas County, at Law, No. 2, shall be held five times each year on the second Monday in January, March, May, September and November, and each term of said court shall extend over a period of two months; provided, further there shall be a term of said court convened by the judge thereof not later than two weeks after he has qualified as such, as provided by law, and such term when so convened, shall continue until the beginning of the ensuing term, as provided herein. [Id., § 6.]

**Art. 1798g. Judge; qualifications; salary.**—There shall be elected in said county by the duly qualified voters thereof at each general election a judge of the County Court of Dallas County, at Law, No. 2, who shall be a licensed attorney in this State, well informed in the laws of the State, who shall have resided in, and been actively engaged in the practice of law in Dallas county for a period of not less than four years prior to such general election, who shall hold his office for two years and until his successor shall be duly qualified. The judge of said court shall receive a salary of three thousand (\$3,000.00) dollars per annum, payable monthly out of the county treasury by the commissioners' court. [Id., § 7.]

**Art. 1798h. Special judge.**—A special judge of the County Court of Dallas County, at Law, No. 2, may be appointed or elected as provided for by the laws relating to county courts and the judges thereof. [Id., § 8.]

**Art. 1798i. Jurors.**—The jurisdiction and authority now vested by law in the county court for the appointment of jury commissioners and the selection and service of jurors shall be exercised by the County Court of Dallas County, at Law, No. 2. [Id., § 9.]

**Art. 1798j. Vacancy.**—Any vacancy in the office of the County Court of Dallas County, at Law, No. 2, shall be filled by the commissioners' court of Dallas county until the next regular election. [Id., § 10.]

**Art. 1798k. Fees.**—The judge of the County Court of Dallas County, at Law, No. 2, shall collect the same fees as are now stipulated by law relating to the judge of the County Court of Dallas County, at Law, all of which shall be by the county clerk paid monthly into the county treasury of Dallas county, in accordance with the orders of the commissioners' court. [Id., § 11.]

**Art. 1798l. Transfer of cases.**—It shall be the duty of the judge of the County Court of Dallas County, at Law, to immediately transfer from the docket of the County Court of Dallas County, at Law, to the docket of the County Court of Dallas County, at Law, No. 2, one-half of the civil cases pending upon said docket, which shall be done by beginning with the oldest case pending upon the docket of his court and transferring every second case without reference to whether any particular case be pending upon the jury or non-jury docket of said court. [Id., § 12.]

## CHAPTER TWO

## COUNTY COURT OF TARRANT COUNTY FOR CIVIL CASES

Art. 1799.	Creation of county court of Tarrant county for civil cases.	Art. 1800.	Jurisdiction of said court.
		1802.	Both courts may issue writs.

**Article 1799. Creation of county court of Tarrant county for civil cases.**

Cited, *McFarland v. Hammond*, 106 Tex. 549, 173 S. W. 645 (dissenting opinion); *Wardlaw v. Savage* (Civ. App.) 191 S. W. 1176.

**Art. 1800. Jurisdiction of said court.**

Cited, *Wardlaw v. Savage* (Civ. App.) 191 S. W. 1176.

**Art. 1802. Both courts may issue writs.**

Cited, *Wardlaw v. Savage* (Civ. App.) 191 S. W. 1176.

## CHAPTER FOUR

## COUNTY COURT OF BEXAR COUNTY FOR CIVIL CASES

**Article 1811—6. Creation of county court of Bexar county for civil cases.**

Cited, *McFarland v. Hammond*, 106 Tex. 549, 173 S. W. 645 (dissenting opinion).

## CHAPTER FIVE

## COUNTY COURT OF CASTRO COUNTY

**Article 1811—19. Jurisdiction of court.**

Repeal.—Act March 20, 1911 (Act 32d Leg. c. 93), restoring the civil and criminal jurisdiction of the county court of Castro county, repeals Act April 26, 1893 (Act 23d Leg. c. 57), which diminished such jurisdiction, and conferred it upon the district court of the county. *Turnbow v. J. E. Bryant Co.* (Civ. App.) 159 S. W. 605.

## CHAPTER SIX

COUNTY COURT OF DEAF SMITH, PARMER, RANDALL,  
(CASTRO) AND LUBBOCK COUNTIES AND THE UN-  
ORGANIZED COUNTIES OF BAILEY AND LAMB

Art. 1811—30.	Jurisdiction of court.	Art. 1811—31.	Same subject.
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**Article 1811—30. Jurisdiction of court.**

Validity of act.—This act, which is entitled an act to increase the civil jurisdiction of the county court of Castro county and others, which, in section 2, gives those counties the jurisdiction possessed by ordinary county courts, held valid in so far as it pertains to civil matters, the act not exceeding the title. *Turnbow v. J. E. Bryant Co.* (Sup.) 181 S. W. 686.

**Art. 1811—31. Same subject.**

Jurisdiction conferred.—This article invests the county court of Castro county with such civil jurisdiction as a county court possesses under the general law, despite Act 23d Legislature, curtailing the jurisdiction. *Turnbow v. J. E. Bryant Co.* (Sup.) 181 S. W. 686.

Transfer of causes.—Where this article took effect while an appeal from justice court was pending in district court, the cause should be transferred to the county court. *Turnbow v. J. E. Bryant Co.* (Sup.) 181 S. W. 686.

## CHAPTER SEVEN

## COUNTY COURT AT LAW OF HARRIS COUNTY, TEXAS

## Articles 1811—35 to 1811—40.

Cited, *McFarland v. Hammond*, 106 Tex. 549, 173 S. W. 645 (dissenting opinion).

## CHAPTER SEVEN A

## COUNTY COURT AT LAW, NO. 2, OF HARRIS COUNTY, TEXAS

Art.	Art.
1811—53a. Court created.	1811—53h. Special judge.
1811—53b. Jurisdiction.	1811—53i. Power to issue writs.
1811—53c. Powers of judge; concurrent jurisdiction.	1811—53j. Jurisdiction of county court at law.
1811—53d. Qualifications of judge; appointment; oath; bond; fees and salary.	1811—53k. Terms.
1811—53e. Clerk; fees.	1811—53l. Transfer of cases.
1811—53f. Seal.	1811—53m. Same.
1811—53g. Sheriffs and constables.	1811—53n. Practice.
	1811—53o. Process in transferred cases.
	1811—53p. Appointment of judge; election.

**Article 1811—53a. Court created.**—There is hereby created a court to be held in Harris County, Texas, to be called the “County Court at Law No. 2 of Harris County, Texas.” [Act May 28, 1915, 1st C. S., ch. 8, § 1.]

Act took effect 90 days after May, 28, 1915, date of adjournment.

**Art. 1811—53b. Jurisdiction.**—Said County Court at Law No. 2 of Harris County, Texas, shall have, and it is hereby granted original and appellate jurisdiction, in all matters and causes of a civil and criminal nature, concurrent with and in all things equal to that heretofore conferred upon the County Court at Law of Harris County, Texas. [Id., § 2.]

**Art. 1811—53c. Powers of judge; concurrent jurisdiction.**—The judge of said County Court at Law No. 2 of Harris County, Texas, shall have and exercise all the powers and shall be subject to all the limitations and obligations heretofore or hereafter conferred or imposed upon the judge of the County Court at Law of Harris County, Texas. Said County Court at Law No. 2 of Harris County, Texas, shall have concurrent jurisdiction with the County Court at Law of Harris County over criminal matters, and shall have the same jurisdiction over criminal matters, that is now vested in county courts having jurisdiction in civil and criminal cases under the Constitution and laws of Texas. And said County Court at Law No. 2 of Harris County shall have concurrent jurisdiction with the County Court at Law of Harris County in all appeals from justices, mayors, recorders or other inferior courts within Harris County; and the judge of said court shall have the same powers, rights and privileges as to criminal matters as are now vested in and enjoyed by the judges of county courts having criminal jurisdiction; provided, however, that said court shall have no jurisdiction over any of those matters the jurisdiction over which is now vested in the County Court of Harris County, or the judge thereof. [Id., § 3.]

**Art. 1811—53d. Qualifications of judge; appointment; oath; bond; fees and salary.**—The judge of the County Court at Law No. 2 of Harris County, Texas, shall be well informed in the law; he shall have been a duly licensed and practicing member of the bar of this State for not less than two years; he shall be appointed by the Governor of the State of Texas as soon as may be after this Act takes effect; he shall take the oath of office and execute an official bond as now required by the law relating to county judges, and he shall collect the same fees in civil cases

as are now provided by law in case of county judges, all of which he shall pay monthly into the county treasury, and in lieu of such fees he shall receive a salary of three thousand dollars per annum to be paid out of the county treasury by the Commissioners Court of Harris County in monthly installments of two hundred and fifty dollars each. In addition to the compensation hereinbefore provided the judge of the County Court at Law No. 2 of Harris County shall tax up, receive and collect in each criminal case the same fees and costs as are now provided by the General Laws of the State for the judges of county courts having criminal jurisdiction, such fees to be retained by him as compensation for the exercise of the criminal jurisdiction herein conferred upon his court. [Id., § 4.]

**Art. 1811—53e. Clerk; fees.**—The county clerk of Harris County shall be the clerk of said County Court at Law No. 2 of Harris County in civil matters and causes; and shall receive and collect the same fees which he now receives and collects as clerk of the County Court at Law of Harris County, Texas. The clerk of the Criminal District Court of Harris County, Texas, shall be clerk of said County Court at Law No. 2 in all criminal matters and causes, and shall receive and collect such fees as he now receives and collects in criminal matters as clerk of the County Court at Law of Harris County. [Id., § 5.]

**Art. 1811—53f. Seal.**—The seal of the County Court at Law No. 2 of Harris County, Texas, shall be the same as that provided by law for county courts, except that such seal shall contain the words "County Court at Law Number Two of Harris County, Texas," and said seal shall be judicially noticed. [Id., § 6.]

**Art. 1811—53g. Sheriffs and constables.**—The sheriff of Harris County, either in person or by deputy, shall attend said court when required by the judge thereof; and the various sheriffs and constables of this State executing process issued out of said court shall receive the fees now or hereafter fixed by law for executing process issued out of county courts. [Id., § 7.]

**Art. 1811—53h. Special judge.**—A special judge of said court may be appointed or elected in the manner and instances now or hereafter provided by the law relating to county courts and the judges thereof. [Id., § 8.]

**Art. 1811—53i. Power to issue writs.**—Said court shall have power to issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas, habeas corpus in criminal misdemeanor cases, and all writs necessary to the enforcement of its jurisdiction; and, within the limitations placed upon county courts, to punish contempts thereof. Writs of injunction granted in civil cases by the judge of said County Court at Law No. 2 and by the judge of said County Court at Law shall be made returnable to the court in which the petition for injunction shall be filed, as hereinafter provided. [Id., § 9.]

**Art. 1811—53j. Jurisdiction of County Court at Law.**—The jurisdiction, civil and criminal, of the County Court at Law of Harris County, Texas, shall not in anywise be impaired or affected by this Act. [Id., § 10.]

**Art. 1811—53k. Terms.**—The terms of the court hereby created shall begin on the first Monday of the months of June, August, October, December, February and April of each year. The sessions of said court shall be held in such place as may be provided therefor by the Commissioners Court of Harris County. [Id., § 11.]

**Art. 1811—53l. Transfer of cases.**—As soon as may be, after this Act takes effect, the clerk of the County Court at Law of Harris County, Texas, shall transfer to the docket of the County Court at Law No. 2 of

Harris County, Texas, one-half of the civil cases then pending in said County Court at Law. In making such transfer, said Clerk shall first transfer to said County Court at Law No. 2 the case having the smallest file number on the docket of said County Court at Law. The case having the next highest file number shall remain on the docket of said County Court at Law. The case having the third smallest file number shall be transferred. In like manner said clerk shall go through the docket of said County Court at Law, transferring to the docket of said County Court at Law No. 2 every second civil case thereafter. The clerk shall note such transfer, when made, on the minutes of the County Court at Law of Harris County, Texas. New civil and new criminal cases filed with said clerk after such transfer has been made, irrespective of the court or judge to which the petitions in such civil cases shall be addressed, shall, in like manner, be filed by the said clerk, one civil and one criminal case in said County Court at Law No. 2, and one civil and one criminal case in said County Court at Law. The first new civil case and the first new criminal case, filed with said clerk after such transfer has been made, shall both be filed in said County Court at Law No. 2. [Id., § 12.]

**Art. 1811—53m. Same.**—The judges of said County Court at Law and of said County Court at Law No. 2, in their discretion, either in term time or in vacation, by an order entered upon the minutes of their respective courts, may transfer to the court of the other any case or cases then pending in their respective courts. And when such case or case shall be so transferred the court to which such transfer shall be made shall have the same right and authority to try and finally dispose of the same as the court making such transfer. [Id., § 13.]

**Art. 1811—53n. Practice.**—The practice in said County Court at Law No. 2, and in cases of appeal and writs of error therefrom and thereto, shall be the same as is now, or may hereafter be prescribed for county courts. [Id., § 14.]

**Art. 1811—53o. Process in transferred cases.**—All process issued out of the County Court at Law of Harris County, Texas, prior to the time when the clerk thereof shall transfer cases from the docket of said courts, as provided in Section 12 of this Act [Art. 1811—53l] in cases transferred as therein provided, shall be returned to and filed in the court hereby created, and shall be equally as valid and binding upon parties to such transferred cases as though such process had been issued out of the County Court at Law No. 2 of Harris County, Texas. Likewise, in cases transferred by the judges of either of said courts, as provided in Section 13 of this Act [Art. 1811—53m], all process extant at the time of such transfer shall be returned to and filed in the court to which such transfer is made, and shall be as valid and binding as though originally issued out of the court to which such transfer may be made. [Id., § 15.]

**Art. 1811—53p. Appointment of judge; election.**—As soon as this Act shall take effect the Governor of the State shall appoint a judge of the County Court at Law No. 2 of Harris County, who shall serve until the next general election and until his successor shall be duly elected and qualified. And any vacancy thereafter occurring in the office of the judge of the County Court at Law No. 2 of Harris County, created by this Act, shall be filled by the Commissioners Court of Harris County, the appointee thereof to hold office until the next succeeding general election, and until his successor shall have qualified. There shall be elected by the qualified voters of Harris County at each general election hereafter, a judge of the County Court at Law No. 2 of Harris County, who shall hold his office for two years, and until his successor shall be duly qualified. [Id., § 16.]

## CHAPTER TEN

## COUNTY COURT OF KENDALL COUNTY

**Article 1811—76. Jurisdiction of county court of Kendall county.**

**Matters of eminent domain.**—A county court has jurisdiction in matters of eminent domain, such jurisdiction not being taken away by Acts 32d Leg. c. 24. *Balch v. San Antonio, F. & N. R. Co.* (Civ. App.) 161 S. W. 1091.

## CHAPTER FIFTEEN

## COUNTY COURT OF JEFFERSON COUNTY AT LAW

Art.		Art.	
1811-119.	Court created.	1811-127.	Clerk and sheriff.
1811-120.	Jurisdiction.	1811-128.	Jury commission; selection of jurors.
1811-121.	Jurisdiction of other courts.	1811-129.	Vacancy in office of judge.
1811-122.	Terms of court.	1811-130.	Salary of judge; fees collected and accounted for.
1811-123.	Election of judge; tenure; qualifications.	1811-131.	Appeals from lower courts.
1811-124.	Appointment of judge.	1811-132.	Fees of county judge.
1811-125.	Disqualification of judge.		
1811-126.	Issuance of writs.		

**Article 1811—119. Court created.**—There is hereby created a court to be held in Beaumont, Jefferson County, Texas, to be called the County Court of Jefferson County at Law. [Act March 1, 1915, ch. 29, § 1.]

**Art. 1811—120. Jurisdiction.**—The County Court of Jefferson County at Law shall have jurisdiction in all matters and cases, civil and criminal, original and appellate, over which by the general laws of the State the County Court of said county would have jurisdiction, except as hereinafter provided in Section 3 of this Act [Art. 1811—121], and all cases pending in the County Court of said county other than probate matters such as are provided in Section 3 of this Act, shall be and the same are hereby transferred to the County Court of Jefferson County at Law, and all writs and process, civil and criminal, heretofore issued by or out of said County Court, other than those pertaining to matters which are hereby exempt from this bill that are to remain in the County Court of Jefferson County, shall be and the same are hereby made returnable to the County Court of Jefferson County at Law. The jurisdiction of the County Court of Jefferson County at Law, and to the Judge thereof, shall extend to all matters of eminent domain of which jurisdiction as heretofore vested in the County Court or in the County Judge; but this provision shall not affect the jurisdiction of the Commissioners Court or the County Judge of Jefferson County as the presiding officer of said Commissioners Court as to roads, bridges and public highways, or matters of eminent domain which are now in the jurisdiction of the Commissioners Court or the Judge thereof. [Id., § 2.]

**Art. 1811—121. Jurisdiction of other courts.**—The County Court of Jefferson County shall retain, as heretofore, the general jurisdiction of the Probate Court and all jurisdiction conferred by law now over probate matters; and the court herein created shall have no other jurisdiction than that named in this bill, and the County Court of Jefferson County as now and heretofore existing shall have all jurisdiction which it now has, save and except that which is given the County Court of Jefferson County at Law in this bill, but the County Court as now existing shall have no other jurisdiction, civil or criminal. The County Judge of Jefferson County shall be the Judge of the County Court of said county, and all ex-officio duties of the County Judge shall be exercised by said Judge of the County Court of Jefferson County, except in so far as the same

shall by this bill be committed to the County Court of Jefferson County at Law. [Id., § 3.]

**Art. 1811—122. Terms of Court.**—The terms of the County Court of Jefferson County at Law, and the practice therein, and the appeals and writs of error therefrom shall be as prescribed by the laws relating to County Courts. The terms of the County Court of Jefferson County at Law shall be held monthly, that is to say, the terms of said court shall be held in the court house of Jefferson County, and begin on the first Monday in each month during the year, and shall end on the last Saturday in each month during the year. [Id., § 4.]

**Art. 1811—123. Election of judge; tenure; qualifications.**—There shall be elected in Jefferson County by the qualified voters thereof at each general election a Judge of the County Court of Jefferson County at Law, who shall be well informed in the laws of the State, and who shall hold his office for two years and until his successor shall have been duly elected and qualified. No person shall be elected Judge of said court who has not been a resident citizen of Jefferson County, Texas, for at least two years prior to his election, and shall possess all of the qualifications for the office that are now required by the general laws of the State for County Judges. [Id., § 5.]

Sec. 6 relates to criminal business, and is set forth in Vernon's Code Cr. Proc. 1916, as art. 40a.

**Art. 1811—124. Appointment of judge.**—As soon as this bill becomes effective the Governor shall appoint a Judge of the County Court of Jefferson County at Law, who shall hold his office until the next general election. [Id., § 7.]

**Art. 1811—125. Disqualification of judge.**—In the case of the disqualification of the County Judge at Law of any case pending in his court, the parties or their attorneys may agree on the selection of a special Judge to try such case or cases; and in default of such agreement a majority of the practicing lawyers of Jefferson County shall elect a Judge to try such cases where the County Judge at Law is disqualified. [Id., § 8.]

**Art. 1811—126. Issuance of writs.**—The County Court of Jefferson County at Law, or the Judge thereof, shall have power to issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas and all writs necessary to the enforcement of jurisdiction of said court, and to issue writs of habeas corpus in such cases where the offense charged is within the jurisdiction of said court, or of any other court in said county of inferior jurisdiction to said county court at law. [Id., § 9.]

**Art. 1811—127. Clerk and sheriff.**—The County Clerk of Jefferson County, Texas, shall be the clerk of the County Court of Jefferson County at Law, and the seal of said court shall be the same as that provided by law for County Courts, except the seal shall contain the words "County Court of Jefferson County at Law," and the Sheriff of Jefferson County shall in person or by deputy attend said court when required by the Judge thereof, and the County Clerk of Jefferson County, Texas, is hereby authorized, if it becomes necessary, in his judgment, to appoint a deputy to specially attend to the matters pertaining to the County Court of Jefferson County at Law, and said deputy shall be allowed a salary of one hundred dollars per month. [Id., § 10.]

**Art. 1811—128. Jury commission; selection of jurors.**—The jurisdiction or authority now vested by law in the County Court for the appointment of jury commission and the selection and service of jurors shall be exercised by the County Court of Jefferson at Law. [Id., § 11.]

**Art. 1811—129. Vacancy in office of judge.**—Any vacancy in the office of the Judge of the County Court of Jefferson County at Law may



be filled by the County Commissioners Court, and when so filled the Judge shall hold office until the next general election and until his successor is elected and qualified. [Id., § 12.]

**Art. 1811—130. Salary of judge; fees collected and accounted for.**—The Judge of the County Court of Jefferson County at Law shall receive a salary of twenty-five hundred dollars (\$2,500.00) per annum, to be paid out of the county treasury of Jefferson County, Texas, on the order of the Commissioners Court of said county, and said salary shall be paid monthly in equal installments. The Judge of the County Court of Jefferson County at Law shall assess the same fees as are now prescribed by law relating to County Judge's fees all of which shall be collected by the clerk of the court and shall be paid into the county treasury on collection. No part of which shall be paid to the said judge, but he shall draw the salary as above specified in this section. [Id., § 13.]

**Art. 1811—131. Appeals from lower courts.**—All cases appealed from the Justices' Court and Recorders' Court in Jefferson County, Texas, shall be made direct to the County Court of Jefferson County at Law, under the provisions heretofore governing such appeals. [Id., § 14.]

**Art. 1811—132. Fees of County Judge.**—The County Judge of Jefferson County, at the time this Act goes into effect, shall receive the same compensation in ex officio salary and fees as he would have received had this Act creating the County Court of Jefferson County at Law not been enacted, said compensation to be computed and allowed and ordered paid by the Commissioners Court of said county out of the general fund of said county. [Id., § 15.]

## CHAPTER SIXTEEN

### EL PASO COUNTY COURT AT LAW

Art.		Art.	
1811—133.	Court created.	1811—139.	Bond and oath of judge.
1811—134.	Jurisdiction.	1811—140.	Special judge.
1811—135.	Jurisdiction of county court.	1811—141.	Clerk; seal; sheriff.
1811—136.	Power to issue writs.	1811—142.	Juries.
1811—137.	Terms of court.	1811—143.	Fees.
1811—138.	Appointment of judge; election; qualifications of judge.	1811—144.	Removal of judge.
		1811—145.	Salary of county judge.

**Article 1811—133. Court created.**—That there is hereby created a court to be held in El Paso county, Texas, to be known and designated as the "El Paso County Court at Law." [Act March 26, 1917, ch. 93, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1811—134. Jurisdiction.**—The El Paso County Court at Law shall have jurisdiction of all civil and criminal matters and causes original and appellate, over which, by the general laws of the State of Texas, the county court of said county would have jurisdiction except as provided in Section 3, of this Act [Art. 1811—135], and all civil and criminal cases other than probate matters and such as are provided in Section 3 of this Act, to be and the same are hereby transferred to the El Paso County Court at Law; and all civil and criminal writs and processes heretofore issued by or out of said county court other than pertaining to matters over which, by section 3 of this Act, jurisdiction remains in the County Court of El Paso county, be and the same are hereby made returnable to the El Paso County Court at Law. The jurisdiction of the El Paso County Court at Law and of the judge thereof shall extend to all matters of eminent domain of which jurisdiction has heretofore rested in the county court of El Paso county, or the judge thereof; but this provision shall not affect the jurisdiction of the commissioners court, or of the county judge of El Paso county as the presiding officer of said court,

as to roads, bridges and public highways and matters of eminent domain which are now within the jurisdiction of the commissioners court, or of the judge of the County Court of El Paso county, Texas. [Id., § 2.]

**Art. 1811—135. Jurisdiction of county court.**—The county court of El Paso county, shall retain as heretofore, its jurisdiction as a juvenile court; its jurisdiction in matters pertaining to liquor licenses, forfeitures and bonds; the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and drunkards, grant letters testamentary and of administration, settle accounts of administrators, executors and guardians; transact all business pertaining to deceased persons; and to apprentice minors as provided by law. The County Judge of El Paso county, shall be the judge of the County Court of El Paso County, and all ex-officio duties of the county judge shall be exercised by said judge of the County Court of El Paso county except in so far as the same shall by this Act be committed to the judge of the El Paso County Court at Law. [Id., § 3.]

**Art. 1811—136. Power to issue writs.**—Both the said County Court of El Paso county and the El Paso County Court at Law or either of the judges thereof shall have the power to issue writs of injunction, sequestration, attachments, garnishment, certiorari, supersedeas and all other writs necessary to the enforcement of the jurisdiction of said courts; and also power to punish for contempt under such provisions as are, or may be provided by the general laws governing county courts throughout the State, and to issue writs of habeas corpus, in cases where the offense charged is within the jurisdiction of said courts or of any court or tribunal inferior to said courts. [Id., § 4.]

**Art. 1811—137. Terms of court.**—The terms of the El Paso County Court at Law and the practice therein and appeals and writs of error therefrom shall be, as prescribed by law relating to county courts. The terms of the El Paso County Court at Law shall be held not less than four times each year, and the commissioners court of El Paso county shall fix the time at which said court shall hold its terms, until the same shall be changed according to law. [Id., § 5.]

**Art. 1811—138. Appointment of judge; election; qualifications of judge.**—The Governor shall appoint some suitable person who is a resident citizen of El Paso county as judge of the El Paso County Court at Law, as herein constituted, who shall hold such office until the next general election after his appointment, and until his successor shall have been elected and qualified, and all vacancies in said office shall also be filled by appointment by the Governor until the next general election thereafter. At the first general election in said county and at each general election thereafter there shall be elected by the qualified voters a judge of the El Paso County Court at Law, who shall be well informed in the laws of this State, who shall hold his office for two years and until his successor shall have been duly elected and qualified; provided that no person shall be eligible for judge of the El Paso County Court at Law by election, unless he shall be a citizen of the United States and of this State; who shall have been a practicing lawyer of this State or a judge of a court in this State for at least four years next preceding his election, and who shall have resided in the county of El Paso for two years next preceding his election. [Id., § 6.]

**Art. 1811—139. Bond and oath of judge.**—The judge of the El Paso County Court at Law shall execute a bond and take the oath of office as required by law relating to county judges. [Id., § 7.]

**Art. 1811—140. Special judge.**—A special judge of the El Paso County Court at Law may be appointed or elected as provided by laws relating to county courts and the judges thereof. [Id., § 8.]

**Art. 1811—141. Clerk; seal; sheriff.**—The county clerk of El Paso county shall be the clerk for the El Paso County Court at Law; the seal of said court shall be the same as that provided for county courts, except that the seal shall contain the words "El Paso County Court at Law." The sheriff of El Paso county shall, in person or by deputy, attend the court when required by the judge thereof. [Id., § 9.]

**Art. 1811—142. Juries.**—The jurisdiction and authority now vested by law in the County Court of El Paso County, for the selection and service of jurors shall be exercised by each of said courts, but juries summoned for either of said courts may by order of the judge of the court in which they are summoned be transferred to the other court for service therein and may be used therein as if summoned for the court to which they may be thus transferred. [Id., § 10.]

**Art. 1811—143. Fees.**—There shall be taxed and collected in the El Paso County Court at Law the same fees provided by law for county judges in similar cases, all of which shall be paid by the clerk monthly into the county treasury, and the judge of said court shall receive a salary of two thousand five hundred (\$2500) dollars annually, to be paid monthly out of the county treasury, upon order of the commissioners court. [Id., § 11.]

**Art. 1811—144. Removal of judge.**—The judge of the El Paso County Court at Law may be removed from office in the same manner and for the same causes as any other county judge may be removed under the laws of this State. [Id., § 12.]

**Art. 1811—145. Salary of county judge.**—The county judge of El Paso county shall hereafter receive from the county treasury, in addition to the fees allowed him by law, such a salary, for the ex-officio duties, not exceeding in the aggregate of fees and salary that which the existing laws provide for. [Id., § 13.]

## TITLE 37

## COURTS—DISTRICT AND COUNTY—PRACTICE IN

Chap.

1. Institution of suits.
2. Pleadings in general.
3. Pleadings of the plaintiff.
- 3a. Verification of pleadings.
4. Venue of suits.
5. Parties to suits.
6. Process and returns.
7. Abatement and discontinuance of suit.
8. Pleadings of the defendant.
9. Change of venue.
10. Continuance.
11. Stenographic reporters.
12. Trial of causes.
13. Charges and instructions to the jury.

Chap.

14. The verdict.
15. Judgments.
16. Remitter and amendment of judgment.
17. New trials and arrest of judgment.
18. Costs and security therefor.
19. Bills of exceptions and statements of facts.
20. Appeal and writ of error.
21. Certain interlocutory proceedings, etc.
22. Suit by next friend.
23. Suits against non-residents.
24. Attorney's fees, recovery of.
25. Miscellaneous provisions.

## CHAPTER ONE

## INSTITUTION OF SUITS

**Article 1812. [1177] [1181] Suits commenced by petition filed with clerk.**

**Premature commencement.**—Where the cause of action on an accident insurance policy has not matured, the action is premature, and will be abated for that reason. *Commonwealth Bonding & Casualty Ins. Co. v. Knight* (Civ. App.) 185 S. W. 1037.

**Matters arising after commencement of suit.**—In action on oral contract, held, that plaintiff was entitled to recover for work performed after institution of suit. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

Where suit was prematurely brought, but plaintiff filed amended petition two days after cause of action matured, it was duty of court to tax all costs prior to filing of amendment to plaintiff, and to proceed to judgment, rather than to dismiss case because originally filed prematurely. *Potter County v. Boesen* (Civ. App.) 191 S. W. 787.

Where, at time teacher sued for salary during months covered by her contract during which board refused to let her teach, only seven months had expired, and the contract covered eight months, the mere fact that when suit was tried the eighth month had expired did not permit recovery of the salary for the eighth month. *Jones v. Dodd* (Civ. App.) 192 S. W. 1134.

If assignment of improvement certificate was subsequent to filing suit thereon, there would not be any fatal variance between allegata and probata as to ownership. *Kernagan v. City of Ft. Worth* (Civ. App.) 194 S. W. 626.

**Presumption as to lost pleading.**—In view of Rev. St. 1911, arts. 1812, 2157, et seq., relating to pleadings and lost pleadings, held that, where corrected transcript contained copy of lost pleading sufficient to support judgment, it would be assumed that the pleading was before court at its rendition of judgment. *Wiggins v. First Nat. Bank of Denton* (Civ. App.) 175 S. W. 735.

## DECISIONS IN GENERAL

**Demand as condition precedent to suit.**—Where plaintiff as soon as he returned to county of the venue, about a year after the exchange of lands in which he claimed to have been defrauded, filed suit to cancel defendant's deed, and tendered a reconveyance, no formal notice or demand for rescission was necessary. *Pitt v. Gilbert* (Civ. App.) 190 S. W. 1157.

## CHAPTER TWO

## PLEADING IN GENERAL

Art.

1819. "Pleadings" defined.
1822. Pleading charters and acts of incorporation.
1823. Pleading special acts of the legislature.

Art.

1824. Pleadings may be amended.
1825. Time of filing amendment.
1826. Amendment after arrest of judgment, etc.

**Article 1819. [1183] [1187] Pleadings defined.**

**Conclusions of fact or law.**—An allegation that defendant became bound to pay plaintiff held a conclusion. *Baker v. Hahn* (Civ. App.) 161 S. W. 443.

**Construction of pleadings.**—A pleading must be construed most strongly against the pleader. *Mueller v. Simon* (Civ. App.) 183 S. W. 63.

Every reasonable intentment must be presumed in favor of sufficiency of pleading demurred to. *Roberts v. Anthony* (Civ. App.) 185 S. W. 423.

**Issues, proof, and variance.**—“Variance” is a disagreement between the allegation and the proof, in some matter which, in point of law, is essential to the charge or claim. *Hodges v. State*, 73 Tex. Cr. R. 638, 165 S. W. 607.

The pleadings and the proof must agree. *Angelina County Lumber Co. v. Hines* (Civ. App.) 184 S. W. 596.

A party asking affirmative relief must lay a predicate for the relief sought in the pleadings, and, to entitle him to such relief, the proof must sustain the allegations. *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965.

#### Art. 1822. [1186] [1190] Pleading charters and acts of incorporation.

**Pleading corporate powers.**—The charter powers of a city granted to it by public act need not be pleaded in an action by it. *O'Connor v. City of Laredo* (Civ. App.) 167 S. W. 1091.

#### Art. 1823. [1187] [1191] Pleading special act of the legislature.

**Sufficiency to bring special act into record.**—Where both parties pleaded a special law by giving its title and the date of its approval, as authorized by this article, and the entire act was before the court, it must be considered a part of the record on appeal, although not copied into the statement of facts. *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

#### Art. 1824. [1188] [1192] Pleadings may be amended.

**2. Right to amend and subject-matter of amendment.**—Omission of verification on a plea of usury seeking to recover a penalty required by arts. 4982, 4983, is not a jurisdictional defect and may be cured by amendment. *Cotton v. Rhea*, 106 Tex. 220, 163 S. W. 2.

In trespass to try title claiming tracts specifically described, the allowance of a trial amendment to the petition, so as to claim to recover the same amount of land not specifically located, in the absence of any showing of injury to defendants, held not an abuse of discretion. *Davis v. Collins* (Civ. App.) 169 S. W. 1128.

The trial court can permit a defendant corporation to correct a defective affidavit in support of a plea of personal privilege by permitting the president of the corporation to swear to it in lieu of the affidavit of the attorney. *Kelly v. A. B. Crouch Grain Co.* (Civ. App.) 174 S. W. 630.

In a personal injury action, where the answer pleaded contributory negligence, it was within the trial court's discretion to permit plaintiff at the trial to amend the petition so as to deny contributory negligence. *Terrell Sewerage Co. v. Stiles* (Civ. App.) 177 S. W. 1053.

Where plaintiff moved for judgment on the pleadings because the answer had not been verified, the court may properly allow the answer to be verified by way of amendment and then deny the motion. *Teal v. Lakey* (Civ. App.) 181 S. W. 759.

There is no error in not striking out an amendment of a petition, stating definitely the damages at a higher figure than estimated in the petition. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

Where an injunction has been dissolved, complainant by amendment or by supplemental bill may procure a second injunction, but not upon grounds set up in the first bill or which should have been set up therein. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

**3. Matters arising or discovered after original pleading.**—Notwithstanding arts. 1824, 1825, and rule 27 for district courts (142 S. W. xix), held, that defendant should have been granted leave to file an amended answer setting up a good defense, though his general denial did not put in issue averments of the petition; plaintiff having unexpectedly dismissed as to principal defendant. *Cooney v. Eastman* (Civ. App.) 183 S. W. 96.

The lessors, suing for installments of rent, may recover installments accruing after action and before trial, making claim therefor by amendments. *Gardner v. Sittig* (Civ. App.) 188 S. W. 731.

**4. New cause of action or defense.**—Where insured sought a recovery for the destruction of a concrete building, and defendant sought to avoid liability because of additional insurance for an iron building, a supplemental petition alleging that, if the policy included such building, the inclusion was fraudulent, did not set up a new cause of action. *Fire Ass'n of Philadelphia v. Strayhorn* (Civ. App.) 165 S. W. 901.

An amended petition, pleading in confession and avoidance of matter in the answer does not set up a new cause of action though the same should be pleaded by supplemental petition. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

Amendment to petition in action on policy of life insurance claiming a recovery in an amount \$6 less than sought held not a fatal variance. *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169.

Plaintiffs may amend their petition to correctly describe the block of land for injury to which they sue, though they set up a new action. *St. Louis Southwestern Ry. Co. of Texas v. McDermitt* (Civ. App.) 175 S. W. 509.

Where the original petition declares on an express contract, an amended petition, declaring on an implied contract, presents a different cause of action. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

The holder of a vendor's lien note who obtains also the legal title may after instituting foreclosure amend his pleadings and sue for rescission, or he may ask for rescission or foreclosure in the alternative. *Moon v. Sherwood* (Civ. App.) 180 S. W. 296.

**A. complaint, in action for services in locating timber in a certain county, is not**

changed to a new cause of action by amendment alleging that the timber was to be in plaintiff's neighborhood. *Oswald v. Williams* (Civ. App.) 187 S. W. 1001.

Where a broker's petition for commissions alleged that the price at which he was to sell the land was \$8,000, \$2,500 to be paid in cash, a subsequent amendment, repeating the allegations of the petition, except that the amount of cash was not to be less than \$2,500, did not allege a new cause of action. *Rabinowitz v. Smith Co.* (Civ. App.) 190 S. W. 197.

Where evidence under third amendment could have been offered under its first and second, the same defenses urged, the same damages recovered, and recovery upon either barred recovery upon the others, no new cause of action is pleaded by the third. *Silver Valley Horse Co. v. C. V. Evans & Co.* (Civ. App.) 190 S. W. 794.

In action for wrongful death, amendment of allegation that blow caused death by reciting that deceased suffered shock to his back, etc., is mere amplification, and does not raise new issue. *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

7. **Amendment or further pleading after sustaining of demurrer or exception.**—After a general demurrer to a petition in conversion of property, on which plaintiff claimed a chattel mortgage was sustained, it would not have availed plaintiff to have amended his petition to meet an objection presented by defendants' special exception. *Oswald v. Giles* (Civ. App.) 178 S. W. 677.

Where the court sustained plaintiff's exceptions to pleas of waiver and estoppel, and no amendment thereof was filed, the issue was not in the case, and could not be considered by the jury. *Vaden v. Buck* (Civ. App.) 184 S. W. 318.

9. **Discretion of court in general.**—The right to file an amended petition is not an absolute right, but is within the discretion of the trial court. *Houston Oil Co. of Texas v. Reese-Corriher Lumber Co.* (Civ. App.) 181 S. W. 745.

10. **Condition of cause and time for amendment.**—Under arts. 1824, 1825, and rule 16 for district and county courts (102 Tex. xxxix, 142 S. W. xviii) requiring amendments to be filed five days before trial in suit by an agent for commissions, in which the buyer of the lands intervened, refusal to permit the intervenor to file an amendment to his cross-bill held erroneous. *Vaden v. Buck* (Civ. App.) 184 S. W. 318.

11. — **Effect of announcement of ready for trial.**—It was within the discretion of the court to permit plaintiff to file a supplemental petition after the parties had announced ready for trial and after the exceptions to plaintiff's petition had been overruled. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

Where defendant's answer in a suit to cancel a purchase of school land alleged improvements of the value of \$210.17, it was proper to permit an amendment, after announcement of ready, setting up other and additional improvements. *Elza v. State* (Civ. App.) 169 S. W. 633.

The allowance of a supplemental petition after announcement of ready for trial held an abuse of discretion on account of delay, though this article, as to time for filing pleadings, was not mandatory. *Kimbrell v. Chase* (Civ. App.) 170 S. W. 861.

The statute declaring that the court may permit amendments to pleadings before announcing ready on the merits and not thereafter is directory, and the court in its discretion may permit a supplemental petition to be filed after the jury have been selected and the other pleadings read to the court and jury. *St. Louis Southwestern Ry. Co. of Texas v. Shumate* (Civ. App.) 178 S. W. 1050.

12. — **Trial amendments in general.**—The office of a "trial amendment" is to supply allegations in a pleading after exception thereto has been sustained. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

The court abused its discretion in refusing to permit plaintiff to amend his petition during trial to allege the facts constituting damages so as to render admissible evidence of damages, where the court had sustained the petition on damages. *Caswell v. J. S. McCall & Sons* (Civ. App.) 163 S. W. 1001.

It is within the discretion of the trial court to permit a trial amendment to the petition, even though exceptions have been sustained. *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28.

Where a broker brought suit on an express contract to pay him a specified sum for the sale of a ranch, a trial amendment seeking to recover on a quantum meruit stated a new cause of action, and was unauthorized under this article. *Jackson v. Blair* (Civ. App.) 165 S. W. 522.

An amended petition, which merely amplifies the allegations of the original petition by pleading more in detail the facts on which the original cause of action is based, is but a continuation of the original suit, and is properly allowed during the trial. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

Trial amendment to petition in action on policy of life insurance held not to set up a new cause of action. *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169.

Defendant was not entitled to amend his answer during the trial to set up a deed of trust, with a defense based thereon, where the circumstances put him on inquiry. *Ablon v. Wheeler & Motter Mercantile Co.* (Civ. App.) 179 S. W. 527.

Where in foreclosure a misdescription of the note sued on as to date and amount is corrected by trial amendment, an assignment or error will not lie thereto, where defendants were not misled or surprised, the record showing that they were only expected to defend against one note and mortgage. *Memphis Cotton Oil Co. v. Gist* (Civ. App.) 179 S. W. 1090.

In trespass to try title, allowance of trial amendment, alleging that plaintiffs were owners as innocent purchasers for value, was not an abuse of discretion. *Keppeler v. Texas Lumber Mfg. Co.* (Civ. App.) 184 S. W. 353.

The discretion of the court in refusing an amendment offered after trial has begun, which would probably cause delay in trial, is not reviewable. *Bender v. Bender* (Civ. App.) 187 S. W. 735.

It was not intended by the rule allowing trial amendments that an amendment so filed might be made matter of right to include new causes of action or new defenses. *Id.*

Allowance of trial amendments to pleadings is a matter of discretion with trial judge. And such discretion will not be reviewed by appellate court, unless there has been a clear abuse. *Ames Portable Silo & Lumber Co. v. Gill* (Civ. App.) 190 S. W. 1130.

Refusal to allow defendant to file an amendment pleading a lease or rental contract, after all parties have rested, is not an abuse of discretion, especially where testimony clearly shows that there was no agreement for such lease or contract. *Pinchback v. Swasey* (Civ. App.) 194 S. W. 446.

**13. — Amendment to conform to proof.**—In proceedings for the appointment of a receiver, it was not error to permit the plaintiffs to file a trial amendment after the evidence was closed and argument had begun, and to consider such amendment as a basis for the appointment. *Hart-Parr Co. v. Alvin-Japanese Nursery Co.* (Civ. App.) 179 S. W. 697.

Refusal of an amendment of the answer, asked for after the evidence had all been submitted, even if material, held a matter of discretion, not to be revised on appeal. *Thornton v. Goodman* (Civ. App.) 185 S. W. 926.

**15. Notice or citation.**—Where a judgment for plaintiff was rendered on an amended petition alleging a new cause of action not set up in the original pleadings, and of the filing of which defendant had neither actual nor constructive notice, and neither he nor his counsel were present in court at the time of trial, the judgment will be set aside. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

Under this article defendant was entitled to notice of the filing of an amended petition alleging a new cause of action, though it had filed exceptions to the original petition. *Id.*

Amendment of petition being filed with leave in open court after defendant has answered it has constructive notice thereof when it is filed. *St. Louis Southwestern Ry. Co. of Texas v. McDermitt* (Civ. App.) 175 S. W. 509.

In suit to foreclose a vendor's lien, amended petition, describing the land so differently from the original petition as to describe different land, set up a new cause of action, of which defendant should have had notice to make judgment by default valid. *Gilles v. Miners' Bank of Cartersville, Mo.* (Civ. App.) 184 S. W. 284.

**17. Mode of making amendment.**—There was no error in permitting plaintiff to state what he intended to include in proposed trial amendment to be afterwards reduced to writing, such matters being within the discretion of the court, and it not appearing that it harmed defendant. *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169.

Permission to plaintiff to interline words in petition in space left for the amount of special damages for medical attention and drugs was within the trial court's discretion. *Caffarelli Bros. v. Bell* (Civ. App.) 190 S. W. 223.

**19. Operation and effect of amendment.**—Where, in trespass to try title, defendant, relying on the defense of limitations, showed possession under a duly recorded deed for 19 years, and that the actual occupancy was on land within the boundaries of the grant under which plaintiff claimed, defendant could not be deprived of the defense of limitations by plaintiff's amended petition disclaiming title to the land actually occupied. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

A petition, amended petition, and second amended petition cannot be construed together to support a judgment, where they do not conform to District and County Court Rules 13, 14 (142 S. W. xviii). *Smith v. Tipps* (Civ. App.) 171 S. W. 816.

**20. — Superseding prior pleading.**—When amended pleadings are filed, the former pleadings are discarded, and the amended pleadings cannot be aided by reference to the former pleadings. *American Indemnity Co. v. Burrows Hardware Co.* (Civ. App.) 191 S. W. 574; *L. Grief & Bro. v. Texas Cent. R. Co.* (Civ. App.) 163 S. W. 345; *City of Aransas Pass v. Usher* (Civ. App.) 191 S. W. 157.

Filing an amended answer held an abandonment of the former answer. *Sanford v. Cobe* (Civ. App.) 172 S. W. 584.

An amended petition, containing the allegations of the original petition, seeking a recovery on an account and adding a demand on quantum meruit, held not to prevent recovery on the account. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

**27. Supplemental petition.**—The basis of a plaintiff's cause of action should not be left to be found in the supplemental petition. *J. I. Case Threshing Mach. Co. v. First Nat. Bank* (Civ. App.) 160 S. W. 662.

In considering the propriety of the action of the lower court in sustaining a demurrer to the petition, the appellate court cannot consider the allegations of a supplemental petition. *Swanson v. Nacogdoches* (Civ. App.) 161 S. W. 83.

Plaintiff can allege by supplemental petition that defendant was indebted to him when the deed under which intervener claimed was executed to defraud defendant's creditors. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

Where an intervener claimed the property under a deed from defendant, a supplemental petition, alleging that the deed was executed to defraud defendant's creditors, did not state a new cause of action. *Id.*

Under District Court Rules 4 and 5 (142 S. W. xvii), the court in determining the cause of action stated need not consider the supplemental petition. *Gossett v. Vaughan* (Civ. App.) 173 S. W. 933.

A supplemental petition may not, under district court rule 10 (142 S. W. xviii), be considered, in determining whether demurrer to petition should be sustained. *Merchants' & Bankers' Fire Underwriters v. Williams* (Civ. App.) 181 S. W. 859.

**28. Supplemental answer.**—When there was no answer filed to an original plea of privilege, a supplemental plea of privilege is unauthorized. *Mellville v. Wickham* (Civ. App.) 169 S. W. 1123.

Where a supplemental petition consisted solely of exceptions and denials, and alleged no new matter, there was no place in the pleadings for a supplemental answer. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

**29. Repleader.**—Where a suit to cancel vendor's liens and recover the purchase money paid was consolidated with a suit to foreclose the lien notes, the court should have required the parties to replead. *Wright v. Chandler* (Civ. App.) 173 S. W. 1173.

**Art. 1825. [1189] [1193] Time of filing amendment.**

Surprise to adverse party.—Notwithstanding arts. 1824, 1825, and rule 27 for district courts (142 S. W. xix), held, that defendant should have been granted leave to file an amended answer setting up a good defense, though his general denial did not put in issue averments of the petition; plaintiff having unexpectedly dismissed as to principal defendant. *Cooney v. Eastman* (Civ. App.) 183 S. W. 96.

Under this article held, that court in its discretion properly sustained a motion to strike out a plea of non est factum filed on day of trial without notice. *Braxton v. Voyles* (Civ. App.) 189 S. W. 965.

**Art. 1826. [1190] [1194] Pleadings amended after arrest of judgment, etc.**

Forms of action.—Under arts. 1826, 1827, there are no forms of action in this state, all suits being conducted by petition and answer, and the court may render such judgment as will meet the allegations of the petition. *O'Neal v. Bush & Tillar* (Sup.) 173 S. W. 869, reversing judgment *Bush & Tillar v. O'Neal* (Civ. App.) 140 S. W. 242. Judgment reversed on rehearing *O'Neal v. Bush & Tillar* (Sup.) 177 S. W. 953.

## DECISIONS IN GENERAL

2. Demurrer or exception—Grounds for demurrer or exception in general.—Where the petition in an action by a foreign corporation alleges facts showing an intrastate transaction, and does not state that it has a permit to transact business in the state, the issue of its right to do business in the state may be raised by exception. *First State Bank of Teague v. Hadden* (Civ. App.) 158 S. W. 1168.

It was error to sustain a so-called exception to a petition, which was in fact a defensive pleading. *Millard v. Nacogdoches County* (Civ. App.) 170 S. W. 828.

Uncertainty in respect to time is a defect which can generally be raised by exception alone. *Brown v. Davis* (Civ. App.) 178 S. W. 842.

A petition which states two separate causes of action which were misjoined may be corrected by exception, subject to the discretion of the court. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 189 S. W. 997.

3. — Matters not appearing on face of pleading.—Matters not appearing on the face of a petition cannot be reached by exception. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167; *Lakeside Irr. Co. v. Kirby* (Civ. App.) 166 S. W. 715.

As against a general exception a petition must be tested by its allegations, and not by the evidence introduced thereunder. *Ara v. Rutland* (Civ. App.) 172 S. W. 993.

In determining an exception to an answer, the court held to have properly considered the petition, where the answer in effect admitted the allegations thereof. *Young v. Bank of Miami* (Civ. App.) 175 S. W. 1102.

5. — Statute of frauds and of limitations.—Where the petition did not show that a contract for the sale of real estate was oral, an exception to the petition for failure to allege a contract in writing was properly overruled. *Fahey v. Benedetti* (Civ. App.) 161 S. W. 896.

A petition for a vendor's breach of a contract for the sale of land held not subject to an exception that the contract as alleged did not sufficiently describe the land to comply with the statute of frauds. *Spaulding v. Smith* (Civ. App.) 169 S. W. 627.

In the absence of allegations in the petition that plaintiff, in action of trespass to try title, held the land in suit for commercial purposes, the issue of the company's power to acquire title by limitation for that purpose cannot be raised by exceptions. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Where the petition did not show that the land in suit had been dedicated to public use, the issue of whether plaintiff railway company could acquire title by limitation to that character of land could not be raised by special exception. *Id.*

6. — Want of jurisdiction.—Privilege to be sued in county of residence may be raised by exception to petition, where the facts appear in the petition. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

7. — Demurrer to part of pleading or to pleading good in part.—An exception to five counts in a petition of reconvention was properly overruled where one of the counts stated a proper counterclaim. *Gillispie v. Ambrose* (Civ. App.) 161 S. W. 937.

Exception to five counts in plea of reconvention for misjoinder by which it was proposed to strike them out and permit other counts to remain, held properly overruled, as the entire pleading is to be stricken, leaving it to the pleader to select such portions of the plea as he may see fit. *Id.*

When the sufficiency of allegations is tested by demurrer, they must be considered in connection with the other allegations of the petition. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

Petition for specific performance of a contract for two tracts is not subject to general demurrer, because description of one tract is insufficient. *Wooten v. Dermott Town-Site Co.* (Civ. App.) 178 S. W. 598.

Where a petition to establish a trust stated a cause of action at least as to one-half of  $\frac{31}{60}$  of the estate claimed by plaintiffs, a general demurrer should not be sustained. *Briggs v. McBride* (Civ. App.) 190 S. W. 1123.

If petition to which general demurrer was filed stated cause of action in any particular, demurrer was properly overruled. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

In an action on open account supported by plaintiff by the statutory affidavit a general demurrer to a defendant's entire answer is properly overruled, where defendant files as part of his answer a cross-action properly pleaded. *Padgitt Bros. Co. v. Dorsey* (Civ. App.) 194 S. W. 1124.

8. — General demurrer or exception.—On a general demurrer or exception all reasonable intendments must be resolved in favor of the pleading. *Millard v. Nacogdoches County* (Civ. App.) 170 S. W. 828; *Blum v. Kusenberger* (Civ. App.) 153 S. W. 779; *Ad-*



kings v. Heard (Civ. App.) 163 S. W. 127; Higby v. Kirksey (Civ. App.) 163 S. W. 315; City of San Antonio v. Bodeman (Civ. App.) 163 S. W. 1043; Texas-Mexican Ry. Co. v. Reed (Civ. App.) 165 S. W. 4; Smith v. McDaniel (Civ. App.) 170 S. W. 1070; Stephenville, N. & S. T. Ry. Co. v. Wheat (Civ. App.) 173 S. W. 974; Cleveland v. Stanley (Civ. App.) 177 S. W. 1181; Seaton v. Majors (Civ. App.) 182 S. W. 712; Mueller v. Simon (Civ. App.) 183 S. W. 63; Ratliff v. Western Union Telegraph Co. (Civ. App.) 183 S. W. 78; Cofer v. Beverly (Civ. App.) 184 S. W. 608; Goodson v. Western Union Telegraph Co. (Civ. App.) 188 S. W. 736; Rabinowitz v. Smith Co. (Civ. App.) 190 S. W. 197; Anderson v. First Nat. Bank (Civ. App.) 191 S. W. 836; Chapman v. Witherspoon (Civ. App.) 192 S. W. 281; Southwestern Portland Cement Co. v. Latta & Happer (Civ. App.) 193 S. W. 1115.

A petition, which incorrectly alleges the measure of damages for a breach of contract appointing plaintiff exclusive agent for the sale of lots, is not subject to general demurrer. Swartz v. Park (Civ. App.) 159 S. W. 338.

A petition, in an action against a railroad for the penalty for an overcharge, though subject to special exceptions for failing to state that the charges were in excess of those fixed by the Railroad Commission, held not subject to attack by general demurrer. San Antonio & A. P. Ry. Co. v. Bracht (Civ. App.) 163 S. W. 376.

A petition seeking damages to the amount of the difference between the contract price and market value, for failure to convey land that defendant did not own when he contracted to sell it, which did not allege fraud or a willful refusal to convey, was subject to general demurrer, as plaintiff was not entitled to recover such damages. Bird v. Lester (Civ. App.) 166 S. W. 112.

Where the causal connection between the negligence of the master and the injury to the servant is sufficiently shown by reasonable deduction from the facts set up in the petition, the petition is good against general demurrer, although a special exception to its sufficiency in that respect would have been well taken. Hotel Dieu v. Armendariz (Civ. App.) 167 S. W. 181.

An exception to a petition demanding damages for loss to a stock of shoes held a general exception within District and County Courts Rule 18 (142 S. W. xviii), and properly overruled. Ara v. Rutland (Civ. App.) 172 S. W. 993.

Though an answer was open to exceptions for uncertainty, it may be sufficient as against a general demurrer. James McCord Co. v. Rea (Civ. App.) 178 S. W. 649.

An answer presenting a good defense is good against a general demurrer, though it contains matters which should be stricken out upon special exception. Brown v. Davis (Civ. App.) 178 S. W. 842.

That the set-off and counterclaim pleaded by defendant did not distinctly state the nature of the counterclaim and the several items thereof as required by arts. 1326 and 1907 cannot be reached by general demurrer, but must be reached by special exception. Ajax-Grieb Rubber Co. v. Hubbard (Civ. App.) 181 S. W. 568.

The want of allegations in petition to recover on policy that no administration of plaintiff's father, the original beneficiary, was pending, and that none was necessary, could properly be raised upon a general demurrer. Modern Woodmen of America v. Yanowsky (Civ. App.) 187 S. W. 728.

If a petition is defective in failing to plead several alternative allegations by separate counts, special exceptions should be made on that ground, which a general exception will not reach. Rabinowitz v. Smith Co. (Civ. App.) 190 S. W. 197.

Insufficient itemization of an account does not subject a petition to general demurrer. Russek v. Wind, Ems & Co. (Civ. App.) 192 S. W. 584.

Where petition states facts in such sequence that negligence and accident appear as cause and effect, general demurrer is properly overruled, though there is no direct statement that the negligence was proximate cause of accident. Canyon Power Co. v. Gober (Civ. App.) 192 S. W. 802.

Petition by former client against attorney, alleging that defendant hypothecated notes, given him for purpose of settlement of an action against them, held not subject to general exception. Padgett v. Hines (Civ. App.) 192 S. W. 1122.

9. — **Special demurrer or exception.**—A special exception, which does not comply with district court rule 18 (142 S. W. xviii), declaring that a special exception shall not only point out the particular pleading excepted to, but shall also point out the insufficiency in its allegations, will be regarded as a general demurrer. Vickrey v. Dockray (Civ. App.) 158 S. W. 1160.

In an action for salary by a city officer, failure of the petition to set out in *hæc verba* or in substance the ordinance creating the office could be taken advantage of only by special exception. City of San Antonio v. Bodeman (Civ. App.) 163 S. W. 1043.

A special exception which asserted that defendant was not bound by the contract sued on, because it was an oral one, and that plaintiff therefore stated no cause of action, was general. City of Brownsville v. Tumlinson (Civ. App.) 179 S. W. 1107.

Exception, though directed specially to a particular paragraph of the answer, held a general demurrer, as it set up no specific reason why the answer failed to set up a defense. Bolt v. State Savings Bank of Manchester, Iowa (Civ. App.) 179 S. W. 1119.

An exception to the petition as seeking to enforce a contract illegal as violative of the United States laws relating to rates on interstate commerce, need not name the particular laws. St. Louis, I. M. & S. Ry. Co. v. Landa & Storey (Civ. App.) 187 S. W. 358.

In action against railroad for damages caused by flooding of plaintiff's basement by surface water, although plaintiff's cause of action was indefinitely stated and confused by failure to separate two counts and by immaterial facts, held sufficient, in absence of special exceptions, to state a failure to comply with Rev. St. 1911, art. 6495. Pence v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 190 S. W. 538.

A special exception, from which it is impossible to tell what portions of the pleadings are objected to, is too general for consideration. Hoover v. First Nat. Bank (Civ. App.) 192 S. W. 1149.

11. — **Abandonment or waiver of demurrer or exception.**—Exceptions to the answer of an intervener, where not called to the attention of the trial court, must be regarded as waived. Ratcliff v. Ratcliff (Civ. App.) 161 S. W. 20.

Where the absence of certain allegations was fundamental error, that defendant in

the lower court waived its demurrer did not prevent it from raising the question on appeal. *Crowell Independent School Dist. v. First Nat. Bank* (Civ. App.) 163 S. W. 339.

Unless an exception to an answer and to a plea in intervention was called to the attention of the trial court and action thereon requested, the exception was waived in the court below. *Slaughter v. Bank of Texline* (Civ. App.) 164 S. W. 27.

Where an answer pleads a defense within the statute of frauds and a general demurrer filed thereto is waived, the answer is as effective as though no demurrer had been filed. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

In landowner's suit against city, for price of land sold for reservoir and to foreclose implied lien, where general demurrer to petition, which did not affirmatively show that no provision had been made by city to provide for payment of the debt, as required by Const. art. 11, §§ 5, 7, was not called to attention of, or acted on, by court below, demurrer was waived. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

12. — **Admissions by demurrer or exception.**—A demurrer or exception to a pleading admits the truth of the allegations thereof. *Tyler Building & Loan Ass'n v. Biard & Scales*, 171 S. W. 1122, 106 Tex. 554, reversing judgment (Civ. App.) 165 S. W. 542, and rehearing denied 171 S. W. 1200, 106 Tex. 554; *Lastinger v. Toyah Valley Irr. Co.* (Civ. App.) 167 S. W. 788; *Dibrell v. City of Coleman* (Civ. App.) 172 S. W. 550; *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901; *Brown v. First Nat. Bank of Corsicana* (Civ. App.) 175 S. W. 1122; *Dye v. Livingston Lumber Co.* (Civ. App.) 161 S. W. 53; *Key v. Key* (Civ. App.) 167 S. W. 173; *Wooten v. Dermott Town-Site Co.* (Civ. App.) 178 S. W. 593; *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993; *Smith v. Texas & P. Ry. Co.* (Civ. App.) 180 S. W. 920; *Dublin Fruit Co. v. Neely* (Civ. App.) 182 S. W. 406; *Johnson v. Atlas Supply Co.* (Civ. App.) 183 S. W. 31; *Stockwell v. Melbern* (Civ. App.) 185 S. W. 399; *Roberts v. Anthony* (Civ. App.) 185 S. W. 423; *W. B. Clark & Co. v. Gans S. S. Line* (Civ. App.) 187 S. W. 1106; *Robertson v. Haynes* (Civ. App.) 190 S. W. 735; *First Nat. Bank v. Herrell* (Civ. App.) 190 S. W. 797; *Chapman v. Witherspoon* (Civ. App.) 192 S. W. 281.

In an action against a railroad on notes, not approved by the railroad commission as a condition of validity under arts. 6717–6732, the issue of fact raised by a supplemental plea that the road was suburban, excepted by act, held not controlled by demurrer. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

14. — **Hearing and determination.**—Where the court decides that a petition states no cause of action, it is unnecessary to consider the petition with reference to special demurrers. *Blum v. Kusenberger* (Civ. App.) 158 S. W. 779.

The sustaining of defendant's exception to plaintiff's exceptions to a pleading is in effect merely the overruling of plaintiff's exceptions. *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

In passing on a pleading as against demurrer, the court must consider everything as properly alleged which by any reasonable construction may be embraced within the allegations made. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

16. — **Effect of sustaining.**—A plea having been eliminated, by the sustaining of exceptions thereto, will not sustain a finding, and judgment thereon, for defendant. *First Nat. Bank of Roswell, N. M., v. Browne Grain Co.* (Civ. App.) 187 S. W. 489.

19. **Defects and objections and waiver thereof.**—An assignment of error, in trespass to try title, that, appellant having paid a certain sum for the land in controversy, if appellee claimed that appellant acquired it as trustee for appellee's benefit he should have offered in his pleadings to do equity by reimbursing appellant for the price was really an objection to the sufficiency of the pleadings and should have been presented as an exception to the pleading making that issue. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

Where no special exception was taken to a defective pleading, its correctness was not open to review. *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

If a general demurrer is well taken, it should be sustained at any stage of the proceedings. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

20. — **Cure by subsequent pleading.**—Allegations in a supplemental petition will not cure defects or omissions in the original petition, but such defects must be cured by amendment. *Fink v. San Augustine Grocery Co.* (Civ. App.) 167 S. W. 35.

Allegations of petition to recover for breach of contract for exchange of realty, aided by answer, held defective for failure to allege market values of the properties. *Montgomery v. McCaskill* (Civ. App.) 189 S. W. 797.

21. — **Cure by pleadings of adverse party.**—Though the petition showed that a note was barred by limitations, the error is cured where the answer showed that the note was not due until a later date falling within the period of limitations. *Cox v. Thompson* (Civ. App.) 160 S. W. 604.

In an action involving the disposition of trust property, defendants impleaded by the trustee, against whom plaintiffs brought their action, cannot complain that the petition did not state a cause of action against them, where, by their own pleading, they alleged their interest, and contested the right asserted by plaintiffs. *Barnett v. Elliott* (Civ. App.) 160 S. W. 671.

The defects in the pleadings of one party may be cured by averments in the pleadings of the other. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

The failure of defendant's answer to show that plaintiff, the wife of the possessor of land against whom a judgment had been recovered, was a party to that action so as to be bound by the judgment, is cured where plaintiff's petition showed that the property was the community estate of herself and her husband. *Childress v. Robinson* (Civ. App.) 161 S. W. 604.

Where plaintiff's decedent, while riding in an ambulance, received fatal injuries in a collision between the ambulance and a railroad train, and plaintiff failed to charge the railroad company with omitting a proper lookout, such omission was not cured by such allegation in the answer of the owner of the ambulance so as to entitle plaintiff to the benefit thereof. *Missouri, K. & T. Ry. Co. of Texas v. Kennon* (Civ. App.) 164 S. W. 867.

Where a servant's petition for damages for injuries sustained was defective in not showing causal connection between the master's negligence and the injury, an answer,

which alleged that the proximate cause of the injuries, if any, was the negligence of fellow servants, cured the defect in the petition. *Hotel Dieu v. Armendariz* (Civ. App.) 167 S. W. 181.

In an action for an accounting between agents who had agreed to share commissions on sales of stock, the petitioner's want of a material allegation held supplied by its being set out in the answer. *Harless v. Haile* (Civ. App.) 174 S. W. 1020.

In an action on a policy of benefit insurance, where plaintiff beneficiary alleged specifically the duty of defendant to notify deceased of suspension, it was not necessary for defendant to allege notice before introducing evidence that all delinquent members were duly notified. *Cole v. Knights of Maccabees of the World* (Civ. App.) 188 S. W. 699.

In trespass to try title, allegations of the defendant's answer held to supply deficiency as to plaintiff wife's allegations as to common source or her claim of separate property. *Martinez v. De Barroso* (Civ. App.) 189 S. W. 740.

The allegations of the answer may be used to aid and supplement those of the petition. *Montgomery v. McCaskill* (Civ. App.) 189 S. W. 797.

The failure of a petition against a railroad company which had resumed possession of the property to allege that the acts of the receiver complained of were authorized by the court is not cured by an answer alleging that such acts were without authority. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 191 S. W. 591.

22. — **Waiver in general.**—Plaintiff's failure to answer special matter of defense, as required by art. 1829, as amended by Acts 33d Leg. c. 127, § 3, with the result that any fact so pleaded and not denied shall be taken as confessed, was waived where, without objection, there was a trial as though there were a denial, and defendant requested instructions submitting the matters thereby alleged as controverted issues to the jury. *Texas & P. Ry. Co. v. Tomlinson* (Civ. App.) 169 S. W. 217.

Plaintiff's failure to deny a special defense, as required by the statute, held waived by failure to call the court's attention thereto. *Gulf, C. & S. F. Ry. Co. v. Loyd* (Civ. App.) 175 S. W. 721.

23. — **Waiver of objections to petition or complaint in general.**—Though failure of the petition to allege necessary facts only rendered it subject to special exception, plaintiff is not excused from proving such facts. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

Where, though allegation charging defendants with fault in connection with contract negotiated by brokers was general, it was not excepted to for that reason, held that it had standing as a plea fixing responsibility on defendants. *Levy v. Dunken Realty Co.* (Civ. App.) 179 S. W. 679, denying rehearing *Levy v. Duncan Realty Co.*, 178 S. W. 984.

Where a railway company and its contractor litigated with a subcontractor's creditors the amount due such subcontractor, they cannot urge upon appeal, for first time, that the issue was not presented by the pleadings. *Texas Bldg. Co. v. Collins* (Civ. App.) 187 S. W. 404.

Where trial court's attention was not called to the conflicting allegations of the petition by exception thereto, the question could not be raised on appeal. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

That petition for injunction was not properly verified as required by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4649, should be raised in the trial court by exception, and failure to except is waiver of sufficiency of affidavit. *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216.

Sufficiency of petition as against general demurrer can be raised for first time on appeal. *Dawson v. George* (Civ. App.) 193 S. W. 495.

The objection that a divorce petition was insufficient for failure to deny charges of infidelity alleged will not be considered on appeal, where not raised either in pleadings or motion for new trial. *Hill v. Hill* (Civ. App.) 193 S. W. 726.

The petition not having been excepted to, every reasonable intendment must be given it in favor of its sufficiency. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 194 S. W. 218.

24. — **Misjoinder of causes of action and duplicity.**—An exception to a petition for misjoinder of causes of action, not called to court's attention, is presumptively waived. *United S. S. Co. v. Houston Packing Co.* (Civ. App.) 177 S. W. 570.

In a servant's action for injuries against a master and an industrial insurer, the insurer may waive the misjoinder of an action over against it on the policy by the master. *Southwestern Surety Ins. Co. v. Thompson* (Civ. App.) 180 S. W. 947.

A misjoinder of causes of action may be waived. *Madden v. Shane* (Civ. App.) 185 S. W. 908.

25. — **Failure to state cause of action.**—Where a petition shows on its face that no action can be maintained, the failure of the defendants to demur or except is not a waiver of the defect which can be taken advantage of by answer. *Garrett v. A. G. McAdams Lumber Co.* (Civ. App.) 163 S. W. 320.

An objection that plaintiffs' petition does not state facts sufficient to constitute a cause of action may be urged for the first time on appeal. *Pierce Fordyce Oil Ass'n v. Woods* (Civ. App.) 180 S. W. 1181.

Objection that the suit is based on an illegal contract, when the petition discloses it, may be made at any stage, as it goes to the substance of the petition. *St. Louis, I. M. & S. Ry. Co. v. Landa & Storey* (Civ. App.) 187 S. W. 358.

26. — **Waiver of objections to plea or answer.**—Error in overruling a special exception to defendant's insufficient plea of *res judicata* was waived by agreement that all judgments previously rendered in the case should be considered in evidence. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Defendant, by not excepting to the answer to his cross-action nor moving for judgment on the pleadings, but introducing evidence, waived failure of such answer to specifically deny an item pleaded in the cross-action. *Tabet Bros. Co. v. Higginbotham* (Civ. App.) 170 S. W. 118.

Where, in trespass to try title, defendant pleaded the three-year statute of limitations and not guilty to the first count of plaintiff's petition, and no exception was taken thereto, plaintiff waived her right to a better plea. *Hughes v. Hughes* (Civ. App.) 170 S. W. 847.

Plaintiff cannot on appeal complain that the answer of defendant did not state the legal effect of the contract relied on, where no special exception was taken to the answer on that account. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Where appellant urged no exception to the sufficiency of defendant's plea, and failed to complain of the court's failure to submit material questions to the jury, those matters cannot be complained of on appeal. *Taylor v. Jackson* (Civ. App.) 180 S. W. 1142.

In garnishment proceedings, where supplement, so called, and other portion, of traverse were attached, and made part of each other by allegation, in absence of special exception as to order of pleading, or that they were attached, entire answer should be looked to by Court of Civil Appeals. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

That exceptions were contained in a supplemental answer, instead of an amended answer, is an irregularity, so that, in the absence of exception on this account, error because of this in sustaining them is waived. *Paddleford v. Wilkinson* (Civ. App.) 194 S. W. 467.

28. — **Objections to rulings on demurrer or exception.**—Assignments of error to the sustaining of exceptions to portions of defendant's answer will not be considered on appeal, where the record does not show that the exceptions were ever presented to or ruled on by the court. *Wauhop v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

Sustaining of demurrers to answer is reviewable on appeal from judgment on directed verdict for plaintiff, though defendant did not object to peremptory instruction. *Farrar v. Holt* (Civ. App.) 178 S. W. 618.

Where a general demurrer as well as special exceptions were sustained to an answer which presented a good defense, though it was open to special exceptions, the judgment will on defendant's appeal be reversed, though he failed to complain of the sustaining of the exceptions. *Brown v. Davis* (Civ. App.) 178 S. W. 842.

When the court refuses to rule on a general demurrer which is well taken, the case will be reversed for fundamental error. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

Where petition clearly showed it stated a cause of action within jurisdiction of county court, held that, though plaintiff did not present exceptions in the court below to the sustaining of an exception to the petition and assessing of costs up to that time against him, the matter would be reviewed on appeal. *Opiela v. Manka* (Civ. App.) 182 S. W. 1166.

Whether a petition is subject to general demurrer is a question of fundamental error, so that it is immaterial that exceptions to the overruling of such demurrer do not appear in the transcript. *General Eonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

The Court of Civil Appeals, in the absence of an exception by the appellant noted of record and presented in an assignment to trial court's action in sustaining a codefendant's exception to allegation of petition, could not review the ruling. *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965.

If there was error in sustaining general demurrer to the petition, plaintiff waived it by filing an amended petition. *Apache Cotton Oil & Mfg. Co. v. Watkins & Kelly* (Civ. App.) 189 S. W. 1083.

In a suit by beneficiary in policy of fraternal benefit insurance for use of his assignee, where defendant demurred to petition, and after demurrer was overruled admitted cause of action to acquire right to open and close under Rule No. 31 (142 S. W. xx), he did not waive his right to complain of ruling on demurrer. *American Ins. Union v. Allen* (Civ. App.) 192 S. W. 1087.

29. — **Objections to amendments and supplemental pleadings and rulings relating thereto.**—Where special plea of want of jurisdiction was presented in an amended answer, leave to file which had been granted, the court must hear and determine it in the absence of any objections to the plea or motion to strike it out. *Day v. Mercer* (Civ. App.) 175 S. W. 764.

That special exception in plaintiff's supplemental petition was not in due order of pleading would not be entertained when first made in the Court of Civil Appeals. *Scruggs v. E. L. Woodley Lumber Co.* (Civ. App.) 179 S. W. 897.

A motion to strike supplemental answers, filed after all parties had announced ready for trial, and plaintiffs had rested their case on pleadings, held too late. *Carr v. Grand Lodge, United Brothers of Friendship of Texas* (Civ. App.) 189 S. W. 510.

In action to restrain illegal sale of intoxicating liquors, defendant cannot object to amendment allowed at trial, where he made no application for continuance. *Ætna Club v. State* (Civ. App.) 193 S. W. 1106.

30. — **Want or insufficiency of indorsement or verification.**—Failure of defendants to verify their answer may be waived by plaintiffs filing only a general exception thereto. *Taber v. Eyler* (Civ. App.) 162 S. W. 490.

The failure of the plaintiff or his attorney to sign his petition, as required by statute, is a mere irregularity, and, unless excepted to or motion made to strike in the lower court, it will be held waived. *O'Donnell v. Chambers* (Civ. App.) 163 S. W. 138.

Failure to verify a plea of failure of consideration is waived, unless objected to in the trial court before going to trial. *St. Louis, S. F. & T. Ry. Co. v. Wall* (Civ. App.) 165 S. W. 527.

Where case was tried by defendant without asserting that plaintiff's failure to deny plea of limitations under oath admitted it, the error was waived. *Shaw v. Thompson Bros. Lumber Co.* (Civ. App.) 177 S. W. 574.

The failure to verify a petition was waived by the defendant where he did not invoke the benefit of the statute requiring the petition to be verified. *Wedgworth v. Smith* (Civ. App.) 178 S. W. 641.

30½. — **Want or insufficiency of replication or other denial.**—Any right of defendant to judgment on the pleadings, because of absence of reply to allegations of the answer, is waived by proceeding to trial without claim thereof. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309; *Galveston, H. & S. A. Ry. Co. v. Carmack* (Civ. App.) 176 S. W. 158; *Denison Cotton Mill Co. v. McAmis* (Civ. App.) 176 S. W. 621.

Plaintiff's failure to deny special pleas of contributory negligence, as required by art. 1829, as amended by Acts 33d Leg. c. 127, is waived, defendant not calling attention thereto, at the trial, by request that such pleas be taken as confessed, but only requesting an instruction for a verdict, without embodying such contention therein or in the objection to the refusal thereof. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

An objection that the reply did not specifically deny allegations in the answer held waived by defendant's failure properly to object and by a trial as if answer had been denied. *Hill County Cotton Oil Co. v. Gathings* (Civ. App.) 173 S. W. 597.

In an action on notes, where the defendants did not avail themselves of plaintiffs' failure to deny their allegation of a credit, introducing evidence as if issue had been joined thereon, defendants waived plaintiffs' failure to deny the credit, and could not complain of judgment not allowing therefor. *Bybee v. Austin & Riley* (Civ. App.) 180 S. W. 287.

In the absence of a motion for judgment on the pleadings, the failure of either party to specifically deny affirmative matter will be a waiver of that right. *Kansas City Southern Ry. Co. v. Johnson* (Civ. App.) 180 S. W. 944.

Failure to reply to an answer alleging contributory negligence held waived by failure to move for judgment on the pleadings. *Texarkana & Ft. S. Ry. Co. v. Rea* (Civ. App.) 180 S. W. 945.

Where a surety, when sued on contract of suretyship, having alleged fraud in securing his signature, to which plaintiff failed to reply, went to trial without moving for judgment on the pleadings, and made no objection to evidence, he waived the objection that there was no reply. *Gulf Live Stock Ins. Co. v. Love* (Civ. App.) 181 S. W. 766.

Where the railway company went to trial without objecting to a shipper's failure to controvert the averments of defense in the answer, held, that its right to insist that the answer was confessed was waived. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

Right of defendant to have special defenses pleaded and not denied by plaintiff taken as confessed may be waived. *Kansas City, M. & O. Ry. Co. v. Cole* (Civ. App.) 183 S. W. 137.

33. — **Objections to evidence on ground of variance.**—In an action to recover for furnishing water to a city, which agreed to require water users to install meters, etc., held that where the city did not withdraw its announcement of ready for trial, it could not, on appeal, complain of the admission of evidence of the names of users who had not installed meters, on the ground that it was surprised because the supplemental petition did not name them. *City of Comanche v. Hoff & Harris* (Civ. App.) 170 S. W. 135.

34. **Aider by verdict or judgment.**—Error, if any, in overruling a special exception to a petition, alleging that usurious payments of interest were made to defendant's agent, but not showing that he had more than one agent, was cured by judgment for plaintiff upon evidence conclusively showing that defendant had but one agent. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

The objection of variance cannot be raised after verdict. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

In a servant's action for injury, where promise of an alleged vice principal was not declared upon as promise to remove risk of danger from negligence of fellow servants, it could not, after judgment, be given such effect. *Medlin Milling Co. v. Mims* (Civ. App.) 173 S. W. 968.

Judgment reciting defendant's appearance and his withdrawal of his answer held in nature of judgment by confession, and to operate as waiver of alleged error, in that the court, when rendering judgment, did not have before it pleading sufficient to support judgment. *Wiggins v. First Nat. Bank of Denton* (Civ. App.) 175 S. W. 735.

When not questioned by demurrer the petition after verdict and judgment should be liberally construed. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

In absence of exception, petition in action by contractor held to authorize charge and verdict either upon quantum meruit or for balance of contract price. *King v. Collins* (Civ. App.) 179 S. W. 899.

A verdict for exemplary damages in an action against a telegraph company for negligently delaying delivery of a message did not cure the defect of the petition, in that it did not allege that the act of the company's agent in changing the name of the addressee was directed or ratified by the company, or that the latter was negligent in selecting the employé. *Western Union Tel. Co. v. Schoonmaker* (Civ. App.) 181 S. W. 263.

Where defendant city waived demurrer to plaintiff's petition, after verdict and judgment for plaintiff, petition should receive most liberal construction, and should be held sufficient if its terms are broad enough to support recovery on any theory. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

36. **Compelling election.**—In an action by the widow of a railroad employé for his death, pleadings intended to meet proof of his engagement either in intrastate or interstate commerce at death held not improper as an attempt to recover under federal and state statutes at once, so as to require an election. *International & G. N. Ry. Co. v. Reek* (Civ. App.) 179 S. W. 699.

In action against telephone company and its manager for slander, plaintiff should be required to elect to proceed against both jointly for slanders by the manager as agent for the company, or for those uttered by the manager in his individual capacity. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

## CHAPTER THREE

### PLEADINGS OF THE PLAINTIFF

Art.  
1827. Requisites of the petition.  
1828. Defensive matters by plaintiff.

Art.  
1829. Denial of special defenses presumed.

**Article 1827. [1191] [1195] Requisites of the petition.**—The petition shall set forth clearly the names of the parties and their residences, if known, with a full and clear statement of the cause of action, and such other allegations pertinent to the cause, as the plaintiff may deem necessary to sustain his suit, and without any distinction between suits at law and in equity, and shall also state the nature of the relief which he requests of the court. [Act May 13, 1846, p. 363, § 5; P. D. 1427; Acts 1913, p. 256, § 1; Act March 22, 1915, ch. 101, § 1.]

**Explanatory.**—The act amends articles 1827, 1828, 1829, 1902, as amended by chapter 127 of Acts 33rd Leg., Reg. Sess. Sec. 5 repeals arts. 1829a and 1829b as added by that act. Sec. 6 repeals all laws in conflict. Sec. 7, the emergency clause, declares that the act of the 33rd Leg. has resulted in loss of time, and increase of expense, and that a return to the former system of pleading is desirable. The act took effect 90 days after March 20, 1915, date of adjournment.

Cited, *Pugh v. Werner* (Civ. App.) 166 S. W. 698; *Tabet Bros. Co. v. Higginbotham* (Civ. App.) 170 S. W. 118; *Spencer v. Levy* (Civ. App.) 173 S. W. 550; *Needham v. Cooney* (Civ. App.) 173 S. W. 979; *Kansas City, M. & O. Ry. Co. v. Cave* (Civ. App.) 174 S. W. 872; *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025; *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644; *Mutual Film Corp. v. Morris & Daniel* (Civ. App.) 184 S. W. 1060; *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

1. **Matters of presumption or implication.**—In action for death of an employé, where petition alleged that the floor was greasy and slippery, but failed to show that any other person was responsible for such condition, held that it would be presumed that the employé caused such condition. *Snipes v. Bomar Cotton Oil Co.*, 106 Tex. 181, 161 S. W. 1.

2. **Matters of fact or conclusions.**—Allegations in a petition in an action by a carrier for freight held mere conclusions. *St. Louis Southwestern Ry. Co. v. Browne Grain Co.* (Civ. App.) 166 S. W. 40.

An allegation that a judgment was void because altered by the parties before being recorded is a statement of a conclusion, not sufficient to authorize an injunction. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

An allegation of a legal conclusion that the condition upon which defendant's liability depended had been performed need not be considered on appeal, even though it was alleged to be upon information from the defendant. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

In a suit to enjoin a foreclosure sale, the mere conclusion of a pleader that the property would not bring its full value cannot be considered, in absence of facts alleged reasonably tending to support it. *Floore v. Morgan* (Civ. App.) 175 S. W. 737.

Allegations that by fraudulent representations and by overreaching by flatteries, and persuasions, a conveyance was induced, amount to a legal conclusion. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

In petition for injunction, allegations that plaintiff was lawfully in possession of land, and that defendants unlawfully entered and forcibly ejected him therefrom, are mere conclusions of law and insufficient to authorize injunction. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

An allegation that a party "sold and transferred said business and accounts in violation of the bulk sales law" is a conclusion of the pleader. *Texas Auto & Supply Co. v. Magnolia Petroleum Co.* (Civ. App.) 191 S. W. 573.

Petition to set aside judgment on a note pleaded a conclusion in pleading, that plaintiff "has a good and legal defense." *First Nat. Bank v. Hartzog* (Civ. App.) 192 S. W. 363.

3. **Conclusions of law from facts alleged.**—A petition, averring it was orally agreed that defendant should be responsible for the note of another in consideration of plaintiff's extension of credit, is sufficient, in pleading the conclusion, and need not set up the conversation. *Thornburg v. Moon* (Civ. App.) 180 S. W. 959.

4. **Matters of evidence.**—An allegation in a supplemental petition claiming a fraudulent conveyance that defendant had conveyed other property at the same time and for the same purpose, and had been sued by various creditors, was a pleading of evidence. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

6. **Directness and positiveness, or argumentativeness.**—In pleading, facts to be established should be directly averred, and not merely suggested as an inference from other facts stated. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

7. **Certainty, definiteness, and particularity.**—In action against a city a supplemental petition by which it was sought to avoid a defense held not bad for indefiniteness. *City of Comanche v. Hoff & Harris* (Civ. App.) 170 S. W. 135.

In action for extra services in superintending building, petition alleging it would have taken 8 or 9 months to perform the work as originally planned, whereas it required 18 to 19 months because of the alterations, held sufficiently specific. *Shear v. Bruyere* (Civ. App.) 187 S. W. 243.

8. **Ambiguity.**—Allegations of a petition, in an action for lumber sold, declaring upon a cause of action for lumber delivered at defendant's special instance and request, were

not ambiguous nor inconsistent with allegations declaring upon a written contract, and hence defendant's exception was properly overruled. *Fink v. San Augustine Grocery Co.* (Civ. App.) 167 S. W. 35.

9. **Disjunctive and alternative allegations.**—In an action by a real estate broker for compensation in assisting defendant to obtain title to land, the petition may allege in the alternative an express contract and a right of recovery on a quantum meruit. *Bond v. Hancock* (Civ. App.) 163 S. W. 660.

In view of art. 5686, declaring that, in an action for injuries which were not those which caused death, the heirs might continue the suit, held, that where plaintiff died pending his suit, and his surviving children were doubtful as to the real cause of death, they might frame their petition for a recovery for injury causing his death, or for his death from some other cause. *Houston & T. C. R. Co. v. Walker* (Civ. App.) 167 S. W. 199, judgment reversed (Sup.) 173 S. W. 208, motion to retax costs granted (Sup.) 177 S. W. 954.

Petition, in action for wrongful death of car repairer, may be drawn in alternative, showing a cause of action under the federal Employers' Liability Act, § 9, as added in 1910, the state laws, or at common law, depending on development of facts on trial for cause to be relied upon. *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194.

A petition alleging an unconditional liability against the defendant railway company and in the alternative alleging that if plaintiff was mistaken another was liable, states a cause of action against the railway company. *Missouri, K. & T. Ry. Co. of Texas v. Elias* (Civ. App.) 184 S. W. 312.

A plaintiff who is doubtful about the particular facts he can establish may plead in the alternative without rendering his pleading demurrable for inconsistency or multifariousness. *San Angelo Cotton Oil Co. v. Houston County Oil Mill & Mfg. Co.* (Civ. App.) 185 S. W. 887.

Where third count of petition showed on its face that it was an alternative plea, plaintiff was not confined to allegation therein, but might make out a case by proving allegations of second count. *City of Houston v. Ritchie* (Civ. App.) 191 S. W. 362.

10. **Consistency or repugnancy.**—A petition seeking possession of certain land, or if defendant is a tenant in common with plaintiff, in the alternative, for contribution for money paid for necessary improvements, is not subject to general demurrer on the ground of inconsistency. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

Where a petition alleged that plaintiff sold property at the best price obtainable, for \$425 and that the market value at the time of the sale was \$870 and prayed for the difference as damages, the allegations were repugnant. *Stanley v. Sumrell* (Civ. App.) 163 S. W. 697.

Allegations of negligence of a master in using a dangerous brake, and of negligence of his servants in applying it, not being necessarily inconsistent, a general verdict for plaintiff could stand. *Texas & P. Ry. Co. v. Matkin* (Sup.) 174 S. W. 1098, affirming judgment (Civ. App.) 142 S. W. 604.

The assignor of an account could not recover thereupon, and also for a tort growing out of the same transaction; as it would constitute a double recovery. *Carver Bros. v. Merrett* (Civ. App.) 184 S. W. 741.

An amended petition for the appointment of a receiver attaching deed of trust as an exhibit and made a part thereof, made the terms of such instrument conclusive against contrary allegations contained in the body of the petition. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

11. **Irrelevancy and surplusage.**—In a suit to restrain individuals from maintaining a disorderly house, used for the sale of liquor without a license, an allegation that the house was known as the "Ureka Club and Socorro Mutua Mexicana," held superfluous and not to show that defendants were dispensing liquor to members of a bona fide club. *Soto v. State* (Civ. App.) 171 S. W. 279.

In action for breach of warranty, held that exception should have been sustained to allegations of petition concerning similar contract between defendant and a third party. *Texas-Kalamazoo Silo Co. v. Alley* (Civ. App.) 180 S. W. 621.

Use of the word, "administratrix" in action for wrongful death of plaintiff's husband held surplusage, where facts do not bring the case under federal Employer's Liability Act, § 9, as added in 1910, and petition and charge were full and complete under state laws, under which plaintiff could not sue in a representative capacity. *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194.

In action against telephone company for slander in discharging employé, but not for the discharge, special exception to allegations that employé satisfactorily performed duties should be sustained. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

Where a broker suing for an agreed commission pleaded the facts justifying recovery, the question whether the allegation that he was defendant's agent was a conclusion and not a fact, and whether exception thereto was erroneously sustained, was immaterial; his right to compensation being the same regardless of that question. *Robinson v. Lingner* (Civ. App.) 183 S. W. 850.

Where no punitive damages were sought and the petition averred that defendant maliciously breached its contract, special exception thereto should have been sustained; motive being immaterial. *Texas Power & Light Co. v. Roberts* (Civ. App.) 187 S. W. 225.

In buyer's action to recover damages for failure to deliver calves pursuant to a sales contract, allegations that the seller's withholding of certain calves was fraudulent may be rejected as surplusage. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

12. **Scandalous matter and false allegations.**—Where a chattel mortgagee erroneously set up the giving of two instead of a single note to secure the debt, the error was immaterial and foreclosure could be had. *Bailey v. Culver* (Civ. App.) 175 S. W. 1083.

In action for slander, where plaintiff claims no damages for being forced from telephone office, exception to allegation that plaintiff left because she feared manager would assault her should be sustained. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

13. **Mistakes in use of language.**—The facts, pleaded therefor, showing the transaction usurious, it is immaterial that the pleading designated it as "exchange or interest"; the sum deducted for use of money, under art. 4973, constituting interest. *Morris v. First State Bank of Dallas* (Civ. App.) 192 S. W. 1074.

14. **Pleading written instruments.**—A petition relying on ambiguous instruments must place some definite construction thereon so as to cure the ambiguity and support a judgment. *Greene Gold-Silver Co. v. Silbert* (Civ. App.) 158 S. W. 803.

One suing for breach of contract to furnish water for irrigation need not allege in the petition the part of the contract providing that \$4 an acre should be the maximum damage allowed for failure to furnish the water. *Northern Irr. Co. v. Dodd* (Civ. App.) 162 S. W. 946.

Where an instrument sued upon is merely an offer to sell certain land, the petition, in order to state a cause of action, should allege sufficient facts to show an acceptance of such offer. *Houghtling v. Eubank* (Civ. App.) 186 S. W. 364.

16. — **Parol evidence to vary, add to, or explain writing.**—Where complaint did not disclose consideration of defendant's oral promise to refund commission on payment of purchase-money notes, general demurrer could not be sustained on ground that cause of action tended to vary terms of notes, since consideration might be based upon some matter independent or collateral to payment of notes. *Chapman v. Witherspoon* (Civ. App.) 192 S. W. 281.

17. **Construction of petition.**—Petition to restrain official duty will be strictly construed, and every reasonable inference indulged in favor of the legality of the act. *Marion County v. Perkins Bros. Co.* (Civ. App.) 171 S. W. 789.

18. **Conclusiveness of allegations.**—The allegation in the pleading of plaintiff, seeking to recover with damages, fixtures he manufactured and installed for defendant, who refused to accept and pay for the same as agreed, that the defendant was, by remaining in possession of the fixtures, estopped to deny that they were in substantial compliance with the contract, may not be used against him as an assertion of acceptance, and so limiting his remedy to recovery of contract price. *Banner v. Thomas* (Civ. App.) 150 S. W. 102.

In an action to establish ownership of corporate stock, plaintiffs are bound by the allegations of their petition as to the amount of stock taken up by the corporation. *Green v. Galveston City Co.* (Civ. App.) 191 S. W. 182.

21. **Names, description, and capacity of parties, and venue.**—Under arts. 1827, 1850, 1852, petition in suit in county court failing to allege the residence of either of the defendants held not to authorize the clerk to command the sheriff to execute the citation therein. *Friend v. Thomas* (Civ. App.) 187 S. W. 986.

22. **Statement of cause of action in general.**—In determining on appeal whether the petition was so fundamentally defective in its allegations as to damages as to be insufficient to support any recovery, the petition will be held good if it was good as against general demurrer. *St. Louis, B. & M. Ry. Co. v. Hamilton* (Civ. App.) 163 S. W. 666.

Where there is a total failure to state a cause of action, or of some fact essential to it, the defect may be taken advantage of on appeal, though defendant's general demurrer has not been ruled on by the trial court. *City of San Antonio v. Bodeman* (Civ. App.) 163 S. W. 1043.

23. **Theory and form of action.**—Under a contract to take stock in plaintiff corporation, then "in process of formation" and to be chartered under the laws of the state, the law supplied the condition that the concern should in fact be incorporated, and on performance of such condition the subscriber's liability became absolute and enforceable by action of assumpsit; an action for breach of contract not being the only remedy. *McCord v. Southwestern Sundries Co.* (Civ. App.) 158 S. W. 226.

Where a petition for personal injuries received by a railroad employé in Oklahoma alleged a good cause of action under the laws of Texas, it need not specify whether the plaintiff claims recovery under the laws of Texas, of Oklahoma, or of the United States. *St. Louis & S. F. R. Co. v. Cox* (Civ. App.) 159 S. W. 1042; *Snipes v. Bomar Cotton Oil Co.*, 106 Tex. 181, 161 S. W. 1.

Where defendants converted cotton which had been shipped to them for storage, and an action was brought to charge them with the highest price of the cotton during the season of conversion, the action sounds in tort and not in assumpsit. *First Nat. Bank v. Martin & Co.* (Civ. App.) 162 S. W. 1029.

The designation of an action as one to remove a cloud does not necessarily make it such, but the character of the suit is to be determined by the facts alleged therein. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

An action for fraud of bank officers, inducing a purchase of negotiable instruments of the bank, is in tort, and the bank is not liable as on contract, where the buyer accepted the paper without indorsement or guaranty from the bank, though the paper was worthless. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

Under the Texas system of pleading, distinctions between actions do not exist, but the facts alleged control, and if a contract appears to be the gravamen of an action it will be so determined. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Civ. App.) 171 S. W. 1103.

A cause of action arising from breach of promise is an action *ex contractu*, but a cause of action arising from a breach of duty growing out of the contract is in form an action *ex delicto*. *Id.*

Wrongs arising from nonperformance of implied contract obligations will sustain an action on the case, and where such wrong outside the contract is the gravamen of the action the action is an action *ex delicto*. *Id.*

Under arts. 1826, 1827, there are no forms of action in this state, all suits being conducted by petition and answer, and the court may render such judgment as will meet the allegations of the petition. *O'Neal v. Bush & Tillar* (Sup.) 173 S. W. 869, reversing judgment *Bush & Tillar v. O'Neal* (Civ. App.) 140 S. W. 242. Judgment reversed on rehearing *O'Neal v. Bush & Tillar* (Sup.) 177 S. W. 953.



Action by the buyer of a piano, alleged to have been represented perfect by the seller's agent, to recover his damages from the seller, held to sound in tort for fraud, supporting recovery of damages. *Jesse French Piano & Organ Co. v. Gibbon* (Civ. App.) 180 S. W. 1185.

Landowners, who engaged to pay realty brokers a commission for effecting a sale in notes received for the land, but who, after receiving such notes, sold them to a third person, held liable in assumpsit to the brokers for their commission in money. *Patterson v. Kirkpatrick* (Civ. App.) 184 S. W. 739.

**24. Separate causes of action—Separate statement.**—The facts alleged in the petition being specifically answered by defendant, any error in overruling an exception to the petition as not complying with art. 1827, as amended by Acts 33d Leg. c. 127, requiring a petition to plead by separate paragraphs, consecutively numbered, each fact going to make up the cause of action and other allegations, was harmless. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

**25. Separate counts on same cause of action.**—The cause of action set up in two counts of a petition for injury to an employe, the one alleging a specific act of negligence, the other making a general allegation of negligence, held to be the same. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545.

Where petition for fraud prays in one count for rescission of a contract of sale, and in another prays damages, the election to stand on the count for rescission compelled by the court would not in equity waive the plea of damages. *Hubbs v. Marshall* (Civ. App.) 175 S. W. 716.

In petition against county commissioner for sums collected by county, a paragraph for money had and received does not state a cause of action where remaining paragraphs are insufficient. *Polk v. Roebuck* (Civ. App.) 184 S. W. 513.

**26. Joinder of causes of action.**—Where plaintiff oil company sued to recover money paid under mistake as for money had and received, the pleading of all the facts showing that the payment was made pursuant to a draft attached to a bill of lading did not indicate a misjoinder of causes of action. *Jewett State Bank v. Corsicana Nat. Bank* (Civ. App.) 167 S. W. 747.

In an action by plaintiff against defendants, one of whom had been associated with him in a transaction for sharing commissions on the sale of stock, plaintiff's petition held not multifarious. *Harless v. Haile* (Civ. App.) 174 S. W. 1020.

Under the legal and equitable jurisdiction of the courts a multiplicity of suits is to be avoided, as it is the general policy of the law to settle all matters between the same parties and between all parties to the same subject-matter in the same suit. *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993.

Vendees of land and their grantee may jointly bring trespass to try title and to cancel conveyances between defendants, and notes given plaintiffs, held properly brought against a person alleged to have induced plaintiffs by fraud to join with him in purchasing a half interest in land and a person to whom this defendant had conveyed his interest. *Garrison v. Bowman* (Civ. App.) 183 S. W. 70.

The strict rules of pleading with respect to the joinder of parties in action have been relaxed owing to the abolition of the distinction between law and equity and the forms of pleading. *Missouri, K. & T. Ry. Co. of Texas v. Elias* (Civ. App.) 184 S. W. 312.

In action against owner of realty to recover commission under contract, joined with action of tort against owner and others, demurrers addressed to the question of a misjoinder of parties and causes of action held properly overruled. *Madden v. Shane* (Civ. App.) 185 S. W. 998.

The rule forbidding misjoinder of causes of action is a rule of convenience and expediency and should be construed with the broader rule for avoidance of multiplicity of suits. *Paul v. Sweeney* (Civ. App.) 188 S. W. 525.

To avoid multiplicity of suits, different causes of action may, as a rule, be joined in one suit. *Rowland v. Klepper* (Civ. App.) 189 S. W. 1033.

**27. — Injuries to person, property, or reputation.**—A statement in justice's court of damages to crops by trespassing cattle, which shows that plaintiff based his action on defendant's negligence and willful disregard of plaintiff's rights and failure to repair a partition fence pursuant to contract, and that he left open gates, held not objectionable on the ground that there was a misjoinder. *Adair v. Stallings* (Civ. App.) 165 S. W. 140. See *Citizens Planing Mill Co. v. Tunstall* (Civ. App.) 160 S. W. 424.

**28. — Causes of action arising out of contract.**—There is no misjoinder of causes of action, where the original payee of the note is brought in after suit by the indorsee against the maker, and the maker prays either that the note be canceled, or that he have judgment against the payee. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

A party may sue in one action for a breach of contract and for damages for slander where both claims grow out of the same transaction and are so connected that they may conveniently and appropriately be litigated together. *Paul v. Sweeney* (Civ. App.) 188 S. W. 525.

**30. — Contract and tort.**—An action against a bank for breach of a contract to advance money cannot be joined with a tort action against it and its cashier for injuring plaintiff's credit. *First Nat. Bank of Gorman v. Mangum* (Civ. App.) 176 S. W. 1197.

Matters ex contractu and ex delicto should not be joined in the same suit, though they may be joined when they grow out of the same transaction, relate to the same subject-matter, and are dependent upon the same evidence. *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993.

An action in contract against the sureties on a school contractor's bond can be joined with an action in tort against the trustees for failing to require a sufficient bond. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

Where the tenant alleged that the landlord and his agents conspired to destroy his business, closed his office against him, publicly ridiculed him, and accused him of dishonesty, and claimed actual and exemplary damages, his petition sounded in tort and not in contract for a breach of a lease, so that there was no misjoinder. *Paul v. Sweeney* (Civ. App.) 188 S. W. 525.

31. — **Parties and interests involved in general.**—In a suit against county and contractor to enjoin contract and issue of bonds, there is a misjoinder of parties. *Brousard v. Wilson* (Civ. App.) 183 S. W. 814.

Where but one cause of action is alleged against one of defendants, and no cause of action is alleged against the remaining defendants, there is in reality no misjoinder. *Madden v. Shane* (Civ. App.) 185 S. W. 908.

33. — **Joint or common interest of plaintiffs.**—Parties standing in different relations to, and having separate demands against, the defendant may not join; the essence of the right being mutuality of interest both in the subject-matter and in the remedy. *Ford v. Sutherland Springs Land & Town Co.* (Civ. App.) 159 S. W. 876.

Claims of plaintiffs, purchasers of separate lots in a town plat, against the selling corporation for damages for the latter's failure to perform its contract to expend \$50,000 in improvements on the streets, alleys, parks, etc., of the town, though conspiracy was alleged, held several and therefore not to be properly joined. *Id.*

Persons having no common or joint interest in property damaged by a nuisance may not unite in a suit for damages. *Hunt v. Johnson*, 106 Tex. 509, 171 S. W. 1125, dismissing appeal (Civ. App.) 141 S. W. 1060.

34. — **Joint or common liability of defendants in general.**—Where plaintiff and B. were employed by defendant insurance company to represent it and, after plaintiff was discharged, he sued the company for breach of contract and joined B., alleging that he conspired to aid the company in ousting plaintiff, there was a misjoinder of causes of action. *Oklahoma Fire Ins. Co. v. Ross* (Civ. App.) 170 S. W. 1062.

Where a bank was sued for breach of contract and also for wrongfully injuring plaintiff's credit, it was improper to join third persons interested only in the contract. *First Nat. Bank of Gorman v. Mangum* (Civ. App.) 176 S. W. 1197.

There was no misjoinder of causes of action, where a life insurance company sued together its agent and the sureties on his bond securing his indebtedness to the company. *Shaw v. Southland Life Ins. Co.* (Civ. App.) 185 S. W. 915.

37. — **Corporation or partnership and members, officers, and other interested persons.**—A petition in an action against a corporation, its officers and directors, and a trustee for the benefit of creditors, alleging the sale by the corporation as a commission merchant of cotton for plaintiff, and the misapplication of the proceeds by the officers and directors, held not objectionable as being multifarious. *Dollar v. Lockney Supply Co.* (Civ. App.) 164 S. W. 1076.

38. — **Codefendants in actions for equitable relief.**—Where a tenant gave a note for rent, and subsequently subleased the land, and the subtenant converted the crop, it was proper to join the subtenant in a suit on the note and to foreclose the landlord's lien and to recover from him the value of the crop to the extent of the amount due on the note. *Horton v. Lee* (Civ. App.) 180 S. W. 1169.

41. — **Waiver of defects and objections.**—See notes at end of chapter 2 of this title.

42. **Splitting cause of action.**—Where a car load of fruits was shipped with the privilege of unloading certain bananas in one county and certain other bananas in another county, and neither were unloaded because of injury to the shipment, the consignor could not maintain a separate action in each county for injuries to the fruit intended to be unloaded in each. *Texas & P. Ry. Co. v. Southern Produce Co.* (Civ. App.) 168 S. W. 999.

Railroad's repudiation of its contract to establish a siding at a lumber yard and its notification thereof, before the time for performance by it, held a breach of the contract in its entirety, so that the lumber company had only one suit in which to recover all the damages sustained thereby. *J. B. Farthing Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 178 S. W. 725.

A contract of employment which provides for payment in monthly installments gives a right of action upon each installment as it falls due. *Jones v. Dodd* (Civ. App.) 192 S. W. 1134.

43. **Reference from one part of petition to another or to other instruments.**—In a suit against a tax collector to cancel void tax liens, a statement of the taxes, showing the years for which they were due and the lots incumbered, which accompanied the petition, constitutes a part thereof, and the petition is not bad because not stating with particularity the property incumbered. *Raley v. Bitter* (Civ. App.) 170 S. W. 857.

44. **Right of plaintiff.**—In an action to set aside a judicial sale of an irrigation company's property, allegations held sufficient to show interest, and that such interest would be injuriously affected. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 180 S. W. 928.

45. — **Ownership, title, or possession.**—In suit on note payable to maker's order and indorsed in blank, so becoming payable to bearer, allegations that defendant executed and put it into circulation, and that plaintiff became its owner, were sufficient to admit note in evidence on issue of ownership. *Kanaman v. Gahagan* (Civ. App.) 185 S. W. 619.

48. **Matter of inducement and performance of conditions.**—In ordinary actions of debt a failure to allege a demand for and refusal of payment renders the petition bad on general demurrer. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

Where petition showed repudiation of the contract by the purchaser, an allegation of the execution of the deed and tender thereof into court held unnecessary. *Pollard v. McCrummen* (Civ. App.) 160 S. W. 1148.

In an action *ex delicto* outside the contract which induced the occasion for the wrong, the contract was a mere inducement, and should be so pleaded. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Civ. App.) 171 S. W. 1103.

51. **Statutory actions.**—In an action for the death of a car repairer, if the facts alleged bring the cause within the federal Employers' Liability Act, § 9, as added in 1910, it is not necessary to plead the act. *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194.

Allegations of petition held sufficient to entitle plaintiff to recover under the federal Employers' Liability Act, although he failed to state that his action was brought thereunder. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

In a railroad employe's action for injuries, allegations of the petition held sufficient to plead a cause of action under art. 6713, providing that it shall be unlawful for any common carrier to use in moving interstate traffic cars unprovided with sufficient and secure handholds. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

**52. Duplicity and multifariousness.**—"Multifariousness" is the improper joining in one bill of distinct and independent matters as the union of several distinct and unconnected matters against one defendant or a demand with respect to several distinct matters against several defendants. *Dollar v. Lockney Supply Co.* (Civ. App.) 164 S. W. 1076.

**53. Anticipating defenses.**—In a suit to collect a vendor's lien note, and to foreclose the vendor's lien on the property in the hands of a purchaser from the vendee, it was not necessary for the vendor to allege that the purchaser had notice of the lien, or that he was not a purchaser in good faith. *Hunker v. Estes* (Civ. App.) 159 S. W. 470.

Where a municipal officer was improperly removed from office, that the salary was paid to a de facto officer is matter of defense which plaintiff need not negative in an action for salary. *City of San Antonio v. Steingruber* (Civ. App.) 177 S. W. 1023.

A proviso contained in a statute need not be negatived by a party seeking relief thereunder. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

The petition on a fire policy held not to state a cause of action, not alleging the money sued for was not paid. *Merchants' & Bankers' Fire Underwriters v. Williams* (Civ. App.) 181 S. W. 859.

Even if a contract sued on was void for want of mutuality, allegation that there had been an accord and satisfaction between the parties rendered the petition good as against general demurrer. *Roberts v. Anthony* (Civ. App.) 185 S. W. 423.

A complaint on a fire policy need not allege that the fire did not result from causes for which insurer was not liable. *St. Paul Fire & Marine Ins. Co. v. Laster* (Civ. App.) 187 S. W. 969.

Where the petition sufficiently alleged the facts to entitle plaintiff to recover on note and mortgage, he was not required to anticipate defenses, but the burden was upon the defendant to plead and prove them. *Blount, Price & Co. v. Payne* (Civ. App.) 187 S. W. 990.

In architect's action for services in drawing plans under allegation that the plans were accepted by defendant, it was not necessary for plaintiff to allege defendant's knowledge of defects when he accepted the plans. *Vaky v. Phelps* (Civ. App.) 194 S. W. 601.

**57. — Statute of frauds and limitations.**—In a lessee's action to enjoin interference with its exclusive and quiet enjoyment of the premises, allegation of payment to the lessor according to contract, delivery of possession, and permanent valuable improvements held all that was necessary to take the verbal lease out of the statute of frauds. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

An allegation that defendant orally agreed to take the premises for at least one year from January 1, 1914, to January 1, 1915, does not allege an oral lease for more than one year. *Street-Whittington Co. v. Sayres* (Civ. App.) 172 S. W. 772.

In statutory action against sheriff and his sureties for failure to levy and return execution on judgment assigned to plaintiff, allegations held insufficient to show suspension of limitations by concealment of cause of action. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

Ordinarily, where a contract can only be enforced if written under the statute of frauds, an allegation that it was made, without stating whether it was in writing or by parol, will, as against general demurrer, be sufficient; the presumption being that the pleader intended to set forth an enforceable contract. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

The presumption is that a contract pleaded, which would otherwise be affected by the statute of frauds, was in writing. *Graham v. Kessler* (Civ. App.) 192 S. W. 299.

**58. Admissions.**—The allegation in the petition in an action to recover personalty that defendant had converted the same to his own use and possession is not an admission that title was in defendant. *Nunn v. Raby* (Civ. App.) 158 S. W. 187.

In an action to reform a policy by inserting the name of plaintiff as mortgagee and payee, an allegation in the petition that the person named insured was building on the premises, and had no interest therein at the time of loss or at any time, held not an admission that such insured had no interest in the building, so as to avoid the policy for want of insurable interest. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

Allegations of complaint in action to set aside a judicial sale as to the reasonable value of the property sold held not admissions, so as to preclude plaintiff from proving that the property was worth more, where defendant alleged that the sale price was adequate, in view of incumbrances. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 180 S. W. 928.

**59. Prayer for process and relief.**—Judgment authorized, see notes under art. 1994.

A prayer for general relief authorizes such relief as the facts warrant. *Crenshaw v. Staples* (Civ. App.) 173 S. W. 1184.

In landowner's suit against city for part of price of realty and to foreclose implied lien, prayer of petition held broad enough to cover any legal or equitable relief to which plaintiff was entitled. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

**60. — Alternative relief.**—The petition seeking to recover half the profits of a transaction, though praying that a defendant be ordered to convey to plaintiffs an interest in lands in another state, which the court has no jurisdiction to do, is not subject to general demurrer; there being an alternative prayer that, if the property had been converted, and it was inequitable to do so, plaintiffs have judgment against de-

defendants in a certain sum, and also a prayer for all equitable relief. *Woolley v. Canyon Exch. Co.* (Civ. App.) 159 S. W. 403.

The holder of a vendor's lien note who obtains also the legal title may after instituting foreclosure amend his pleadings and sue for rescission, or he may ask for rescission or foreclosure in the alternative. *Moon v. Sherwood* (Civ. App.) 180 S. W. 296.

**63. Exhibits—Operation and effect.**—In suit to recover street improvement assessment, held, that a copy of notice to property owners was improperly attached to the petition under district court rule 19 (142 S. W. xviii), and the petition, alleging proper notice, was not demurrable for defects in the notice attached. *City of Paris v. Bray* (Sup.) 175 S. W. 432, reversing judgment (Civ. App.) 142 S. W. 927.

**65½. Verification.**—A petition to set aside a judgment is an appeal to the equity powers of the court, and must be sworn to. *Patruccio v. Selkirk* (Civ. App.) 160 S. W. 635.

The term "verification," as applied to pleadings in equity practice, means that an affidavit must be attached to the plea that the facts therein stated are true. *Forest Oil Co. v. Wilson* (Civ. App.) 178 S. W. 626.

**69. Pleading damages in general.**—Where, in an action for wrongful garnishment, the petition alleged that the garnishment writ, as well as the attachment, was sued out wrongfully and maliciously and without probable cause, and actual damages were claimed, exceptions to the claim for exemplary damages on the ground that actual damages were not sufficiently pleaded were properly overruled. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

Petition, in an action for injuries while riding over a railroad crossing by the horse stumbling and throwing plaintiff to the ground, held not objectionable as not alleging in what way plaintiff sustained damages alleged. *Pecos & N. T. Ry. Co. v. Huskey* (Civ. App.) 166 S. W. 493.

Facts as to impairment of health by slander should be alleged. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

In action for slander, allegations that plaintiff would be debarred from honest employment and excluded from society of respectable people held not objectionable as alleging remote and speculative damages. *Southwestern Telegraph & Telephone Co. v. Wilkins* (Civ. App.) 183 S. W. 429.

In suit against loan society if treated as one for damages for deceit of its agent inducing plaintiff to enter into a loan contract, plaintiff held not entitled to recover, where he did not allege and prove facts enabling the court to measure his damages. *National Equitable Soc. of Belton v. Carpenter* (Civ. App.) 184 S. W. 585.

The holder of notes indorsed without recourse cannot recover damages for fraud without pleading and proving the value of the property given in exchange for the notes. *Doolen v. Hulsey* (Civ. App.) 192 S. W. 364.

Allegations that plaintiffs had arranged a sale to parties able to pay for the land, and that the actual market value was much less when sold at a foreclosure sale, sufficiently alleged actionable damages against a general demurrer. *Hoover v. First Nat. Bank* (Civ. App.) 192 S. W. 1149.

Allegations that plaintiffs' proposed sale of real estate was broken up by the attachment levy are sufficient despite the improbability of a trade for some \$137,000, being interrupted by attachment for some \$4,000 with large partial payments already made. *Id.*

Allegations that the prospective purchaser was to give notes which he was able to pay, and that a mortgagee had agreed to extend his debt until such notes were due, allege damages with sufficient certainty. *Id.*

**70. Pleading general or special damages.**—Under a general allegation of damage, evidence is admissible of all damages which naturally and necessarily result from the wrongful act, but if the damages sustained do not necessarily result from the negligent act, plaintiff must allege the particular damage, unless the law infers such damage from the facts alleged. *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145.

Special damages for a carrier's delay in delivering goods shipped must be pleaded and proved. *Foster v. International & G. N. Ry. Co.* (Civ. App.) 175 S. W. 762.

In action for general damages for slander, petition need not itemize elements of damages. *Southwestern Telegraph & Telephone Co. v. Wilkins* (Civ. App.) 183 S. W. 429.

Where petition sought to recover special damages for defendant's failure to comply with agreement made when it leased portion of premises to plaintiff, it must aver facts showing that defendant should have known such damages would result from breach. *Texas Power & Light Co. v. Roberts* (Civ. App.) 187 S. W. 225.

**71. Personal injuries and physical suffering.**—A petition, in an action for personal injuries, which alleges that plaintiff's skull was fractured, that bones, muscles, and tissues of the head were injured, that he sustained injury to his nervous system and internal injury, and that his eyesight and hearing were practically destroyed, sufficiently specifies the injuries. *Bartley v. Marino* (Civ. App.) 158 S. W. 1156.

Petition in a personal injury action, which alleged that because of defendant's negligence plaintiff was thrown to the ground while riding a horse and injured his nose, arm, etc., held not objectionable as failing to state of what his damages consisted. *Pecos & N. T. Ry. Co. v. Huskey* (Civ. App.) 166 S. W. 493.

A petition for personal injury alleging that plaintiff fell 30 feet to the ground, and was paralyzed from his hip down, specifies the injuries. *Stephenville N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974.

**72. — Issues, proof, and variance in general.**—In an action for the death of a husband and father, the jury may consider the value of the father's mental and moral training to the minor children, even though the petition did not allege such damage, and the evidence showed no such training. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

One suing for a personal injury resulting in his leg being broken by a violent blow and the subsequent amputation of the leg need not allege that he suffered physical pain to recover damages therefor. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

Under the general allegation of damages in a personal injury action by breaking plaintiff's arm, etc., plaintiff could recover for physical suffering. *Pecos & N. T. Ry. Co. v. Huskey* (Civ. App.) 166 S. W. 493.

Ordinarily personal injuries other than those alleged in the petition cannot be proved. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

Testimony that by his injuries plaintiff was rendered impotent is proper, when the petition alleges that an accident affected the plaintiff's brain and "other organs." *Missouri, K. T. Ry. Co. of Texas v. Smith* (Civ. App.) 172 S. W. 750.

73. — **Consequences of injury in general.**—Under allegations of the petition in a personal injury action that the injury caused a concussion of plaintiff's spine and of the nerves and muscles connected therewith, and caused the loss of sensation and mental and physical suffering, evidence of the nature of traumatic hysteria, and that plaintiff might be so affected, was admissible. *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145.

Evidence as to possibility of hernia becoming strangulated held admissible, though strangulated hernia was not alleged. *St. Louis S. W. Ry. Co. of Texas v. Brown* (Civ. App.) 163 S. W. 383.

In a personal injury action, an allegation as to the nature of the injury that plaintiff "was hurt internally, the exact nature of which he does not know, and cannot state, but he passed for several days blood from his bowels and he was sore and still is sore internally," was sufficiently specific to justify the court in overruling the demurrer. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

76. — **Aggravation of pre-existing disease, and mode of treatment.**—Where the petition alleged plaintiff was a healthy man, and the general issue was pleaded, damages caused by the additional injury by reason of a pre-existing diseased condition held recoverable, though not expressly pleaded. *Galveston, H. & H. R. Co. v. Hodnett*, 106 Tex. 190, 163 S. W. 13.

77. — **Permanent or future injuries.**—The mind and nervous system being so intimately connected with the body, and so likely to be affected by physical injuries, proof of impairment of these faculties is admissible under allegations in substance setting up grievous or permanent injuries. *Allen v. Bland* (Civ. App.) 168 S. W. 35.

In an action for personal injuries, an allegation as to damages in the petition that plaintiff would probably lose his arm by reason of the injury is a proper allegation of the effect of the injury. *Andrews v. York* (Civ. App.) 192 S. W. 338.

80. **Impairment of earning capacity.**—Alleging and proving physical and mental condition which would necessarily result in loss of earning capacity is sufficient pleading and proof of diminished earning capacity. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

81. — **Issues and proof.**—Under an allegation that plaintiff's hand was rendered useless, evidence by plaintiff as to diminished earning capacity held admissible. *Texas & Pac. Ry. Co. v. Elliott* (Civ. App.) 189 S. W. 737.

82. **Loss of or damage to property.**—Petition held to state good cause of action for damages from nuisance, without alleging market value of property thereby injured before and after erection of cotton gin constituting the nuisance. *Crum v. Thomason* (Civ. App.) 181 S. W. 803.

83. — **Issues and proof.**—In proceedings to condemn land for a right of way, pleadings held sufficient to authorize an allowance of damages, not only for the land taken, but also to the remaining portions thereof. *Wichita Falls & W. Ry. Co. of Texas v. Wyrick* (Civ. App.) 158 S. W. 570.

In an action against a carrier for damages to a shipment of fruit and vegetables, allegations of petition held to sufficiently show how and in what respect a defendant road was liable for damages. *Missouri, K. & T. Ry. Co. of Texas v. Gray* (Civ. App.) 160 S. W. 434.

Where plaintiff did not allege market value of grass destroyed by fire but value to him for grazing purposes, evidence as to its value to him for such purposes held admissible. *Galveston, H. & S. A. Ry. Co. v. Brune* (Civ. App.) 181 S. W. 547.

The action being only for damages to land from the breaking of a dam allowing escape of diverted and impounded water, with no claim, as an element of damages, of the dam being a menace, defendant's testimony of it being a benefit and not a menace is inadmissible. *Texas & P. Ry. Co. v. Frazer* (Civ. App.) 182 S. W. 1161.

In an action by shippers of live stock for delay in transit, evidence as to additional shrinkage in weight after the cattle's arrival and of decline in the market for which they were held over held inadmissible as without proper basis in the pleadings. *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384.

84. **Damages from breach of contract in general.**—The petition in an action for damages resulting from the delivery of cheat seed, instead of oat seed as ordered, which alleged that the reasonable value of the time and labor required to remove the cheat from the soil and prevent it from interfering with other crops was a certain amount, was not defective for not itemizing the time and labor required. *Texas Seed & Floral Co. v. Watson* (Civ. App.) 160 S. W. 659.

A buyer of fuel oil could not recover the wages of its employes and profits lost during the time it was compelled to close its factory by reason of the seller's failure to furnish the oil as agreed, without pleading such damages. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

In a petition for breach of contract to exchange realty, allegations as to commissions and inability to close another trade set up no cause of action, since such matters are no part of the measure of damages. *Montgomery v. McCaskill* (Civ. App.) 189 S. W. 797.

In buyer's action for nondelivery of certain cattle, damages caused rest of the herd by such nondelivery must be specially pleaded and proved. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

85. — **Proof and variance.**—In an action for delay in delivery of a telegram, an allegation in the petition held sufficient to show that defendant's sending agent was notified of the insufficient hotel accommodations at the destination at which plaintiff's wife

expected to arrive at night, so as to authorize proof thereof as an element of damage. *Western Union Telegraph Co. v. Erwin* (Civ. App.) 164 S. W. 908.

Where no interest was sought to be recovered, eo nomine, plaintiff was not entitled to interest from execution of bond. *Port Huron Engine & Thresher Co. v. McGregor* (Civ. App.) 174 S. W. 848.

The submission of the issue of damages for delay in installing irrigating machinery refusal of the court to submit question of damages for delayed delivery, held not erroneous, though the contract provided receipt of machinery should constitute waiver of damages for delay in delivery, there being no claim for such damages. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

**86. Loss of profits.**—Loss of profits for a carrier's delay in delivering dresses intended for sale held not recoverable where not alleged. *Foster v. International & G. N. Ry. Co.* (Civ. App.) 175 S. W. 762.

**87. Expenses incurred.**—A petition in a personal injury action was subject to special exception for failure to itemize the amount of damages claimed so as to show the amount claimed for loss of time, doctor's bills, drug bills, etc. *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439.

**89. Mental suffering.**—One suing for a personal injury resulting in his leg being broken by a violent blow and the subsequent amputation of the leg need not allege that he suffered mental pain to recover damages therefor. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

**90. — Proof and variance.**—Under the general allegation of damages in a personal injury action by breaking plaintiff's arm, etc., plaintiff could recover for mental suffering. *Pecos & N. T. Ry. Co. v. Huskey* (Civ. App.) 166 S. W. 493.

Under allegation that plaintiff's daughter would have come home had defendant telegraph company delivered message to her, plaintiff held not entitled to recover for mental anguish caused by defendant's failure to deliver telegram where evidence showed daughter would not have come home had she received the message. *Western Union Telegraph Co. v. Sims* (Civ. App.) 181 S. W. 800.

**92. Exemplary damages.**—Where one count charged malicious ouster and claimed exemplary damages, and other counts for damages for unlawful entry were good and susceptible of a construction that malice was charged, the plaintiff would be held to have stated a cause of action for exemplary damages as against a general demurrer, although the count did not state a cause of action for wrongful ouster. *Higby v. Kirksey* (Civ. App.) 163 S. W. 315. See *Cotton v. Cooper* (Civ. App.) 160 S. W. 597.

**93. Allegations as to amount of damages.**—In an action against a carrier for injuries to a shipment of cattle, the petition need not aver the measure of damages. *Missouri, K. & T. Ry. Co. of Texas v. Mulkey & Allen* (Civ. App.) 159 S. W. 111.

Petition held to sufficiently allege damages beyond the overcharge paid defendant. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

A petition which states facts essential to a cause of action is good without setting out a proper legal measure of damages. *Ara v. Rutland* (Civ. App.) 172 S. W. 993.

Where the petition alleged the several items of property destroyed and their value, it need not, in an action for damages for the flooding of land, set forth a measure of damage. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

Petition in an action for injury to a shipment of live stock, not alleging the measure of damages, held sufficient. *Gulf, C. & S. F. Ry. Co. v. King* (Civ. App.) 174 S. W. 960.

Ad damnum clause of petition, being merely an effort to state entire amount due, or what will be due when suit is tried, may be disregarded in determining whether claim sued on was the same as that presented to the commissioners' court of defendant county. *Dromgoole v. Karnes County* (Civ. App.) 189 S. W. 975.

**96. — Proof and variance in general.**—Where, in a buyer's action for breach of a contract for the sale of cotton, the petition did not allege the facts constituting damages, but only that plaintiff was damaged in the sum of \$500, it was not error to exclude evidence of damages. *Caswell v. J. S. McCall & Sons* (Civ. App.) 163 S. W. 1001.

**97. — As to value.**—Where petition alleged sale of cattle and leaving of land for defendant pursuant to express contract, and that plaintiff was entitled to a reasonable compensation, evidence as to the customary price charged for such services held admissible under the pleading. *Saunders v. Thut* (Civ. App.) 165 S. W. 553.

In an action for damages to a shipment of cattle, in which plaintiff did not seek to recover special damages for the extra feed necessary to restore the cattle back to their former condition, evidence as to the value of such feed held inadmissible. *Ft. Worth & D. C. Ry. Co. v. Shank & Dean* (Civ. App.) 167 S. W. 1093.

In an action for damages for injuries to a shipment of live stock, evidence of the intrinsic value of the stock at the place of destination is admissible under a general allegation as to their value at such place, where there was no market at the point. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

A petition in a broker's action held to justify a recovery for reasonable value of the services. *Martin v. Jeffries* (Civ. App.) 172 S. W. 148.

In an action for damage to a shipment of bananas, where the petition described the property only as "four cars of bananas loaded in cars M. K. & T.," giving their numbers, such allegation was too indefinite as to the number of bunches or the value, and open to special exception. *Illinois Cent. R. Co. v. Freeman* (Civ. App.) 182 S. W. 369.

In action by buyer of land for damages by seller's misrepresentation there was good will thereon, where pleadings failed to indicate what buyer paid, or that land was of less value than sum he paid, there were no allegations on which court could invoke proper measure of damages in rendering judgment. *Linnartz v. Lawrie* (Civ. App.) 192 S. W. 789.

**98. — Interest on amount of recovery.**—To recover interest upon an unliquidated claim for damages, interest must be asked for or embraced in the aggregate amount laid as damages. *Wells Fargo & Co. Express v. Crittenden* (Civ. App.) 189 S. W. 296. See *Hancock v. Haile* (Civ. App.) 171 S. W. 1053.

In suit for damages with prayer for general relief without any special demand for interest as part of damages, interest might be allowed as a part of sum claimed as in-

cluding interest thereon from the accrual from cause of action to trial. Ft. Worth & D. C. Ry. Co. v. Allen (Civ. App.) 139 S. W. 765.

99. **Pleading particular facts or issues—Agency and scope of employment.**—In an action to recover double the amount of usury paid, an allegation that the payment was made to defendant's agent was sufficient in the absence of a further allegation that he had more than one agent. Cotton v. Thompson (Civ. App.) 159 S. W. 455.

In an action against a corporation on a note, allegations in the petition held to sufficiently charge that the president who executed the note was authorized by the directors. Canadian Long Distance Telephone Co. v. Seiber (Civ. App.) 159 S. W. 897.

In an action against a corporation on a note for the purchase price of property, allegations in the petition as to plaintiff's knowledge of how the business was carried on and his belief that the president had authority to execute the note in question were immaterial. Id.

Pleadings in an action for services alleging that the agent who did the hiring was acting within his apparent authority is sufficient to raise the issue of the liability of the principal for a hiring on terms in excess of private instructions to the agent. Bergere v. Parker (Civ. App.) 170 S. W. 808.

Allegations of petition held to sufficiently allege the authority of the agent to bind the insurer by his statements as to what the premium would be. Illinois Bankers' Life Ass'n v. Dodson (Civ. App.) 189 S. W. 992.

99½. — **Assignment.**—Petition held not to sufficiently allege an assignment by one L. of a debt claimed to be due him to make the plaintiff bank the real owner of the claim against defendant. Browne Grain Co. v. Farmers' & Merchants' Nat. Bank of Abilene (Civ. App.) 173 S. W. 942.

100½. — **Bona fide purchase.**—A petition averring purchase of a note before maturity is not subject to general demurrer because not alleging the date of the note's maturity. McWhorter v. Estes (Civ. App.) 175 S. W. 846.

101. — **Consideration or want thereof.**—Allegations of petition in action on notes held sufficient to show consideration passing to defendant for his signature to the notes as surety. Pennock v. Texas Builders' Supply Co. (Civ. App.) 193 S. W. 760.

103. — **Customs and usages.**—In broker's action for commission for effecting a lease, not alleging that defendant knew of any custom as to the commission for such services, or that he was legally chargeable with notice thereof, evidence as to the customary commission for such services was inadmissible. Brady v. Richey & Casey (Civ. App.) 187 S. W. 508.

105. — **Discovered peril.**—A complaint, in a crossing accident case, held not to raise the issue of discovered peril. Ft. Worth & D. C. Ry. Co. v. Hart (Civ. App.) 178 S. W. 795.

In an action against a railroad company for injuries to horses which, being frightened while driven on a road, were injured in crossing a cattle guard, the petition held to raise the issue of discovered peril. International & G. N. Ry. Co. v. Vogel (Civ. App.) 184 S. W. 229.

107. — **Estoppel.**—By way of replication, see notes under art. 1828.

In an action against a corporation on a note given for the price of property, allegations in the petition held to sufficiently charge an estoppel on the part of the corporation to deny the contract. Canadian Long Distance Telephone Co. v. Seiber (Civ. App.) 159 S. W. 897.

A plaintiff suing to remove a cloud on his title held not entitled to rely on an estoppel not pleaded. Ford v. Warner (Civ. App.) 176 S. W. 885.

One claiming title by estoppel must plead and prove the facts creating an estoppel. McLemore v. Bickerstaff (Civ. App.) 179 S. W. 536.

In an action on a fire insurance policy, plaintiff cannot rely on the estoppel of defendant to deny the agency of the one who took plaintiff's application in premium, unless he specially pleads it. Merchants' & Bankers' Fire Underwriters v. Parker (Civ. App.) 190 S. W. 525.

108. — **Foreign laws.**—Holder of drafts belonging to estate of a foreign administrator, and indorsed by the latter, can maintain a suit on drafts in courts of Texas without alleging administration laws of foreign country or state. Bloch v. Rio Grande Valley Bank & Trust Co. (Civ. App.) 190 S. W. 541.

109. — **Fraud and mistake.**—Allegations of fraud in representing the solvency of the maker of notes given as consideration for a purchaser of timber, upon which plaintiff, having no opportunity for investigation, relied, held sufficient to admit parol evidence of fraud to vary the written contract, or to show facts inducing its execution. Benton v. Kuykendall (Civ. App.) 160 S. W. 438.

Mere broad general charges of fraud in the procurement of a judgment without specific allegations of fact constituting the fraud are insufficient to impeach a judgment. Patrucio v. Selkirk (Civ. App.) 160 S. W. 635.

Allegations of fraud in the recovery of a judgment sued on, in that the person recovering the same had given false testimony at the trial, are insufficient to sustain a cross-bill to vacate the judgment. Id.

Petition held to sufficiently allege vendor's fraud in misrepresenting the acreage after having it surveyed as demanded by the purchaser, and an excuse for the purchaser's failure to discover the fraud. Smalley v. Vogt (Civ. App.) 166 S. W. 1.

In purchaser's action to rescind for false representations, petition held to allege sufficiently the purchaser's reliance on the representations, and that they were a material inducement, to admit evidence of the representations. Underwood v. Jordan (Civ. App.) 166 S. W. 88.

Where one seeks to avoid the bar of limitations, on the ground of fraud, he must allege the facts upon which he relies. Powell v. March (Civ. App.) 169 S. W. 936.

A petition alleging that a mortgagor did not read the instrument and did not know that it contained a recital, but relied on the friendship and business relations with the mortgagee, does not allege that the recital was procured by fraud. Parker v. Schrimsher (Civ. App.) 172 S. W. 165.

A petition held sufficient to charge deceit by a railroad company in presenting a contract for the exchange of land which described land other than that pointed out. *Missouri, K. & T. Ry. Co. of Texas v. Edwards* (Civ. App.) 176 S. W. 60.

In an action on notes for the purchase of a registered horse, plaintiff can show that the horse was registered, but the certificate contained a mistake in the description without pleading such mistake. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 177 S. W. 528.

Allegations in petition seeking to cancel a conveyance held sufficient to show fraud. *Cleveland v. Stanley* (Civ. App.) 177 S. W. 1181.

Allegation of representation that property was good income property, and that plaintiff was thereby induced to believe that it was rented for \$50 a week, held not to show fraud supporting a recovery. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

Land buyer's petition held to aver seller's fraud in representing the land contained 267 acres, sufficiently to admit parol evidence to show a deficiency. *Ashley v. Holland* (Civ. App.) 180 S. W. 635.

A petition held to allege fraud in accepting paving where evidence of fraud was admitted without objection that it was not authorized by the pleadings. *Rudolph S. Blome Co. v. Herd* (Civ. App.) 185 S. W. 53.

Petition in action for damages for fraud in purchasing plaintiff's land at less than its listed price, so that plaintiff was compelled to pay a broker's commission, not showing that plaintiff had sustained any damage, held to state no cause of action. *Hope v. Shirley* (Civ. App.) 187 S. W. 973.

A complaint for deceit must allege false representations, their materiality, that defendant was ignorant of their falsity, and that he was actually deceived thereby. *Dempster Mill Mfg. Co. v. Humphries* (Civ. App.) 189 S. W. 1110.

Where a count charged alleged partner of indorsee of notes with conspiracy to convey to plaintiff notes worth less than face value, no injury to plaintiff, first essential in action for fraud, was shown, and there was no liability. *Borschow v. Wilson* (Civ. App.) 190 S. W. 202.

In action against part owner of property by abandoned wife of other owner for fraudulently obtaining entire ownership, allegations that defendant stated sufficient money could not be borrowed to pay an outstanding mortgage, and forced sale would not pay it but that such loan was secured after defendant obtained entire ownership, are insufficient. *Baugh v. Houston* (Civ. App.) 193 S. W. 242.

112. — **Homestead exemption.**—In suit to cancel deeds as a mortgage upon homestead, it was for plaintiff to allege facts showing the mortgage was one not permitted by the constitutional provision on that subject (Const. art. 16, § 50). *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

114. — **Jurisdictional facts.**—In an action against defendant trustee in bankruptcy to restrain him from cutting timber, the petition held not to allege constructive possession of such timber, either in the bankrupt or the trustee so as to give the bankruptcy court jurisdiction to determine conflicting claims to such timber. *Bennette v. Lewis* (Civ. App.) 176 S. W. 660.

114½. — **Mental incapacity.**—Allegation that a release was executed "without his knowledge or consent" or "while he was under the influence of opiates or suffering" sufficiently alleged mental incapacity in absence of special exception. *Turner v. Ontiveros* (Civ. App.) 193 S. W. 1089.

115. — **Modification of contract.**—The petition in a seller's action for breach of a new contract held not demurrable for failure to specifically allege that the old contract was merged in the new. *Mahaney v. Lee* (Civ. App.) 171 S. W. 1093.

118. — **Partnership.**—The mere allegation in the petition of joint ownership of the mules sought to be recovered was not equivalent to an allegation of partnership as to the mules. *Coody v. Shawver* (Civ. App.) 161 S. W. 935.

Where the affidavit and writ of garnishment described plaintiff as the W. company, a firm composed of persons named, it sufficiently appeared that plaintiff was a partnership and not a corporation, since a "firm" is a partnership. *Dodson v. Warren Hardware Co.* (Civ. App.) 162 S. W. 952.

The petition of a corporation alleging partnership relations between it and defendant corporations and individuals, held insufficient to show partnership between plaintiff and defendants. *Southern Oil & Gas Co. v. Mexia Oil & Gas Co.* (Civ. App.) 186 S. W. 446.

119. — **Payment.**—A petition to recover usurious interest, alleging that defendant, agreeing to make a loan of \$8,000, exacted and received \$1,200, alleged payment of \$1,200 within *Vernon's Sayles' Ann. Civ. St. 1914, art. 4982*. *Gunter v. Merchant* (Civ. App.) 172 S. W. 191, rehearing denied 173 S. W. 260.

120. — **Proximate cause.**—In action for delay in delivering telegram, petition held to raise issue as to whether, had telegram been promptly delivered, plaintiff could have reached child's bedside before the child died. *Western Union Telegraph Co. v. Forest* (Civ. App.) 177 S. W. 204. See *Fred A. Jones Co. v. Drake* (Civ. App.) 159 S. W. 441.

An allegation as to the servant's inexperience in the work and ignorance of its dangers is sufficient allegation as to proximate cause to admit his testimony on question of assumed risk. *Stockey & White v. Mears* (Civ. App.) 181 S. W. 774.

122. — **Tender and offer of equity.**—A purchaser seeking to rescind need not show by his pleading the value of the rents and profits and offer restitution, but it is sufficient if he offer generally to do equity. *Hurst v. Knight* (Civ. App.) 164 S. W. 1072.

123. — **Waiver and ratification.**—Pleading by plaintiff in defense, see post, art. 1828.

A waiver of proofs of death required by policy, if relied on by the insured in an action thereon, must be alleged. *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170.

The pleading by plaintiff, suing on an accident policy, that he was informed by defendant that further proofs of loss were unnecessary held sufficient to authorize a showing of waiver by conversations with defendant's agents. *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979.



In an action to cancel a deed from husband to wife, an allegation in petition that wife later entered into a written agreement, to care for husband while he lived, to procure another deed, with a general denial, held not sufficient to raise as an issue question of ratification of prior deed, by another provision of contract. *McKay v. McKay* (Civ. App.) 189 S. W. 520.

Waiver of the right to contest the opening of a road upon the ground of lack of public necessity is not available unless pleaded. *Moseley v. Bradford* (Civ. App.) 190 S. W. 824.

124. **Pleading in particular actions.**—Petition in action by agent for first premium, on a life policy delivered to defendant, of which plaintiff had the entire interest, held to state cause of action. *Just v. Herry* (Civ. App.) 174 S. W. 1012.

Pleading held insufficient to remove a transaction by one of two tenants in common from the rule that a tenant in common who discharges an incumbrance against the common property acquires only an equitable lien, and not the whole title. *Hardee v. Alexander* (Civ. App.) 182 S. W. 57.

Petition in action by landlord held to show a good cause of action based on special contract of the tenant to indemnify him in case of loss by fire. *Seligmann v. Sonka* (Civ. App.) 183 S. W. 73.

125. — **Account.**—In an action for an accounting, petition held to state a cause of action as alleging collection and retention by defendant of commissions jointly earned by the parties. *Harless v. Haile* (Civ. App.) 174 S. W. 1020.

A petition based upon an open account should be properly itemized. *Thornburg v. Moon* (Civ. App.) 180 S. W. 959.

In German corporation's suit against resident of Mexico on open account, the account, in a foreign language, but accompanied by an English translation, was sufficient. *Russek v. Wind, Ems & Co.* (Civ. App.) 192 S. W. 584.

128. — **Against carriers of goods and live stock.**—Where plaintiff shipped cattle from the quarantined area in Texas to a point outside the quarantine line, and did not plead or prove that the carrier was charged with the duty of complying with the quarantine regulations, it was not liable for any damages resulting from its failure to dip the cattle, or to deliver them at destination because of noncompliance therewith. *Texas & P. Ry. Co. v. Crowder* (Civ. App.) 165 S. W. 116.

In the absence of allegation and proof that money claimed by a traveler to be baggage was for reasonable traveling expenses, the court cannot hold that \$25 contained in a trunk lost was intended for use on the passenger's journey home, and was reasonably necessary for that purpose. *San Antonio & A. P. Ry. Co. v. Green* (Civ. App.) 170 S. W. 110.

A petition, which enumerated articles and averred that they were proper articles of baggage being necessary for comfort, convenience, and adornment of plaintiff and members of her family, who were traveling with her, held sufficient in an action for the recovery for loss of baggage. *Carter-Mullaly Transfer Co. v. Angell* (Civ. App.) 181 S. W. 237.

In an action by shippers of live stock for delay in transit, the petition, alleging that the cattle should have reached destination on a given date, but did not, so that plaintiffs were compelled to hold them over for the next market, was insufficient as failing to allege when they arrived and why they were held over. *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384.

Petition in an action for injury to a live stock shipment held not limited to a claim for negligent delay. *St. Louis, B. & M. Ry. Co. v. Marcofich* (Civ. App.) 185 S. W. 51.

129. — **Against connecting carriers.**—Petition against connecting carriers for damages caused by delay in transportation held to be based on original oral agreement for transportation of all the property, not upon bills of lading subsequently issued on delivery of property to carriers. *Gulf, C. & S. F. Ry. Co. v. Nelson* (Sup.) 192 S. W. 1056.

130. — **Against carriers of passengers.**—Passenger's petition for damages for ejection held good as against a general demurrer. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

Allegations of negligence in passenger's action for injuries held specific, and not general. *Dowdy v. Southern Traction Co.* (Civ. App.) 184 S. W. 687.

Petition in an action for personal injury, by the overturning of a box, on which plaintiff stepped in alighting from a car, held to state a cause of action. *Wichita Falls Traction Co. v. Berry* (Civ. App.) 187 S. W. 415.

131. — **Against cities and other municipal corporations.**—Where, in an action by a city detective to recover salary, the petition alleged that plaintiff was appointed to the office, and that the salary was fixed by ordinance at \$85 per month, etc., it sufficiently alleged that the office existed at the time of the appointment and was created by ordinance. *City of San Antonio v. Bodeman* (Civ. App.) 163 S. W. 1043.

In action against a county for services on a road, under section 4 of the special road law of 1903, for the county, petition held sufficient as against a general demurrer, but subject to special exception for failure to allege the particular order of the commissioners' court, authorizing the commissioner to make the contract. *Millard v. Nacogdoches County* (Civ. App.) 170 S. W. 828.

Plaintiff, in a suit to obtain a judgment on a county's obligation, must plead and prove all the things requisite to make it a valid obligation. *Tullos v. Church* (Civ. App.) 171 S. W. 803.

The action against a city not being for debt, but for conversion, the petition need make no allegation as to manner of contracting debt for the property, or provision for its payment. *City of Teague v. Fabric Fire Hose Co.* (Civ. App.) 177 S. W. 160.

A petition in a suit by a teacher for compensation held not to affirmatively show that there are funds on hand for the payment of her claim. *Boyles v. Potter County* (Civ. App.) 177 S. W. 210.

The petition against a county for a debt is bad if not showing that provision for its payment was made when it was created, as required by Const. art. 11, § 7. *Rogers Nat. Bank v. Marion County* (Civ. App.) 181 S. W. 884.

Petition in contractor's suit for price of school building held bad for failure to allege

levy of tax to raise contract price. *Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County* (Civ. App.) 182 S. W. 386.

Under art. 1366, relating to suits against a county, a petition, showing claim made to commissioners' court to have been larger than amount due, held to sufficiently show on general demurrer, that identical claim sued for was presented to commissioners' court for allowance before suit. *Dromgoole v. Karnes County* (Civ. App.) 189 S. W. 975.

132. — **Against heirs.**—A petition seeking recovery on a note of decedent as against his surviving wife is insufficient if it fails to show what specific property of the estate was received by her, or that the estate was solvent, or fails to seek foreclosure of a lien on specific property of the estate. *Hamlet v. Leicht* (Civ. App.) 187 S. W. 1004.

133. — **Against sureties.**—The petition of a materialman against a surety on a county building contractor's bond, which alleged that the materials were used in the building, need not allege that they were approved by the county. *American Surety Co. v. Huey & Philp Hardware Co.* (Civ. App.) 191 S. W. 617.

A petition against a surety on a county building contractor's bond held not demurrable on the ground that there was no allegation as to the condition on which payments for the material were to be made, or that the contract for the building required the contractor to make such payments. *Id.*

In action on notes, allegations of petition held sufficient to show that defendant was surety. *Pennock v. Texas Builders' Supply Co.* (Civ. App.) 193 S. W. 760.

In action on notes of corporation alleging defendant to be surety thereon, it was not necessary to allege that corporation principal was insolvent at institution of suit, nor any reason or excuse for failure to sue it at first or second term of court after notes matured. *Id.*

134. — **Against telegraph and telephone companies.**—A petition, in an action for delaying a message, which alleges that the company accepted the same for delivery and also the sender's guaranty of payment of any special charges for delivery, held to set forth a special contract. *Western Union Telegraph Co. v. Kersten* (Civ. App.) 161 S. W. 369, rehearing denied 161 S. W. 1091.

Petition in action against telegraph company for delay in delivery of message notifying plaintiff that he might obtain a loan for use in buying cattle held insufficient to state a cause of action, in that it did not show that plaintiff sustained any injury. *Ratliff v. Western Union Telegraph Co.* (Civ. App.) 183 S. W. 78.

Allegations of a petition against a telegraph company held sufficient to show that defendant's negligence in transmitting money was the proximate cause of plaintiff's mental suffering caused by the failure to have her husband's body shipped to her. *Western Union Telegraph Co. v. Martin* (Civ. App.) 191 S. W. 192.

A petition for delay in transmitting money by telegraph, which prevented the body of plaintiff's husband being shipped to her, need not allege what particular arrangements could have been made to procure the shipment of the body. *Id.*

136. — **Between assignor and assignee.**—Petition in action by heirs of assignors for benefit of creditors to recover balance due the estate in the hands of the assignees held to state a good cause of action. *Bass v. McCord* (Civ. App.) 178 S. W. 998.

137. — **Bills and notes.**—Where a note provided that default in the payment of interest should, at the option of the holder, mature the note, the holder was not required to give any notice of the exercise of his option prior to the filing of the suit, and an allegation in the petition that he had exercised his option was unnecessary. *Shearer v. Chambers County* (Civ. App.) 159 S. W. 999.

Allegation of petition that the notes sued on were executed and delivered by defendant to plaintiff is enough, without alleging that it is the owner and holder thereof. *Bryan v. Wharton Bank & Trust Co.* (Civ. App.) 174 S. W. 827.

Where note provided for attorney's fees in case of suit, plaintiff to recover such fees need not prove or allege the bringing of the suit. *Raike v. Clayton* (Civ. App.) 175 S. W. 498.

That the makers consented to or ratified alteration of note, or that it was not altered by a party to the suit, held matters to be pleaded by plaintiff suing on the note. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

In suit on note executed by defendant to own order and indorsed in blank, where petition did not aver to whom defendant delivered, or agreed to deliver, stock attached to note as security, but did allege it was owned and held by plaintiff, who produced it on trial, petition was sufficient. *Kanamán v. Gahagan* (Civ. App.) 185 S. W. 619.

Petition in action against the maker and the payee and indorser of a note held to aver that plaintiff acquired the note before maturity. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

In an action against drawee of drafts, an allegation that they were indorsed and delivered by owner is a sufficient allegation of a legal indorsement without allegation of name of indorser. *Bloch v. Rio Grande Valley Bank & Trust Co.* (Civ. App.) 190 S. W. 541.

139. — **Breach of contracts in general.**—To recover for a breach of a contract to furnish water for irrigation, plaintiff need not allege that defendant was negligent in failing to furnish water. *Northern Irr. Co. v. Dodd* (Civ. App.) 162 S. W. 946.

Where an action is brought upon a contract in which the promises or covenants are mutual and concurrent, plaintiff must allege performance, or a readiness and willingness to perform on his part, or some act or omission of defendant which justifies a rescission of the contract by plaintiff. *Fink v. San Augustine Grocery Co.* (Civ. App.) 167 S. W. 35.

Petition alleging failure to perform a written contract to keep a subway free from inflammable material and to indemnify plaintiff for loss by fire therefrom held to state a cause of action for breach of contract. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Civ. App.) 171 S. W. 1103.

A petition, in an action for compensation for plans for fixtures for a building, alleging that defendant accepted the plans as satisfactory, states a cause of action as against a demurrer, though the plans should be to the satisfaction of defendant. *Scarborough v. Wheeler* (Civ. App.) 172 S. W. 196.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1827, a petition, alleging that defendants contracted with plaintiff's assignor for the erection of seven buildings in a certain town and to do "certain other work" in and about the town site, held insufficient because not definite enough. *Day v. Van Horn Trading Co.* (Civ. App.) 183 S. W. 85.

In view of this article, as amended by Acts 33d Leg. c. 127, a petition averring on information and belief that defendant had agreed with the holder of the equity of redemption to discharge vendor's lien notes is insufficient to support default judgment against defendant. *Cooney v. Eastman* (Civ. App.) 183 S. W. 96.

In action by superintendent against insurance company for breach of contract of employment, it was not necessary that plaintiff's petition allege what effort he made to obtain other employment, and what amount he earned or might have earned by reasonable diligence. *American Nat. Ins. Co. v. Van Dusen* (Civ. App.) 185 S. W. 634.

Allegations in complaint held to state cause of action to recover reasonable hospital charges, expenses, etc., from employer to which plaintiff had paid hospital fees, and which had not received him in its hospital or paid medical expenses, etc. *Gulf, C. & S. F. Ry. Co. v. Goodman* (Civ. App.) 189 S. W. 326.

In an action against estate of decedent, petition held to state a suit upon an express contract on part of decedent to devise land to plaintiff for personal services to be rendered. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

A petition in action for failure to furnish irrigation water alleging that defendant had contracted to furnish tenant water, and that landlord had agreed to pay therefor, held sufficient. *Louisiana, Rio Grande Canal Co. v. Elliott* (Civ. App.) 193 S. W. 255.

**140. — Breach of contract of sale.**—In an action by a buyer for damages because of the defective condition of a car load of corn chops, the petition held to sufficiently allege an implied contract that the chops should be fit for food for live stock. *F. A. Piper Co. v. Oppenheimer* (Civ. App.) 158 S. W. 777.

A petition in an action upon a contract for lumber sold, though it showed that plaintiff had failed to deliver the amounts in the time prescribed by the contract, was not subject to general demurrer, where it also showed that defendant had failed to make the required payments, thus relieving plaintiff of the duty to deliver. *Fink v. San Augustine Grocery Co.* (Civ. App.) 167 S. W. 35.

A petition for a vendor's breach of contract, alleging that plaintiff telegraphed defendant accepting his proposition and stating that a letter with contract would follow, held not objectionable as showing that plaintiff's acceptance was subject to the provisions of a contract to follow by mail. *Spaulding v. Smith* (Civ. App.) 169 S. W. 627.

An allegation that defendant agreed to accept a quitclaim deed held equivalent to an allegation that he agreed to 'take chances on plaintiffs' title. *Bushong v. Scrimshire* (Civ. App.) 172 S. W. 155.

In action for breach of contract to buy cattle, allegation of petition that a resale was made on best available market and for best obtainable price held to render unnecessary allegation that cattle had no market value at point of delivery to excuse seller's not having sold there. *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

In an action for breach of contract to buy cattle at so much a pound, allegations as to weight at point of delivery, and at the point to which plaintiff was forced to send them for a market, should have been made to lay foundation for proof of damages. *Id.*

Plaintiffs held not entitled to recover for defendants' refusal of railroad ties without pleadings and proof showing which remedy they had elected to pursue. *Price v. J. B. Faircloth & Co.* (Civ. App.) 181 S. W. 707.

Petition, in action to recover on defendant's promise to pay for wheat taken from plaintiffs, ground into flour, and retained, held sufficient. *Mendiola v. Garza Bros.* (Civ. App.) 185 S. W. 391.

**142. — By broker for commissions.**—In broker's action for commissions, complaint held to allege ability and willingness of party to make exchange of lands, and not merely ability and willingness to make the exchange or pay the stipulated damages. *Levy v. Dunken Realty Co.* (Civ. App.) 179 S. W. 679, denying rehearing *Same v. Duncan Realty Co.*, 178 S. W. 984.

Allegation that person procured by brokers was ready, able, and willing to carry out contract of exchange held equivalent to allegation that he had title to the land he contracted to exchange. *Id.*

A petition setting out the contract for commission agency, the amount of goods sold, the commissions due, and defendant's promise to pay, and that payment has been demanded and refused, to which an exhibit of sales, amounts, purchases, etc., is attached, is sufficient as against demurrer. *Channell Chemical Co. v. Hall* (Civ. App.) 187 S. W. 704.

A petition in a broker's action for commission, alleging that he was to make a sale for part cash, the balance due to suit the purchaser, and that the lot was sold upon terms required by the seller to a purchaser willing and able to pay all cash, or to make terms to suit the seller, is not subject to a general exception. *Rabinowitz v. Smith Co.* (Civ. App.) 190 S. W. 197.

Petition of broker against landowner, stating that, but for defendant's failure to designate land for sale, and fix prices and terms, according to his contract, the land would have been sold at a reasonable price, yielding certain commissions, held sufficient without statement as to whom plaintiff could have sold. *Daugherty v. Smith* (Civ. App.) 192 S. W. 1131.

**143. — By or against corporations in general.**—The petition, in an action by a municipality to recover from a street railway the cost of paving that portion of the street occupied by the railway, should disclose the width of the pavement and the length of the street, so that the court can determine the amount to which the city is entitled, and whether that amount is within its jurisdiction. *Texas Bitulithic Co. v. Abilene St. Ry. Co.* (Civ. App.) 166 S. W. 433.

The petition, in an action by a private corporation, need not state the name of any officer of the corporation. *Rockdale Mercantile Co. v. Brown Shoe Co.* (Civ. App.) 184 S. W. 281.

Petition in action by plaintiff to recover attorney fees from a corporation in which he was a stockholder, held to state a cause of action. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

145. — **By or against insurance company or order.**—In action on policy of life insurance, it was not necessary that petition affirmatively allege that insured was in sound health when policy was issued, as required by its conditions. *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169; *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170.

Petition not showing plaintiff's legal right to sue for interest of her deceased father, one of two original separate beneficiaries, did not give trial court jurisdiction to adjudicate interest of deceased beneficiary, and judgment disposing of such interest was fundamental error. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

Allegation in suit on policy of life insurance that beneficiary complied with all of the provisions of the policy is sufficient allegation in the absence of special exception that proofs of death were duly furnished, in view of arts. 4733 and 5714. *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* (Civ. App.) 192 S. W. 607.

That suit was instituted against defendant by name alleging that it was doing an insurance business in the state of Texas, with an office and place of business in Dallas county, Tex., in the city of Dallas, with a person named, as manager and attorney, upon whom service could be had, was sufficient to show a legal liability by a legally existing association. *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098.

146. — **By or against husband or wife or both.**—Amended petition held sufficient for relief by vacating a judgment against a married woman. *Shaw v. Proctor* (Civ. App.) 193 S. W. 1104.

147. — **By or against landlord.**—As against general demurrer, a petition for wrongful eviction held to state a cause of action, though it averred a valuable consideration, but did not state whether the rent was to be in money or crops. *Joiner v. Citizens' Nat. Bank* (Civ. App.) 186 S. W. 390.

148. — **By or against officers.**—In suit by treasurer of San Augustine county against a county commissioner and his sureties to recover moneys illegally collected, petition, alleging that an account for roadwork was approved, warrant issued, delivered to defendant, and paid by treasurer's check, held insufficient. *Slaughter v. Knight* (Civ. App.) 184 S. W. 539.

148½. — **By or against receivers.**—In a suit against receivers, it is sufficient to allege that defendants are receivers without showing their authority. Petition alleging cause of action against receivers giving date of injury and justifying inference that it arose during receivership was not demurrable for failing to specifically allege that fact, and allegation that receivers were responsible for damages claimed sufficiently alleged that the damage occurred during receivership. *Schaff v. Nash* (Civ. App.) 193 S. W. 469.

In suing receiver appointed by federal court for damages occurring prior to receivership, pleading must allege permission of court to bring suit. *Id.*

149. — **Cancellation or rescission.**—Petition in action for the cancellation of conveyances to defendant, with knowledge that the land might be used as collateral to obtain money to conduct an illegal business, held not to show that plaintiff was in pari delicto, and to state a good cause of action. *Futch v. Sanger* (Civ. App.) 163 S. W. 597.

Plaintiff's petition held not fatally defective because it did not charge that the whole amount of the stock had never been actually paid for. *Commonwealth Bonding & Casualty Ins. Co. v. Bomar* (Civ. App.) 169 S. W. 1060.

In an action to rescind a contract for the sale of a traction engine guaranteed to develop 20 horse power upon a certain test, where the buyer did not plead that the test was ever demanded or made, evidence as to whether the 20 horse power expressed in the contract was at the belt or drawbar held inadmissible. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

Where a deed was sought to be set aside for fraud only, the question whether a consideration was paid was immaterial. *Irvin v. Johnson* (Civ. App.) 170 S. W. 1059.

Pleadings of committee of subscribers impleaded in action by contractors against the railroad held to evidence an intention to rescind its aid contract. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

In suit to set aside conveyance, petition held to make issue as to fraudulent promise to pay cash consideration without intent of doing so, as to two lots, though one was alleged to have been included fraudulently. *Wyatt v. Chambers* (Civ. App.) 182 S. W. 16.

One seeking judicial annulment of a contract as not permitted by law must allege facts disclosing its unlawful character. *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

151. — **Contribution.**—In an action by the owner of two-thirds of a lot of land for contribution from the owner of the other third for filling the land, allegation that the owner of the other third could not be notified because of plaintiff's inability to discover any claimant therefor held sufficient as to notice. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

In an action by the owner of two-thirds of a lot for contribution for filling the lot, allegations held sufficient to show the necessity therefor. *Id.*

Allegations, in an action by the owner of part of a lot for contribution from the owner of the other part, held to sufficiently show plaintiff's payment of the sum agreed upon. *Id.*

Petition by a surety on a note for reimbursement, alleging execution, delivery, and payment of note, and praying for recovery of the money paid, held to authorize recovery on the implied obligation of reimbursement. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

Tenant in common suing for contribution held, under his petition, not entitled to recover defendant's share of the cost of improving a street adjacent to the property. *Stephenson v. Luttrell* (Sup.) 179 S. W. 260.

152. — **Conversion.**—In an action for conversion of notes, a paragraph of petition, not demurred to, held sufficient to raise the issue whether defendant had converted plain-

tiff's 15 per cent. joint interest in such notes and the stock pledged to secure them. *Mutual Loan & Investment Co. v. Matthews* (Civ. App.) 176 S. W. 924.

153. — **Covenant or warranty.**—In an action by a buyer of grain for damages for the inferior quality of a car of corn chops, a petition merely alleging a known purpose to use the chops for stock food does not present an issue as to an implied warranty of soundness or merchantability. *F. A. Piper Co. v. Oppenheimer* (Civ. App.) 158 S. W. 777.

155½. — **Divorce.**—The allegation of a petition for divorce on the ground of cruelty that defendant was guilty of many other excesses, outrages, and cruel treatment so as to render the future living together of the parties insupportable, following acts of cruelty specifically alleged, is too general. *Fitzgerald v. Fitzgerald* (Civ. App.) 168 S. W. 452.

Allegation of original and supplemental petitions in action for divorce, relating to the separate property of plaintiff and the claims of defendant with reference thereto, held to authorize judgment that plaintiff owned land in her own separate right and quieting title thereto as against defendant. *Borton v. Borton* (Civ. App.) 190 S. W. 192.

In wife's suit for divorce on ground of cruel treatment, in absence of an allegation of physical violence or imputation of want of chastity, petition must allege such treatment as will produce a degree of mental distress which threatens to impair her health. *Bloch v. Bloch* (Civ. App.) 190 S. W. 528.

In wife's suit for divorce on ground of cruel treatment, a petition which failed to specifically state time, place, and material circumstances of acts of cruel treatment alleged held insufficient upon special exception, as stating merely conclusion of pleader. *Id.*

In an action for divorce, petition held sufficient against an exception, in effect a general demurrer, that it was insufficient in law, because the allegations of defendant's conduct, etc., were too vague, uncertain, and indefinite. *Hill v. Hill* (Civ. App.) 193 S. W. 726.

158. — **False imprisonment or malicious prosecution.**—In an action for conversion of cattle by levy of attachment, a petition charging malice and seizing cattle without probable cause for believing them to be the property of another was sufficient, without charging facts or acts showing malice; malice being inferred from want of probable cause. *First Nat. Bank of Hereford v. Hogan* (Civ. App.) 185 S. W. 880.

A tenant's petition seeking recovery for alleged wrongful levy of a distress warrant, charging that the writ was issued and served without cause, illegal, unjust, and for the purpose of harassing and vexing the tenant and putting him to trouble and expense, and impairing his credit and reputation in the community, sufficiently charges malicious suing out of the writ, though not using the word "malice." *Streetman v. Lasater* (Civ. App.) 185 S. W. 930.

159. — **Foreclosure of liens.**—Petition, in an action by a materialman against the owner of a building on an order given by the contractor, held not fatally defective for failure to aver that the contractor had obtained and furnished receipts for materials used in the construction of the building so as to entitle him to the amount specified in the order. *Sweetwater Lumber Co. v. Hamner* (Civ. App.) 161 S. W. 1075.

Petition, in a suit on a note and to foreclose a lien upon a collateral note, held not insufficient because failing to allege that the collateral note was ever presented for payment, or that payment was refused. *Baldwin v. Jordan* (Civ. App.) 171 S. W. 1016.

In a suit on a note and to foreclose the lien on a collateral note, petition held not insufficient for not alleging that the maker of the collateral note had not paid it to plaintiff. *Id.*

Petition by minority stockholders of foreign corporation to foreclose equitable lien as creditors upon assets within the state, transferred to a domestic corporation controlled by the officers of the foreign corporation, held to state a cause of action. *Tipton v. Railway Postal Clerks' Inv. Ass'n* (Civ. App.) 173 S. W. 562.

In suit to enforce vendor's lien notes, allegation of owner's intention to mature all the notes held sufficient. *Miller v. Davis* (Civ. App.) 180 S. W. 1140.

Petitions seeking to establish liability by reason of mechanics' liens held bad for failing to show the amount of the contract price unpaid to the contractor at the time of the notice, or the amounts thereafter paid to him. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

Petitions seeking to establish liability by reason of mechanics' liens, held bad for failing to allege date of giving notice. *Id.*

A petition to foreclose a mechanic's lien based on a note mentioning a contract for mechanic's lien for labor to be performed which failed to allege that the labor had been performed was defective. *Herring v. Herring* (Civ. App.) 189 S. W. 1105.

In suit by vendor of lands to city to foreclose implied lien on part of them for part of price, description of lands, in petition, as all "above high-water mark," held sufficient. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

In an action on a note secured by a vendor's lien on land, a petition not seeking personal judgment against a subsequent purchaser of land, who has not agreed to pay note, will not support a personal judgment. *Neeley v. Lane* (Civ. App.) 193 S. W. 390.

161. — **Garnishment proceedings.**—Allegations that defendant, in suit to foreclose vendor's lien, broke his agreement with his codefendant, to whom he had sold, to bid in the property at execution sale and thereafter sell to a purchaser procured by codefendant in reduction of parties' liabilities, held sufficient, against general demurrer, to entitle codefendant to accounting in defendant's garnishment proceedings against his debtor. *Roberts v. Anthony* (Civ. App.) 185 S. W. 423.

162. — **Inducing discharge of employé.**—*Cotton v. Cooper* (Civ. App.) 160 S. W. 597.

165. — **Injuries from obstruction or diversion of water.**—In an action for damages for flowing plaintiff's land, a petition alleging that defendant, by reason of the negligent construction of its roadbed, overflowed plaintiff's land, injuring his growing crops in given sums, held sufficient as against general demurrer. *St. Louis, B. & M. Ry. Co. v. Hamilton* (Civ. App.) 163 S. W. 666.

166. — **Injuries in construction and operation of railroads.**—Petition alleging that a switchman invited plaintiff to go through the train standing across the street, and told him he had time to get through, but that the employés started the cars without looking so as to injure plaintiff, held to sufficiently allege negligence of such employé in inviting

plaintiff to go between the cars. *St. Louis & S. F. R. Co. v. Finley* (Civ. App.) 163 S. W. 104.

Failure to observe, as an element of failure to warn, is sufficiently alleged, as against a general demurrer, by the allegation, in a petition for the killing of a cow by a train, that the engineer negligently failed to warn the cow from the track. *Southern Kansas Ry. Co. v. Texas v. Crutchfield* (Civ. App.) 165 S. W. 551.

168. — **Injuries to servant.**—Petition held insufficient as failing to show upon what ground recovery was sought. *Snipes v. Bomar Cotton Oil Co.*, 106 Tex. 181, 161 S. W. 1. See, also, *St. Louis & S. F. R. Co. v. Cox* (Civ. App.) 159 S. W. 1042.

In an action by a servant of a railroad company, where the acts of negligence relied on, and which were alleged to be in violation of the company's rules, were specifically set out, it was unnecessary to set forth the rules or their substance. *Houston & T. C. R. Co. v. Barlett* (Civ. App.) 162 S. W. 1039.

In an action for injuries to a brakeman by his foot becoming caught in an automatic coupler, an allegation of the petition held to sufficiently charge that the coupler was defective, and did not comply with the safety appliance acts. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

A complaint in an action by a station agent against the railroad for an injury caused by his falling from the platform into a ditch after the steps had been removed to construct the ditch held to show negligence of defendant. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

A general allegation of negligence in the petition in a servant's action for injury is permissible, where the doctrine of *res ipsa loquitur* is applicable. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545.

Petition against a railroad and its contractor for injuries to an employé alleging that defendants jointly constructed a road, and that the employé was employed by both, states a cause of action against both. *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974.

Petition of a switchman, injured when a trunk was cast upon him, held good as against a general demurrer, though not giving certain details. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 173 S. W. 1186.

In a servant's action the petition held sufficient to warrant recovery on the ground that defendant was negligent in the employment of an incompetent engineer. *Texas & Pacific Coal Co. v. Gibson* (Civ. App.) 180 S. W. 1134.

Petition in car inspector's action for injury from explosion of tank car held not to show any unusual facts or circumstances exempting him from rule as to servant employé to repair defective machinery or equipment. *Magnolia Petroleum Co. v. Ray* (Civ. App.) 187 S. W. 1085.

In a railroad servant's action for injuries a statement in plaintiff's petition held not a charge of liability of the company because defendant's car inspector ordered plaintiff to go between cars. *Texas & Pac. Ry. Co. v. Elliott* (Civ. App.) 189 S. W. 737.

In action for damages for electrocution of plaintiff's decedent upon turning an electric switch as commanded by his foreman, negligence of the vice principal in ordering deceased to throw the switch held sufficiently pleaded. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 191 S. W. 599.

169. — **Interpleader.**—A petition showing conflicting claims, and that plaintiff made no claim to the fund in question, held sufficient as a bill of interpleader. *Times Herald Printing Co. v. St. Paul Sanitarium* (Civ. App.) 175 S. W. 1121.

In an action on a policy of insurance, an answer admitting liability and stating that defendant had no personal interest in fund, etc., held, a sufficient bill of interpleader, making it duty of court to require other claimant to answer. *Grand Lodge, Colored K. P. of Texas, v. Cleo Lodge No. 222, Colored K. P.* (Civ. App.) 189 S. W. 764.

In an insurance case upon filing of a bill of interpleader by defendant, only issue raised was whether alleged claimant be required to interplead with plaintiff for fund. *Id.*

170. — **Judgment, action on.**—In action on New York judgment awarding permanent alimony, payable monthly, plaintiff held to have burden of pleading and proving that, under the law of New York, it was final, and that the right to overdue installments was absolute or vested. *Ogg v. Ogg* (Civ. App.) 165 S. W. 912.

Where a petition to enforce a county court judgment contained further allegations of fraud and conspiracy, but no evidence was introduced to sustain such allegations nor any request made for such a finding, such allegations did not change the character of the action. *Willis v. Keator* (Civ. App.) 181 S. W. 556.

171. — **Judgment, equitable relief against.**—Injunctive relief, see notes under art. 4649.

A petition to vacate a judgment is in the nature of a motion for a new trial, and must set out such facts as would have been ground for granting a motion for new trial if made at the term at which judgment was rendered. *Patruccio v. Selkirk* (Civ. App.) 160 S. W. 635.

Petition to set aside judgment for fraud in procuring its entry in the absence of plaintiff's attorneys held not bad on general demurrer. *Evans v. San Antonio Machine & Supply Co.* (Civ. App.) 182 S. W. 694.

Petition to set aside judgment on note held demurrable as failing to state cause of action in that it showed neglect by plaintiff, and failed to show any fraud on defendant's part. *First Nat. Bank v. Hartzog* (Civ. App.) 192 S. W. 363.

172. — **Libel or slander.**—In employé's action against former employer for damages caused by circulation of report that he was unworthy and incompetent, among other employers, indefiniteness on the part of the petition in respect to the extent and date of such circulation, held not to render it insufficient as against a general demurrer. *Beard v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 160 S. W. 633.

A petition which clearly set forth the import of a libelous communication, and contained innuendoes explaining wherein the language used was libelous, and averred that it was falsely and maliciously made, and that plaintiff was damaged, is sufficient. *Texas Furniture Co. v. Meyers* (Civ. App.) 167 S. W. 766.

Complaint in an action for libel held insufficient as not necessarily charging that the

libelous matter was published of the plaintiff. *McCormick v. Houston Printing Co.* (Civ. App.) 174 S. W. 853.

Plaintiff's petition, alleging that defendant manager of defendant store used toward her harsh and insulting language in presence of other shoppers, but failing to set out words used, held not to state cause of action for slander. *Sisler v. Mistrot* (Civ. App.) 192 S. W. 565.

174. — **Mandamus.**—Under the Enabling Act, petition for mandamus to compel the mayor and council to order an election failing to allege that in determining the number and qualification of petitioners they had acted arbitrarily or fraudulently held not to state a cause of action. *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

Petition for mandamus to compel the performance of an official duty must not only aver every fact necessary to show that complainant is entitled to the service sought, but must negative every other fact which the officer might urge as a defense. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

A petition for mandamus to compel a county tax collector to issue to petitioner a nonintoxicating liquor license alleging the tender of the \$2,000 state license tax imposed by art. 7476, but not alleging payment of the local tax or that no such tax had been levied under such section, held fatally defective. *Id.*

Under arts. 1160, 1168, providing for transfer of stock according to the by-laws, a petition to compel transfer of stock on the books by mandamus is insufficient if it fails to show what the by-laws provide as to transfers. *Milner v. Brewer-Monaghan Mercantile Co.* (Civ. App.) 188 S. W. 49.

Petition by landowner for mandamus to compel municipality controlling sole water-works system to furnish separate meters and connections for tenants held not subject to demurrer because not disclosing that water was not obtained or that tenants had applied for separate connections. *City of Galveston v. Kenner* (Civ. App.) 193 S. W. 208.

176. — **Money received or money paid.**—In an action by the buyer of goods, who had a greater quantity delivered than he had ordered, to recover, as money had and received, the price which he had paid in advance for an opportunity to inspect, the petition, not alleging that plaintiff rejected the goods, refused to accept, tendered them back, or notified the seller that plaintiff held them subject to his order, was insufficient against general exception. *Mueller v. Simon* (Civ. App.) 183 S. W. 63.

Where some of the goods delivered are of the character and quality ordered from sample and others are not, the purchaser may accept those according to the sample and reject the remainder, and recover the purchase price of the remainder, paid in advance, as for money had and received. *Id.*

Petition seeking recovery of money paid on a note under mistake held good as against general demurrer. *Michalke v. Brown* (Civ. App.) 185 S. W. 429.

177. — **Negligence in general.**—A petition in an action for damages brought against the consignees of cotton with directions to notify the purchaser, held not to state a cause of action for damages for negligence in weighing the cotton. *Shippers' Warehouse & Compress Co. v. H. B. Moore & Co.* (Civ. App.) 163 S. W. 103.

The general allegation of negligence in a petition is referable to, and controlled by, the specific acts of negligence charged. *Southern Kansas Ry. Co. of Texas v. Crutchfield* (Civ. App.) 165 S. W. 551.

Petition in an action against a stockyards company for injuries to live stock from its negligence held not subject to a general demurrer. *Hovencamp v. Union Stockyards Co.* (Sup.) 180 S. W. 225.

Allegations of petition seeking recovery for injuries to a minor held sufficient to present the issue whether plaintiff, a child, was on the defendant's premises under implied invitation, by reason of the existence of machinery and other articles peculiarly attractive to children of his age, so that the petition was not subject to demurrer. *Johnson v. Atlas Supply Co.* (Civ. App.) 183 S. W. 31.

A general allegation of negligence in a petition is sufficient in the absence of a special exception. *St. Louis, B. & M. Ry. Co. v. Marcofish* (Civ. App.) 185 S. W. 51.

Where the petition in a negligence action alleges generally that the injury was the result of negligence, and then specifically sets up the acts of negligence relied on, the evidence will be confined to the specific allegations. *Kansas City, M. & O. Ry. Co. of Texas v. James* (Civ. App.) 190 S. W. 1136.

182. — **Reformation of instruments.**—If reformation of transfer of interest in business to include claim sued on was desired, held that proper allegations should have been made. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

183. — **Replevin.**—A petition alleging that defendant wrongfully withheld possession of mules which were the subject of the chattel mortgage given by another defendant, which failed to express the mutual intent of the parties, is sufficient as against general demurrer interposed by the defendant in possession of the mules. *Blount, Price & Co. v. Payne* (Civ. App.) 187 S. W. 990.

186. — **Setting aside will.**—A general allegation, in contestant's pleading in a will contest, that testator had been subjected to undue influence held insufficient to present the issue of undue influence, where it clearly appeared that the only predicate for the allegation was misrepresentations made to testator; and hence it was error to instruct on undue influence. *Ross v. Kell* (Civ. App.) 159 S. W. 119.

Petition in a will contest alleging undue influence, whereby testator discriminated against his daughter, the contestant, held not objectionable for failure to show in what the undue influence consisted, or the facts relied on as a basis for recovery. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed, 106 Tex. 322, 166 S. W. 1138.

187. — **Specific performance.**—A petition held to allege such performance on the part of the vendor as entitles him to specific performance, even if the contract was not in writing. *Fahey v. Benedetti* (Civ. App.) 161 S. W. 896.

Petition for specific performance or damages in alternative showing on its face that vendor did not own land at the time of contract, was demurrable as to the portion seeking specific performance. *Bird v. Lester* (Civ. App.) 166 S. W. 112.

188. — **Taxes.**—*O'Connor v. City of Laredo* (Civ. App.) 167 S. W. 1091.

189. — **Trespass.**—Plaintiff's petition alleging that defendant manager of defendant's store used toward her harsh and insulting language in the presence of other shoppers, but failing to set out words used, held not to state cause of action on the case. *Sisler v. Mistrot* (Civ. App.) 192 S. W. 565.

190. — **Wrongful death.**—A petition, in an action by widow for injuries to husband, is insufficient as one for wrongful death, under art. 4694, when it did not allege whether injuries were cause of death. *Black v. Texas & P. Ry. Co.* (Civ. App.) 161 S. W. 1077. See, also, *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

192. — **Wrongful levy.**—Petition held sufficient as against an exception for failure to show the articles removed from plaintiffs' store and their value or those remaining in the store and their value. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

In action for wrongful attachment on ground that plaintiffs were about to dispose of their property to defraud creditors, allegations as to contract under which attached goods were purchased from defendant held proper to show existence of malice and rebut the grounds of attachment set up. *Id.*

A petition for wrongfully suing out a garnishment, which failed to allege the nature of the expenses incurred or any other damages recoverable, held not to support a judgment for damages. *Heidemann v. Martinez* (Civ. App.) 173 S. W. 1166.

Allegations that plaintiffs had closed a contract for selling the real estate with the exception of consolidating several abstracts already approved by the purchaser, and that such consolidation would have been made, sufficiently showed performance of the contract. *Hoover v. First Nat. Bank* (Civ. App.) 192 S. W. 1149.

Allegations that extension of a mortgage on plaintiffs' property depended on closing a prospective sale sufficiently negated the contention that the mortgage, and not the attachment, caused the sale's failure. *Id.*

Allegations that a prospective buyer had partly performed by assuming a debt and making part payments were proper as showing the terms and extent of compliance with the contract. *Id.*

Allegations that the attaching creditors' statement that the debtor was about to dispose of his property with intent to defraud, etc., was false and known to be false is sufficient, although the pleadings established the property was to be disposed of without cash return. *Id.*

193. **Issues, proof, and variance.**—A landlord who did not plead that the tenant exercised his option to renew the lease cannot recover rent on that ground. *Street-Whittington Co. v. Sayres* (Civ. App.) 172 S. W. 772.

In partition, held, on pleadings, that proof that decedent intended that adopted child, through whom plaintiff claimed, should have same interest as his own children, did not authorize judgment for plaintiff. *Masterson v. Harris* (Civ. App.) 179 S. W. 284. See *Missouri, K. & T. Ry. Co. v. Craddock* (Civ. App.) 174 S. W. 965.

194. — **Allegations which must be proved in general.**—Though the pleadings and proof must correspond, only the substance of the pleadings need be proved. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

That plaintiff alleged a violation of the "fence statute" held not to preclude him from recovering for resulting trespass of stock as at common law. *Jameson v. Board* (Civ. App.) 171 S. W. 1037.

196. — **Proof of matters admitted.**—Special plea, setting out terms of policy, held not to relieve plaintiff of the burden of proving the policy, where defendant also pleaded a general denial. *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 159 S. W. 137.

Admissions contained in the special answer of a cross-defendant of material allegations in the petition filed after he had interposed a general denial to the petition did not relieve the cross-plaintiff of the burden of proving the allegations of the petition. *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

Where the warrantors admit the conveyance by their immediate grantee to a subsequent purchaser, no proof need be submitted of such conveyance. *Coleman v. Luetcke* (Civ. App.) 164 S. W. 1117.

In an action in the nature of an action of trespass to try title, where the fact that defendant had paid the cash for the land in question was not controverted, evidence to that effect held immaterial. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

In action against sheriff for failure to record an attachment lien, admission in answer held to dispense with plaintiff's proof of the attachment and the return thereon. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

Where a libelous article was made a part of a petition which was sworn to by plaintiff and not denied by defendant, it was not necessary to introduce the article in evidence. *Chapa v. Abernethy* (Civ. App.) 175 S. W. 166.

197. — **Materiality to issue in general.**—Mere evidential matters pleaded in the petition may be treated as surplusage, so that variance between such allegations and the proofs, by which defendants could not have been surprised, are immaterial. *Woolley v. Canyon Exch. Co.* (Civ. App.) 159 S. W. 403.

In an action on a contract of guaranty, an alleged variance between the contract and the petition held immaterial. *Young v. Bank of Miami* (Civ. App.) 161 S. W. 436.

Evidence that the buyer of a span of mules, which he alleged were misrepresented offered to return them is irrelevant, where the buyer sought only damages, and not rescission. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

198. — **Place and time.**—Plaintiff, alleging that "on or about" June 14th he demanded and defendant refused to furnish cars, proof that it was on that day of July is not a variance. *Texas & N. O. R. Co. v. Weems* (Civ. App.) 184 S. W. 1103.

199. — **Parties or other persons.**—Proof of several and distinct conversions by two persons will not support a recovery for a joint conversion. *Continental Bank & Trust Co. v. Dealey Bros.* (Civ. App.) 171 S. W. 552.

In suit by the treasurer of San Augustine county, the petition, alleging an action



against a county commissioner, with his sureties, for the unlawful collection of moneys as such does not warrant recovery against him individually for defaults committed by him as ex officio road commissioner under the special road law for the county (Sp. Acts 28th Leg. c. 25). *Slaughter v. Knight* (Civ. App.) 184 S. W. 539.

Where the petition of a passenger slandered by a conductor averred that the railroad was being operated by receivers, evidence that the conductor was the servant of the railroad constitutes a variance and should be rejected. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 186 S. W. 383.

In action to cancel stock subscription, allegations of petition held to give court jurisdiction as against one of the individual promoters, over objection that while he was sued as an individual the proof showed a cause of action against his firm. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

Although a partnership note bore a different firm name from that found in partnership contract proven was no variance, where managing partner testified that original name had been changed to that alleged before execution of note. *Hill v. First State Bank of Oakwood* (Civ. App.) 189 S. W. 984.

There is a fatal variance between allegation of joint ownership and prayer for joint recovery and proof of a separate cause of action. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 189 S. W. 997.

In suit by assignee of legal title to chose in action, where defendant by cross-examination developed the fact that such holder held for the equitable interest of the real owner, it was not error to admit testimony of the amounts due the beneficial owner on the theory of variance between pleadings and proof. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549.

200. — **Property or other subject-matter.**—*Melcher v. Higbee* (Civ. App.) 165 S. W. 478.

201. — **Written instruments.**—The variance between the petition in an action on notes and the notes introduced in evidence, arising from the fact that the petition omits the matter of endorsement of payment of interest and the stipulation that past due interest shall bear interest, and because the notes do not describe the land on which a vendor's lien is asserted as it is described in the petition, is immaterial. *Coleman v. Garvin* (Civ. App.) 158 S. W. 185.

In the absence of appropriate pleadings, the effect of an indorsement whereby a party guaranteed the payment of a promissory note cannot be varied by parol. *Canadian Long Distance Telephone Co. v. Seiber* (Civ. App.) 159 S. W. 897.

Where plaintiff sued on a note and alleged that it was secured by a chattel mortgage dated August 1, 1912, describing the note as providing for 10 per cent. attorney's fees, while the mortgage was, in fact, dated August 3, 1912, and the note provided for 20 per cent. attorney's fees, the variance was not material, so as to require the exclusion of the mortgage. *Power v. First State Bank of Crowell* (Civ. App.) 162 S. W. 416.

In an action by the payee of a note against the maker and surety, in which the surety claimed discharge by an extension of the note, plaintiff need not plead the real conditions as to indorsement of an extension, so as to make it unavailable, but could explain the apparent alterations therein when he put the note in evidence. *Roberds v. Laney* (Civ. App.) 165 S. W. 114.

Allegations of a supplemental petition in an action on a note for the price of land held to present the question of the nature of the conveyance as a quitclaim or warranty deed, so that the court might consider surrounding circumstances in construing the deed. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614.

Official bond of city treasurer sued on set out in the petition and admitted by the answers held properly admitted in evidence. *Brown v. City of Amarillo* (Civ. App.) 180 S. W. 654.

In a suit on a note, in which petition alleged that note was executed January 1, 1911, and matured November 1, 1911, and the note offered in evidence is dated January 1, "19011," and matures November 1, "19011," being manifestly a clerical error, held there was no such variance as would surprise and note was properly admitted in evidence. *Braxton v. Voyles* (Civ. App.) 189 S. W. 965.

In an action against drawee of a draft, where pleading does not state whether acceptance was oral or in writing, it is permissible to prove either a verbal or a written acceptance. *Bloch v. Rio Grande Valley Bank & Trust Co.* (Civ. App.) 190 S. W. 541.

In an action by a materialman against the surety on a county building contractor's bond, the bond is admissible in evidence without the contract referred to therein, in the absence of allegations that the contract would defeat recovery. *American Surety Co. v. Huey & Philp Hardware Co.* (Civ. App.) 191 S. W. 617.

Where seller alleged a written contract for sale with an erroneous allegation of indorsement of a note by B., and buyer pleads no defense in his answer, but alleges that note, otherwise properly described by seller, was not indorsed as alleged, the admission of note in evidence is proper and does not constitute a variance. *Houston Transp. Co. v. Paine* (Civ. App.) 193 S. W. 188.

202. — **Nature and extent of relief.**—Where, in an action by a principal against his agent, the petition alleged that the agent had received \$440, and failed to turn over, proof that the amount so received was less than \$440 would not defeat recovery. *J. C. Stewart Produce Co. v. Hamilton-Turner Grocery Co.* (Civ. App.) 163 S. W. 1000.

In an action against a testamentary trustee to recover for services to a devisee, plaintiff could not recover as to any one item an amount in excess of that claimed to be due. *McLean v. Breen* (Civ. App.) 183 S. W. 394.

203. — **Matters of defense.**—In an action for the price of lumber, plaintiff could not insist that defendant by asking damages for the breach of the contract was estopped to disaffirm the contract, where plaintiff based the claim of estoppel only on defendant's examination and acceptance of the lumber. *Continental Lumber & Tie Co. v. Miller* (Civ. App.) 161 S. W. 927.

Where only pleading was verified account, instruction authorizing recovery, if defendant had led plaintiff to believe that purchaser of goods was its agent, held erroneous,

as estoppel must be specially pleaded. *Young Men's Christian Ass'n of Dallas v. Schow Bros.* (Civ. App.) 161 S. W. 931.

204. — **Effect of variance to mislead or surprise.**—The note sued on being attached to the petition as an exhibit, there could be no variance between the allegation and the proof such as would surprise defendants when the note was offered in evidence. *Heaton v. State Nat. Bank* (Civ. App.) 159 S. W. 874.

205. — **Agency.**—Evidence as to false representations by agents held not admissible under allegations that they were made by defendants. *Kirkland v. Rutherford* (Civ. App.) 171 S. W. 1031.

Where the petition, in an action to cancel a deed for fraudulent representations, alleged that the fraudulent representations were made by a particular agent of defendant, evidence that they were made by another agent was inadmissible. *Orient Land Co. v. Reeder* (Civ. App.) 173 S. W. 939.

207. — **Ownership or title.**—If assignment of improvement certificate was prior to institution of suit thereon for benefit of assignor, held, that a contention of variance should be sustained. *Kernagan v. City of Ft. Worth* (Civ. App.) 194 S. W. 626.

208. — **Nature and form of contract and performance or breach thereof in general.**—Where a petition alleges a contract for a commission of 7½ per cent. "of the list selling price" of any automobile sold by plaintiff and evidence of an agreement to pay a commission of 7½ per cent., with only an understanding by plaintiff that it would be based on the list selling price, because commissions on such sales were usually based on such price is inadmissible. *Overland Automobile Co. v. Buntyn* (Civ. App.) 154 S. W. 654.

In an action for goods sold, a petition, averring that plaintiff sold defendant oats at 75 cents per bushel is broad enough to admit proof of and authorize a recovery upon the basis of a sale at the market value. *Dunman v. McKinney* (Civ. App.) 158 S. W. 1053.

An allegation that the plaintiff "has and here now exercises its option" to declare a note due is sufficient to entitle the plaintiff to prove that that option had been exercised before the suit was filed, if such proof were necessary. *Shearer v. Chambers County* (Civ. App.) 159 S. W. 999.

In an action on a contract for the performance of services which had been modified, the petition held to raise the issue of quantum meruit. *Looney v. Evans* (Civ. App.) 160 S. W. 150.

Where plaintiff alleged an express contract to pay 25 cents per acre on a sale of 3,750 acres on satisfactory terms, a recovery could not be sustained on proof of an agreement to pay plaintiff all that he should obtain over \$4 per acre on a sale of the land. *Haile v. Keller* (Civ. App.) 163 S. W. 393.

Where, in an action for the price of cotton shipped to defendant, the petition alleged that plaintiff shipped the cotton to defendant and was to have the market value of the cotton at the time of its reception, and the evidence was that plaintiff expected defendant to hold the cotton until a certain date, and failed to show the exact date of the reception of the cotton, there was a failure of proof. *Weld-Neville Cotton Co. v. Lewis* (Civ. App.) 163 S. W. 667.

Where, in an action by a bank to recover the amount paid on a forged check, the petition alleged that it was drawn on plaintiff bank, while the check showed that it was drawn on another bank, and the name of plaintiff bank was written thereon, there was no fatal variance; there being no question as to the identity of the check. *Texas State Bank of Walnut Springs v. First Nat. Bank of Meridian* (Civ. App.) 168 S. W. 504.

Alleged fraud in obtaining a premium note held not sustained by proof of an agreement between defendant and the agent writing the policy that defendant would not be called upon to pay the note if he would assist the agent. *Security Life Ins. Co. of America v. Allen* (Civ. App.) 170 S. W. 131.

In an action for balance on a contract, testimony that it was mutually agreed that the work should be completed within 60 days was properly excluded, where there were no pleadings to support it. *Jefferson Cotton Oil & Fertilizer Co. v. Fridgen & Congleton* (Civ. App.) 172 S. W. 739.

In an action on an account, a written order addressed to defendant's agent held admissible over objection that it was not supported by pleadings. *Melado Land Co. v. Field* (Civ. App.) 172 S. W. 1136.

Where the petition relied upon one contract, recovery cannot be had on a subsequent contract. *Gossett v. Vaughan* (Civ. App.) 173 S. W. 933.

In an action for the price of wood, evidence that plaintiffs had contracted with defendant to ship him 450 cords held not at variance with the contract pleaded. *McLaughlin v. Terrell Bros.* (Civ. App.) 179 S. W. 932.

Where the petition in an action for specific performance averred that defendant through its agent entered into a written contract to sell land, plaintiff cannot recover on proof of an oral contract and part performance. *Loop Land & Irrigation Co. v. Ogburn* (Civ. App.) 180 S. W. 914.

In suit against street railway to enforce claim for material furnished, submission of issue as to power of its president to purchase material and to give a lien held erroneous, where not pleaded by plaintiff and was of estoppel only. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

In action upon agreement between plaintiff, defendant, and other independent cotton buyers, to recover proceeds of cotton put in by plaintiff and not repaid by defendant, exclusion of evidence in support of allegation that defendant was retaining part of the proceeds, held erroneous. *Driskill v. Boyd* (Civ. App.) 181 S. W. 715.

Where a verified account attached to the petition contained items other than those set forth in the petition, the account was inadmissible. *Day v. Van Horn Trading Co.* (Civ. App.) 183 S. W. 85.

In action for excess paid on price of cotton by buyer, where the contract pleaded was that the cotton should be paid for on the basis of its grade, plaintiff need not allege that the contract provided for grading in town to which it was to be shipped by seller, to admit testimony of its real grade ascertained at such place. *Townsend v. Pilgrim* (Civ. App.) 187 S. W. 1021.

Under an issue whether a fire insurance policy was intended to become effective before approval by the insurer's general agents, the undisclosed intention of the insurer's general agent when making the contract is inadmissible. *Fire Ass'n of Philadelphia v. Powell* (Civ. App.) 188 S. W. 47.

In action against estate of decedent, where petition did not state whether an alleged contract to devise land in payment for personal services was written or oral, plaintiff could prove a written contract. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

Where plaintiff alleged an option to take additional salary or an interest in the business "within a reasonable time" and proof showed a different contract held that there was a variance between allegations and proof. *Graham v. Kessler* (Civ. App.) 192 S. W. 299.

In a suit on a contract, one cannot recover unless the evidence sustains the exact contract or agreement alleged in the pleadings. *Padgitt Bros. Co. v. Dorsey* (Civ. App.) 194 S. W. 1124. See *Oswald v. Williams* (Civ. App.) 169 S. W. 185.

209. — **Express and Implied contracts.**—In an action for the sale of oats, a petition averring a sale at 75 cents per bushel, does not allege an express contract, so that proof that there was no price agreed upon, but that the market price was 75 cents per bushel, does not constitute a variance. *Dunman v. McKinney* (Civ. App.) 158 S. W. 1053.

The evidence showing plaintiff took charge of deceased's business under an agreement to receive as compensation a share of the profits, he may not recover in an action against the administratrix for the value of the services. *Stacey v. McClave* (Civ. App.) 175 S. W. 807.

In a suit for breach of an agreement to make a will in plaintiff's favor, recovery can be had only on an express contract, where such contract was alleged. *Dyess v. Rowe* (Civ. App.) 177 S. W. 1001.

Under a petition based on an alleged oral contract for the lease of pasture land, plaintiff cannot recover on a quantum meruit. *White v. Barrow* (Civ. App.) 182 S. W. 1154.

One suing on an express contract may not recover on a quantum meruit. *Day v. Van Horn Trading Co.* (Civ. App.) 183 S. W. 85.

In action on alleged oral agreement for additional work changing proposed well into gas well, held that, upon repudiation of contract at commencement of suit, depriving plaintiff of legal right to recover on said contract for work done after that time, he could recover upon his alternative claim of quantum meruit. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

In an action for extra services in superintending building, where plaintiff sues in the alternative upon either express or implied contract, evidence as to reasonable value of such services is admissible. *Shear v. Bruyere* (Civ. App.) 187 S. W. 243.

In broker's action for commission for effecting lease, where no custom binding on the parties was pleaded and proven, the end accomplished, as well as effort expended, were to be considered, but evidence of customary rate for leasing property for term and of custom for landlord to pay such commission was inadmissible. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

A pleading that defendant became liable to pay the fair and usual commission for broker's services was sufficient to authorize proof of what was the reasonable value of the services performed. *Id.*

A cattle broker, who effected a sale for a less sum than the list price, is, under appropriate pleadings, entitled to recover reasonable compensation for his services. *Shaller v. Johnson-McQuiddy Cattle Co.* (Civ. App.) 189 S. W. 553.

One cannot plead express contract and recover on implied contract, nor plead an express contract to pay a fixed sum or specified commodity and recover reasonable worth of services, where there has been only a breach in stipulation of payment. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

The evidence which will support an express contract to pay an attorney's fee will not sustain recovery on a quantum meruit. *G. R. Scott, Boone & Pope v. Willis* (Civ. App.) 194 S. W. 220.

In an action for bank's breach of agreement to extend plaintiff credit to enable latter to buy and sell produce, an implied agreement to accept drafts drawn on purchasers to cover plaintiff's checks was sufficient for recovery. *First Nat. Bank v. Mangum* (Civ. App.) 194 S. W. 647.

210. — **Action by broker for commissions.**—Where a broker sued on an express contract for commissions, alleging that he was the procuring cause of the sale, and was entitled to his commission, whether the title to all the land failed or not, and testified that he agreed to sell the whole ranch, and that, unless the title to all the land was clear, the ranch could not be sold at the price, he did not prove the case alleged, and could not recover. *Jackson v. Blair* (Civ. App.) 165 S. W. 522.

Where an agent sued for commissions and proved right to compensation by way of discount on automobiles purchased by him of his principals for his customers, there was no variance between pleadings and proof. *Overstreet v. Hancock* (Civ. App.) 177 S. W. 217.

Allegations in broker's action for commission under contract, joined with action of tort and bringing in other parties, held sufficient to permit a recovery against owner upon contract. *Madden v. Shane* (Civ. App.) 185 S. W. 908.

In action for broker's commission, evidence as to method of purchase from the owner through a third person to avoid payment of commissions held admissible, notwithstanding the action in contract against him was joined with an action of tort against owner and purchasers. *Id.*

In a broker's action for commissions for the sale of real estate under an agency contract with defendants, finding for plaintiff for \$3,155, held not supported by the pleadings. *Wick v. McLennan* (Civ. App.) 186 S. W. 847.

In action for a commission for effecting lease of defendant's property for term, petition's failure to show that the lease contained a provision under which it might be canceled by the lessee on the forfeiture of a certain amount did not prevent a recovery on a ground of a variance between allegation and proof. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

217. — **Action against telegraph company.**—Variance, between the allegation of the petition, in an action for failure to transmit a telephone call, whereby attempt was made to notify plaintiff of the impending death of S., that S. was plaintiff's sister, and proof that she was his half-sister, is not material; defendant having been told when the call was put in that S. was plaintiff's sister. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

Variance between the allegation of the petition and the proof as to the place of death and burial of S. held not material. *Id.*

Variance between the petition in an action against a telegraph company for delay in delivering a message and the proof held not substantial. *Western Union Telegraph Co. v. McMillan* (Civ. App.) 174 S. W. 918.

Where the addressee of a message in his action for failure to deliver alleged a contract to deliver at a named town, but failed to allege a contract to deliver by phone to a residence, it was immaterial that there was a phone connection from such town to such residence. *Western Union Telegraph Co. v. Fabian* (Civ. App.) 189 S. W. 1008.

Where pleadings charged telephone company with placing wires above railway track at such elevation that plaintiff, a brakeman, was injured, no right to place them at such elevation being pleaded, the only issue was whether such wires encroached. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

218. — **Action to rescind or cancel.**—It may be shown, in an action to set aside an absolute deed on the ground that it was intended as a mortgage, etc., that defendant when he made depositions stating that the instrument was intended as a mortgage was mentally incompetent, though insanity or mental incompetency be not pleaded. *Kellner v. Randle* (Civ. App.) 165 S. W. 509.

In an action to cancel a deed as procured by fraudulent representations, only such representations can be proven as are specifically alleged. *Orient Land Co. v. Reeder* (Civ. App.) 173 S. W. 939.

A deed cannot be set aside on grounds not pleaded. *Cleveland v. Stanley* (Civ. App.) 177 S. W. 1181.

Where plaintiff alleged that one who assumed to sell land as her guardian under orders of court was not legally or in fact her guardian, the allegations must be construed as a direct attack on such orders and entitled her to prove that such person was not her guardian. *Hamer v. Sanford* (Civ. App.) 189 S. W. 343.

220. — **Action for slander.**—Proof that defendant had charged that plaintiff had swindled or stolen from him in the purchase of a mule is not proof of an alleged slander that plaintiff had stolen from defendant all that he raised on defendant's place. *Burkhiser v. Lyons* (Civ. App.) 167 S. W. 244.

In actions for slander, the material and actionable words must be proved strictly as they are alleged in the petition. *Id.*

Where petition alleged good reputation of plaintiff prior to publication of libel, and answer denied sufficient information to form belief, evidence of good reputation of plaintiff was admissible. *Houston Chronicle Pub. Co. v. Quinn* (Civ. App.) 184 S. W. 669.

224. — **Actions against carriers.**—Where the complaint alleged that the cars were jammed together, bruising the cattle, etc., evidence that this was caused by sudden stoppages, due to the fact that a preceding train was being hauled by a broken-down engine, was admissible. *St. Louis & S. F. R. Co. v. White* (Civ. App.) 160 S. W. 1128.

In a passenger's action for injuries caused by alleged failure to have sufficient exits open, allegations that there was no door conveniently open, and that defendant did not indicate from what part of the train passengers could alight, did not raise the issue of negligence in failing to give plaintiff personal notice that there was a door open. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

A husband, suing a carrier for ejecting his wife and minor children, could show that she had money to pay fare if the conductor had asked for it, though not pleaded. *Ft. Worth & R. G. Ry. Co. v. Hales* (Civ. App.) 173 S. W. 991.

Under a petition alleging that a carrier converted household goods of a family, evidence of the loss of wearing apparel, clothing, etc., held admissible. *St. Louis, I. M. & S. Ry. Co. v. Wallace* (Civ. App.) 176 S. W. 764.

A passenger who alleged specific negligence as the cause of an accident has the burden of proving it. *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 177 S. W. 137.

Where a passenger, injured from falling on the steps while she was leaving the station, alleged conjunctively several grounds of negligence causing her injury, she was entitled to recover on proof of either, if shown to be the efficient sole cause, or concurring cause, of her injuries. *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412.

Where the passenger alleged specific acts of negligence and failed to prove them, he could not invoke the maxim "res ipsa loquitur," based on the happening of an accident, but was required to prove the specific negligence alleged. *Dowdy v. Southern Traction Co.* (Civ. App.) 184 S. W. 687.

Where a shipper expressly alleged that the goods were in good condition when delivered to the carrier, it has the burden of proving that fact. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070.

225. — **Action for injuries to servant.**—Allegations in a servant's action for injuries held to raise the issue of negligence in allowing a belt to be laced crooked, causing it to jump. *Sherman Oil Mill v. Neff* (Civ. App.) 159 S. W. 137.

Under allegations of a complaint for injuries by a knot in a stave being knocked out and hitting plaintiff, that the wheel was unsteady, so that the knives failed to cut a knot, but merely tore it out, and that the disc in which the blades were fastened was defective from being in a fire, evidence was admissible that the wheel was warped. *T. B. Allen & Co. v. Shook* (Civ. App.) 160 S. W. 1091.

Plaintiff having alleged three defects in a machine, with a general allegation of other defects, is confined to proof of the three specific defects, and defendant is required to meet them only as regards defendant's negligence. *Gamer Co. v. Gammage* (Civ. App.) 162 S. W. 980.

Variance between petition alleging that car on which employé was working was stopped, and then started with a sudden jerk, and evidence that it was moving slowly when

the jerk occurred, held immaterial. *St. Louis S. W. Ry. Co. of Texas v. Brown* (Civ. App.) 163 S. W. 383.

The variance between the petition, in an action for injury to an employé alleging that the accident happened as the employé reached forward to unloosen a rail, and the evidence that the employé made one step in the direction of the end of the rail and was then struck by it as it swung around, was immaterial. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

A petition for injuries to a railroad construction employé held sufficient to raise the issue of last clear chance by the engineer and fireman of the work train to avoid the injury. *Angelina & N. R. Ry. Co. v. Due* (Civ. App.) 166 S. W. 918.

The petition of a servant, injured by the fall of a scaffold, alleging that the master failed to furnish the servant a safe place in which to work, in that the scaffold was weak and insufficient, warrants the admission of evidence that the scaffold was insufficient because the material furnished was inadequate. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

Where a petition did not allege how defendant could have obtained, as alleged, knowledge of the defective character of a locomotive, proof that the hydrostatic test would have disclosed such knowledge was admissible. *National Ry. of Mexico v. Ligarde* (Civ. App.) 172 S. W. 1140.

Variance between a petition for injuries to an employé and evidence held not fatal. *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974.

Evidence of the absence of foot brake and fender on the machine which injured plaintiff held admissible under the pleadings. *Magnolia Paper Co. v. Duffy* (Civ. App.) 176 S. W. 89.

A complaint held to allege various acts of negligence by the master, on proof of any one of which recovery might be had. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

The petition in a servant's action held, notwithstanding specific averments of negligence, to warrant the jury in referring the facts relating to the master's control of the building to the acts of negligence averred. *Id.*

In an employé's action for injuries, evidence that defendant's physician had mistakenly diagnosed the case and given improper treatment held inadmissible under the pleadings. *W. P. Carmichael Co. v. Miller* (Civ. App.) 178 S. W. 976.

A petition averring that the defendant master was negligent in employing an incompetent and reckless engineer, will support recovery on evidence showing negligence in retaining such a person in its employ. *Texas & Pacific Coal Co. v. Gibson* (Civ. App.) 180 S. W. 1134.

If servant alleges injuries due to defective furnace, in that it was extremely hot, and contained fumes and gases, proof of either is sufficient, and the verdict for the servant need not be set aside for failure to prove all. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

In action for injuries by lumber company's servant, held, that there was no material variance between pleadings and proof as to coemployé's failure to take precautions against collision. *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

In servant's action for injuries caused by a strain received in carrying heavy timber, with others, where petition alleged that timber weighed 1,000 pounds, proof that timber weighed from 350 to 700 pounds held not improper or a variance. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

226. — **Actions for injuries in operation of railroads.**—Where excessive speed and failure to sound whistle or bell were the only grounds of negligence alleged, plaintiff could not recover for the death of a mule on proof that the engineer failed to keep a proper lookout. *Southern Kansas Ry. Co. of Texas v. Graham* (Civ. App.) 155 S. W. 653.

That defendant railroad company failed to select a suitable grade of coal as fuel held not available to sustain a recovery for destruction of plaintiff's building, where no such ground of negligence was alleged. *Missouri, K. & T. Ry. Co. of Texas v. Marshall* (Civ. App.) 160 S. W. 427.

In an action for damage to realty by the construction and operation of railroad terminal yards adjacent thereto, in which plaintiff alleged that the facts alleged had materially impaired the comfortable use and enjoyment of the premises, and that the passing trains interfered with conversation, and threw smoke and dust, evidence was admissible whether persons living on the property experienced or complained of annoyance. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 165 S. W. 560.

Where a licensee, while using a path near a railroad track, was struck by a piece of scantling hurled from a moving train and the negligence claimed was that the railroad company failed to remove the scantling from the floor of the car, evidence of the roughness of the track, which tended, with the motion of the train, to throw the scantling out of the car, was admissible. *St. Louis Southwestern Ry. Co. of Texas v. Bathrop* (Civ. App.) 167 S. W. 246.

In an action for the death of a pedestrian at a crossing, proof that deceased was crossing in one direction is not a material variance from an allegation that he was crossing in the opposite direction. *Texas & P. Ry. Co. v. Marrujo* (Civ. App.) 172 S. W. 588.

Where the petition alleged that the explosion of the locomotive causing plaintiff's injury was due to excessive steam pressure and it did not appear that nothing but such pressure could have caused the explosion, plaintiff could not recover except on proof that the explosion was caused as alleged. *McGraw v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 182 S. W. 417.

Where the petition, in an action for injury from a boiler explosion, alleged merely that the explosion was caused by defendant's negligence, without specifying any negligent acts, it was not essential that plaintiff prove any particular negligent acts. *Galveston, H. & S. A. Ry. Co. v. Perez* (Civ. App.) 182 S. W. 419.

Where the petition averred that plaintiff's horses being driven down the road were frightened by the operation of a hand car, proof that the car was technically a push car which was being shoved by the railroad company's servants does not constitute a variance. *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

In an action for damages to an automobile by a street car, an instruction that plain-

tiffs could not recover unless defendant was guilty of negligence in some of the ways alleged in plaintiff's petition was not error. *Adams & Washam v. Southern Traction Co.* (Civ. App.) 188 S. W. 275.

**Art. 1828. [1192] [1196] Defensive matters pleaded by plaintiff.**—When the defendant sets up a counter claim against the plaintiff, the plaintiff may plead thereto under the rules prescribed for the pleadings of defensive matter by the defendant so far as the same may be applicable; and whenever, under such rules, the defendant is required to plead any matter of defense under oath, the plaintiff shall, in like manner, be required to plead such matters under oath when relied on by him. [Acts 1913, p. 256, § 2; Act March 22, 1915, ch. 101, § 2.]

See explanatory note under art. 1827.

Cited, *Texas & P. Ry. Co. v. Martin Bros.* (Civ. App.) 167 S. W. 792; *Tabet Bros. Co. v. Higginbotham* (Civ. App.) 170 S. W. 118; *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

**Replication or subsequent pleading.**—Amended or supplemental pleading, see ante, art. 1824.

To defeat the five-year statute of limitations because of the forgery of a deed under which the defendant claims, plaintiff must affirmatively allege and prove the fact. *Hanks v. Houston Oil Co. of Texas* (Civ. App.) 173 S. W. 635.

Where defendant merely denied that alleged agent was its agent, estoppel with respect to extent of his authority held available to plaintiff though not pleaded. *International Fire Insurance Co. v. Black* (Civ. App.) 179 S. W. 534.

In an action against the surety on a note, who had been discharged by an extension of time to the maker, waiver of the discharge by the surety if relied on must be pleaded. *Cruse v. Gau* (Civ. App.) 193 S. W. 405.

In suit by vendors for specific performance of contract to purchase land, in which petition alleged full compliance with contract, and defense was that vendors had not complied with provision of contract requiring him to furnish abstract showing merchantable title, if plaintiff desired to depend upon waiver of defects in title, it should have pleaded such waiver in alternative and proved it. *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

In suit by vendors for specific performance of contract to purchase land, if receipt signed by some of purchasers to vendors for commissions for selling land would estop such purchasers to deny that title of vendors was imperfect, it could be of no avail to vendors, if not pleaded. *Id.*

**Verification.**—In an action against a railroad for injuries to a passenger on its car, where the defendant pleaded that plaintiff was guilty of contributory negligence in standing in the aisle, which plea was not denied under oath, the action of the court in refusing to instruct a verdict for defendant was proper. *Texas City Terminal Co. v. Petifils* (Civ. App.) 182 S. W. 19.

**Art. 1829. [1193] [1197] Denial of special defenses presumed.**—It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted. [Acts 1913, p. 256, § 3; Act March 22, 1915, ch. 101, § 3.]

See explanatory note under art. 1827.

Cited, *Tabet Bros. Co. v. Higginbotham* (Civ. App.) 170 S. W. 118; *Word v. Bank of Menard* (Civ. App.) 170 S. W. 845; *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025; *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644; *Fink v. Brown* (Civ. App.) 183 S. W. 46.

**Implied denial.**—Under Rev. Civ. St. 1911, art. 1829, the issue of ratification of unauthorized terms of a broker's contract of sale held raised, in an action for commissions, by the allegation of the answer that defendant refused to accept said terms, and to that extent repudiated the contract. *Wilson v. Burch* (Civ. App.) 162 S. W. 1018.

Untraversed allegations in an answer, denying that the relation of attorney and client existed as alleged by the petition, are not admitted. *Morris v. Brown* (Civ. App.) 173 S. W. 265.

**Decisions under Act of 1913.**—Plaintiff's failure to deny a special defense, as required by the statute, held waived by failure to call the court's attention thereto. *Gulf, C. & S. F. Ry. Co. v. Loyd* (Civ. App.) 175 S. W. 721; *Texas & P. Ry. Co. v. Tomlinson* (Civ. App.) 169 S. W. 217; *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

Under this article, as amended by Acts 33d Leg. c. 127, it is unnecessary for plaintiff to traverse allegations in the answer which are the mere converse of those in the petition. *Galveston, H. & S. A. Ry. Co. v. Pennington* (Civ. App.) 166 S. W. 464.

This article, as amended by Acts 33d Leg. c. 127, had no application to an amended answer filed before the act took effect. *Pugh v. Werner* (Civ. App.) 166 S. W. 698.

Under this article, as amended by Acts 33d Leg. c. 127, a carrier sued for delay in transportation of live stock held entitled to judgment by default, where plaintiff failed to reply to the allegations of the answer. *Texas & P. Ry. Co. v. Martin Bros.* (Civ. App.) 167 S. W. 792.

Though facts set up in a plea of *res adjudicata*, not being specially denied, were confessed as provided under Acts 33d Leg. c. 127, yet the confession did not extend beyond the facts alleged so as to render the plea good as *res adjudicata*, where the facts themselves were not sufficient. *Seedig v. First Nat. Bank of Clifton* (Civ. App.) 168 S. W. 445.

This article, as amended, providing that special matters of defense not answered shall be taken as confessed, does not apply to matters anticipated by the petition. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

In action for breach of contract to buy cattle, allegation of petition that plaintiff had told defendant he would have to reship and sell elsewhere held not a joinder of issue on defendant's plea that plaintiff had agreed to a rescission, within this article, as amended by Acts 33d Leg. c. 127 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1829). *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 1829, plaintiff cannot object to the introduction of deeds because of defects in their execution, where his supplemental petition admitted their execution and he had offered them in evidence. *Brazile v. Blaylock* (Civ. App.) 177 S. W. 155.

A complaint held to allege a cause of action on a policy as well as on the appraisers' award, so that verdict could not be directed under Acts 33d Leg. c. 127, § 3 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1829), for plaintiff's failure to deny new matter attacking the award. *Orient Ins. Co. of Hartford, Conn., v. Harmon* (Civ. App.) 177 S. W. 192.

Judgment for plaintiff will not be reversed on the theory that defendant was entitled to judgment because of failure to deny certain allegations of the answer, where plaintiff had been refused permission, at the close of the evidence, to file a pleading denying such allegations. *Doering v. Denison* (Civ. App.) 178 S. W. 1018.

Where defendants' allegation, in their amended answer, that they were entitled to a credit was denied in plaintiffs' first supplemental petition, issue was properly joined though plaintiffs failed to deny the same allegation, again made in a second amended answer. *Bybee v. Austin & Riley* (Civ. App.) 180 S. W. 287.

Where a railroad by cross-action sought to recover freight charges under an interstate rate, and plaintiff traversed, as required by statute, that the freight was such as to fall within the rate, the burden was on the road to prove the fact. *International & G. N. Ry. Co. v. Carter* (Civ. App.) 180 S. W. 663.

In action under the Louisiana statutes for the killing of stock, judgment on the pleadings under Texas statutes as amended by Acts 1913, c. 127, held not to be given for failure to reply to an answer setting up absence of negligence, as such allegation was not affirmative matter, and a denial of the truth of a denial is not warranted. *Kansas City Southern Ry. Co. v. Johnson* (Civ. App.) 180 S. W. 944.

Either before or after Acts 33d Leg. c. 127, relating to pleadings in the district and county courts, held, that plaintiff who did not deny a paragraph in defendant's answer admitting a balance due to plaintiff, without putting such answer in evidence, was entitled to judgment for such balance. *Fletcher v. Grimm* (Civ. App.) 181 S. W. 550.

Under this article plaintiff, whose petition fixed the accrual of her cause of action within two years from the filing of her suit, was not required to specially deny defendant's plea of the two-year statute of limitations. *Galveston, H. & S. A. Ry. Co. v. Wallraven* (Civ. App.) 182 S. W. 21.

Under this article, as amended by Acts 33d Leg. c. 127, plaintiffs' reply to defendant's answer, that they had not sufficient information to form a belief, was tantamount to a denial to the extent of putting defendant upon proof of the fact alleged. *Canode v. Sewell* (Civ. App.) 182 S. W. 421.

The act of 1913 held to apply only to facts not already in issue by virtue of plaintiff's petition; and where petition pleads a fact which is denied by defendant in its answer, plaintiff need not replead it. *Kansas City, M. & O. Ry. Co. v. Cole* (Civ. App.) 183 S. W. 137.

In salesman's action for compensation under an oral contract, reply to defendant's answer setting up affirmative matter held a sufficient denial under this article, as amended in 1913, in force at the trial, so as to prevent any admission of the facts alleged in the answer. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

Under this article, as amended by Acts 33d Leg. c. 127 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1829), where answer alleged contributory negligence, supplemental petition denying such allegations was a proper pleading, notwithstanding substantial repetition of allegations as to nature of injuries. *Caffarelli Bros. v. Bell* (Civ. App.) 190 S. W. 223.

## CHAPTER THREE A

### VERIFICATION OF PLEADINGS

#### Articles 1829a, 1829b.

Repealed by Act March 22, 1915, ch. 101, p. 155. See explanatory note under Art. 1827.

Cited, *Tabet Bros. Co. v. Higginbotham* (Civ. App.) 170 S. W. 118; *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

**Decisions under repealed act.**—Under Acts 33d Leg. c. 127 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1827-1829b, 1902) and Rev. St. 1911, art. 12, the jurat to the verification of plaintiff's petition held sufficient, though undated. *Order of Aztecs v. Noble* (Civ. App.) 174 S. W. 623.

Under Acts 33d Leg. c. 127 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1829b), the failure to verify a petition could not be made the basis of a valid objection. *Id.*

A motion to set aside a default of a corporate defendant which failed to answer in time is sufficient under Acts 33d Leg. c. 127, §§ 5, 6 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1829a, 1829b), where officer verifying motion merely stated he believed averments of the answer to be true, but did not state the sources of his information and belief. *International Travelers' Ass'n v. Peterson* (Civ. App.) 183 S. W. 1196.

Verification to entire petition held not subject to general demurrer, where allega-

tions made from personal knowledge were separable from those on information and belief and were sufficient in themselves to entitle plaintiff to relief prayed for. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

Act March 3, 1913 (Acts 33d Leg. c. 127), repealed by Act March 22, 1915 (Acts 34th Leg. c. 101), relating to a mere matter of procedure, is no longer available even on appeal. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

If all plaintiff church trustees be regarded as several, any one of them could verify a pleading for use of all, under specific provision of *Vernon's Sayles' Ann. Civ. St. 1914, art. 1829b. Queen Ins. Co. v. Keller* (Civ. App.) 186 S. W. 359.

Under the verification of Pleading Act 33d Leg., an affidavit by an attorney that the pleadings were true to the best of his knowledge formed on information from his client is insufficient. *Thomas v. Kean* (Civ. App.) 190 S. W. 847.

## CHAPTER FOUR

### VENUE OF SUITS

Art.	Art.
1830. Venue, general rule.	1832. If plea sustained, no dismissal, but transfer.
1831. Issuing process and taking depositions, no waiver of plea; use of deposition; cause transferred when; costs.	1833. When plea sustained, order changing venue, record transmitted.
	1834. When water course or highway is county boundary.

#### Article 1830. [1194] [1198] Venue, general rule.

Cited, *Sublett v. Hurst* (Civ. App.) 164 S. W. 448; *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28; *Anderson, Clayton & Co. v. Terry* (Civ. App.) 167 S. W. 1; *Noble v. Broad* (Civ. App.) 167 S. W. 1; *First Nat. Bank of New Boston v. Daniel* (Civ. App.) 172 S. W. 747; *Gensberg v. Neely* (Civ. App.) 187 S. W. 247.

**General rule.**—Plea of privilege to the venue by defendants, nonresidents of the county of suit and not alleged to have done any act for which they might be sued therein, held properly sustained. *Woelfel v. McKean, Eilers & Co.* (Civ. App.) 175 S. W. 476.

A "cause of action" is composed of plaintiff's primary right and defendants' act or omission, and if both occur in one county, entire cause arose there, and fact that measure of damages requires evidence of matter arising elsewhere is immaterial. *Graves v. McCollum & Lewis* (Civ. App.) 193 S. W. 217.

Since Rev. St. 1911, art. 1830, provides for bringing suit in county where defendant resides, except in specified cases, plaintiff has burden of showing that his right to sue in another county comes within exception. *Id.* See, also, *Durango Land & Timber Co. v. Shaw* (Civ. App.) 165 S. W. 490.

**Transfer of cause of action.**—See notes under subdivision 4, post.

**Residence.**—Evidence in support of defendant's plea of privilege to be tried in another county held to show that defendant and his wife were residents of such other county when the suit was filed. *Weller v. Guajardo* (Civ. App.) 174 S. W. 673.

Although "residence" may not be acquired by temporary visits, a man may have several different residences. Evidence that defendant spent seven days every ten days or two weeks at a ranch inside the state where he maintained a house which his family lived in for various periods sustains a verdict that such place was his residence, although he owned a home, sent his children to school, paid poll taxes, and voted outside the state. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

**Contract fixing venue.**—See *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098; notes under Art. 1911.

A stipulation in a contract of sale fixing a venue of any suit growing out of it is valid. *Texas Moline Plow Co. v. Biggerstaff* (Civ. App.) 185 S. W. 341.

**Objections and waiver.**—In view of Const. Tex. art. 5, § 8, and Rev. St. Tex. 1911, art. 1705, giving the District Court original jurisdiction in suits to enforce liens on land, article 1830, subd. 12, does not deprive the District Courts of jurisdiction of the subject-matter of suits to enforce liens on land situated in other counties, but only gives the defendant a privilege to be sued in the county in which the land is situated, which may be waived and is waived by defaulting or by appearing and consenting to judgment, notwithstanding the omission of any statutory provision authorizing a plea of privilege in such case; this not justifying the inference that no such plea is recognized. *Brophy v. Kelly*, 211 Fed. 22, 128 C. C. A. 382.

In the absence of a plea or demurrer interposed by defendants, the district court of one county has jurisdiction to try title to land located in another. *Knoles v. Clark* (Civ. App.) 163 S. W. 369.

Unless objection is made in apt time, any district court can take jurisdiction of a suit by the state to cancel patents to public lands regardless of the defendant's domicile or the location of the land. *Sullivan v. State* (Civ. App.) 164 S. W. 1120.

A plea of privilege to be sued in the county of the defendant's residence is a preliminary plea, which is waived if not fully presented before announcement of ready for trial, and evidence offered on the trial could not be relied on in support of such a plea. *Texas, G. & N. Ry. Co. v. Berlin* (Civ. App.) 165 S. W. 62.

The right of defendant to be sued in the county of his residence, though a valuable right, is only a personal privilege which may be waived. *Wade v. Crump* (Civ. App.) 173 S. W. 538.



Under Vernon's Sayles' Ann. Civ. St. arts. 1827, 1830, 1832, 1833, 1903, 2062, and District Court Rules 53, 55 (142 S. W. xxi), bill of exceptions to overruling of plea of privilege held unnecessary. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

Plea of privilege to be sued in county of defendant's residence held not waived by absence under belief that case would be called on following day. *Johnson v. Waggoner* (Civ. App.) 190 S. W. 835.

— **Participation in cause in general.**—Defendant, proceeding to trial on the merits without invoking the court's action on its plea of privilege, waives the privilege. *United S. S. Co. v. Houston Packing Co.* (Civ. App.) 177 S. W. 570; *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

Where a foreign corporation, after the suggestion of those who had been served as its agents that they were not such agents had been overruled, appeared to claim its privilege to be sued in another county, and thereafter answered to the merits, it submitted to the jurisdiction of the court. *Atchison, T. & S. F. Ry. Co. v. Stevens* (Civ. App.) 192 S. W. 304; *Atchison, T. & S. F. Ry. Co. v. Ayers* (Civ. App.) 192 S. W. 310.

Plea of privilege to be sued in the county of defendant's residence held not waived by granting of continuances contested by such defendant. *Johnson v. Waggoner* (Civ. App.) 190 S. W. 835.

— **Cross-Complaint.**—Where defendant filed a cross-petition in an action for fraud in inducing plaintiff to purchase land, defendant thereby waived its plea of privilege to be sued in the county of its domicile. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28.

A defendant who invokes the jurisdiction of the trial court by a cross-action thereby waives his plea of privilege to be sued in the county and precinct of his residence. *Barnard & Moran v. Williams* (Civ. App.) 166 S. W. 910.

Defendant, by pleading a counterclaim and going to trial without calling his plea of privilege to the attention of the court, waived it. *Harper v. Dawson* (Civ. App.) 167 S. W. 311.

A county made a defendant in a suit in another county, which reconvened, asking for affirmative relief, held to have thereby waived its plea of privilege. *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

### 3. Non-residents and persons whose residence is unknown.

**Non-residents.**—This subdivision is subordinate to the requirement that suits concerning realty be brought in the county where the land lies, when invoked by defendants. *Knos v. Clark* (Civ. App.) 163 S. W. 369.

That one of the defendants is a resident of another state does not authorize suit against him and a resident defendant in the county of plaintiff's residence, in which the resident defendant does not reside. *Sublett v. Hurst* (Civ. App.) 164 S. W. 448.

Where one of the defendants, though temporarily sojourning in Texas, had rented a farm for the current year in Oklahoma, while the other defendant was a resident of Texas in a county other than that in which plaintiff resided, suit could not be brought against both in the county where plaintiff resided. *Id.*

That a nonresident contracted to perform an obligation in the county of plaintiff's residence and might be sued there did not authorize suit in the county of plaintiff's residence against a codefendant residing in another county. *Id.*

Exceptions Nos. 3, 5, and 12, and paragraph 30 construed, and held that, in action against nonresident on purchase money notes payable in named county, and to foreclose vendor's lien, plaintiff had option to bring suit in another county in which he lived. *Holcomb v. Williams* (Civ. App.) 194 S. W. 631.

### 4. Several defendants residing in different counties; effect of assignment.

**Residence of co-defendants.**—Cashier of a bank who was a minor and whose father did not reside in the county held to have a residence in the county where the bank was located so as to permit the bringing of an action against him and the surety on his bond in that county under this subdivision. *First State Bank of Mt. Calm v. Fain* (Civ. App.) 157 S. W. 454.

Where defendants converted cotton belonging to their codefendants, who drew a sight draft upon them for the highest price of the cotton during the season of the conversion, the sale of the draft to a bank with a statement of the facts does not operate as a transfer and guarantee of the payment of the indebtedness, and defendants do not lose their privilege to be sued in the county of their residence. *First Nat. Bank v. Martin & Co.* (Civ. App.) 162 S. W. 1029.

Where an action was brought in the county of the residence of one of the defendants, the other defendants' plea of privilege to be sued in the county of their residence was properly overruled. *Abney v. Roberts* (Civ. App.) 166 S. W. 408.

Where a defendant was in court on the petition of plaintiff and on a cross-petition of a codefendant, and an amended cross-petition presented after satisfaction of plaintiff's claim merely repleaded the cross-petition, the plea of defendant's privilege to be sued in another county was properly overruled. *Closner v. Chapin* (Civ. App.) 163 S. W. 370.

Evidence in an action for trespass held to show that the trespass was joint by both defendants, so that the action was maintainable against both in the county where only one resided. *Fairchild v. Wilson* (Civ. App.) 168 S. W. 409.

Where the petition alleged a joint trespass by two defendants, and charged them jointly with wrongful occupancy and use of plaintiff's land, and the action was brought in the county where one defendant resided, the court properly directed a verdict against the other defendant's plea of privilege to be sued in the county of his residence. *Id.*

Where, by a carrier's negligence, plaintiff's cattle escaped from the cars and returned to ranch of D. who refused to surrender them, he could not be joined and required to answer for the conversion, in an action by plaintiff against the carrier, in a county other than that in which he resided. *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

Held, that payee and owner of draft drawn by defendant residing in H. county, and guaranteed by party residing in T. county, where plaintiff also resided, might sue thereon in T. county. *Harper v. Winfield State Bank* (Civ. App.) 173 S. W. 627.

An action for conversion by both defendants may be brought in the county in which either resides. *Kempner v. Vaughn* (Civ. App.) 174 S. W. 695.

One of several subscribers to stock sued for sums due on corporate stock is not entitled to assert his privilege to be sued in the county of his residence, where the venue was located in a county where other subscribers resided. *Rich v. Park* (Civ. App.) 177 S. W. 184.

Insurer's interpleader against the widow of insured residing in D. county and a creditor residing in K. county held properly brought in K. county, and that the widow's subsequent appointment as administratrix in D. county gave her no privilege to have the cause transferred to D. county. *Joy v. Citizens' Life Ins. Co.* (Civ. App.) 178 S. W. 590.

Under art. 1840, action against husband and divorced wife for necessities purchased during the marriage held properly brought in the county of the wife's residence. *Trammell v. Neiman-Marcus Co.* (Civ. App.) 179 S. W. 271.

Where plaintiff, who had a cause of action against defendant, also had causes of action against two others, the action may be brought in the county of the residence of such others, instead of that of defendant. *Bank of Garvin v. Freeman* (Sup.) 181 S. W. 187.

In creditor's action against codefendants brought in the county where some of them resided to recover amount of note claimed to have been delivered to payees in trust for creditors, plea of privilege by transferee of the note held properly overruled. *Barcus v. Parlin-Orendorf Implement Co.* (Civ. App.) 184 S. W. 640.

Under arts. 1830 and 1842, a bona fide holder for value of an account could bring suit thereon against a bank, assignor and guarantor of the account, jointly with the parties primarily liable thereon, resident elsewhere, in the county of the residence of the bank. *Carver Bros. v. Merrett* (Civ. App.) 184 S. W. 741.

A broker assuming to negotiate a contract for principal is liable to the contracting party for the damages resulting from breach of his warranty of authority; so that suit may be brought against the principal and broker in the county where the broker resides. *San Angelo Cotton Oil Co. v. Houston County Oil Mill & Mfg. Co.* (Civ. App.) 185 S. W. 887.

In a suit for a specific fund to which other litigants make claim, the venue of the action may be laid in any county in which any one or more of the proper or necessary defendants reside. *Roaring Springs Independent School Dist. v. McAbee* (Civ. App.) 187 S. W. 431.

In suit on cause of action jointly and severally against all defendants, brought in county of a defendant's residence, court properly overruled plea of privilege of other defendants to be sued in county of residence of one of them. *Roberts v. Abney* (Civ. App.) 189 S. W. 1101.

In suit against bank and two nonresident individuals seeking injunctive relief, if such relief is ancillary to real cause of action, based on contract, plea of individuals of privilege to be sued in their own county must be sustained. *Garrett v. First State Bank of Kingsville* (Civ. App.) 192 S. W. 313.

In action by stockholder of bank, who alleged that certificates of stock were unlawfully taken from his possession by individual defendants, and who sought injunction against the bank and the individuals to restrain transfer of the stock to their names, the injunctive relief held not merely ancillary to the chief cause of action, and therefore the plea of privilege of the individuals to be sued in their own county should have been overruled. *Id.*

**Retroactive operation of amendment.**—The merits of a plea of privilege held controlled by the law in force when the suit was instituted by filing a demurrable petition, and not by Act July 1, 1913 (Acts 33d Leg. c. 177; *Vernon's Sayles' Ann. Civ. St. 1914, art. 1830*), though a second plea of privilege and an amended petition were filed after such act became effective. *Crowell Independent School Dist. v. First Nat. Bank of Benjamin* (Civ. App.) 174 S. W. 878.

**Improper joinder.**—If another, joined as defendant, was not a proper party to the action, such joinder would not give the court jurisdiction of an action against the other defendant brought in a county other than domicile. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

Where the petition, in an action against the payees of a check, and the bank on which it was drawn to enjoin enforcement of the check, did not allege a tort or joint contract, so as to make the bank liable, the joinder of the bank did not confer jurisdiction to maintain an action against the payees in a county out of their domicile. *Id.*

Defendant W., who owed plaintiff only on a note, not being a necessary party to an action against defendant G. for money which came into its hands for the benefit of plaintiff, under an arrangement with W. that it should pay it to plaintiff, joinder of W. as defendant did not deprive G. of right to be sued in the county of its domicile. *Galveston Dry Goods Co. v. Mitchell* (Civ. App.) 171 S. W. 278.

This subdivision means that, if one who is a proper or necessary party defendant resides in the county in which the action is brought, other defendants residing in other counties may be joined with him. *San Angelo Cotton Oil Co. v. Houston County Oil Mill & Mfg. Co.* (Civ. App.) 185 S. W. 887.

**Assignment of cause of action.**—See notes under preliminary paragraph of this article in *Vernon's Sayles' Civ. St. 1914*.

Where a claim for breach of contract was assigned to plaintiff for a valuable consideration, the assignor guaranteeing payment, the denial of defendant's plea of privilege to be sued in the county of its residence, rather than that of the residence of plaintiff and his assignor, was not error. *McFadden, Weiss, Kyle Rice Milling Co. v. Ardis* (Civ. App.) 167 S. W. 5.

Suit brought prior to Act April 16, 1913 (Acts 33d Leg. c. 177), amending this subdivision, held properly brought in the county of the residence of an assignor who guaranteed the account and was made a party. *Anderson v. Jackson* (Civ. App.) 168 S. W. 54.

Evidence, in an action by the assignee of a claim, held not to show that the assign-

ment was fraudulently made to affect the venue. *Rhome Milling Co. v. Cunningham* (Civ. App.) 171 S. W. 1081.

Whether an assignment was in bad faith to enable the assignee to sue the assignor and the debtor in the county of the residence of the assignor held for the jury. *Eaton v. Klein* (Civ. App.) 174 S. W. 331.

Under the provision of this subdivision as to transfer or assignment of a chose in action, in an action on contract against a school district in which the receiver of plaintiff's assignor is a party defendant, the school district may claim a transfer under article 1832 to the county of its situs notwithstanding nonresidence of such receiver. *Roaring Springs Independent School Dist. v. McAbee* (Civ. App.) 187 S. W. 431.

The fact that a fire insurance policy had been assigned held not to give assignee right to institute suit in a county other than that specified by agreement of assignor in power of attorney. *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098.

### 5. Contract in writing to be performed in a particular county.

**Place of performance.**—An action on notes payable in G. county, where the makers resided, but providing that if they were not paid at maturity they should become due and payable at the payee's office in H. county, was properly brought in H. county. *Newman v. Buffalo Pitts Co.* (Civ. App.) 160 S. W. 657.

Where defendant did not assume to pay the account sued on as his personal debt, but merely agreed with another, who resided in H. county, to pay such debt out of a fund deposited by such other in defendant's bank for the payment of such account by defendant, pursuant to an agreement between them, defendant should be sued in the county of his residence, and not in H. county. *Power State Bank v. Texas Novelty Advertising Co.* (Civ. App.) 160 S. W. 1106.

A consignor of cotton shipped to and paid for by drafts in H. county, could not in the consignee's action to recover an overpayment, plead privilege to be sued in T. county, where he resided. *Theodore Keller Co. v. Mangum* (Civ. App.) 161 S. W. 19.

Where a written contract between a consignor of cotton and a consignee was to be performed in H. county, so that the consignor could not plead the privilege of being sued in another county, the venue for the consignee's recovery of overpaid freight charges might also lie in H. county, in order to avoid a multiplicity of suits. *Id.*

A contract for the sale of corn for delivery on cars in the county of the residence of the seller binds the seller to perform in that county, and an action for breach must be brought therein. *Southwestern Grain & Seed Co. v. Blumberg* (Civ. App.) 162 S. W. 1.

Defendant must have contracted in writing to perform the contract relied on to authorize suing him in such county. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

Where defendant induced plaintiff to purchase an orchestral piano by false representations that it was a new one, and later refused to keep it in repair in B. county as it contracted to do, plaintiff was entitled to sue in B. county for rescission and a temporary injunction, returnable there, restraining a transfer or suit on unpaid purchase-money notes pendente lite, under subds. 5, 7. *Royal Amusement Co. v. Columbia Piano Co.* (Civ. App.) 170 S. W. 278.

A contract expressly agreeing to pay money at a certain place, lays the venue of the action in that place. *Parrott v. Peacock Military College* (Civ. App.) 180 S. W. 132.

Where the broker made written memorandum thereof, and sent copies to the parties, which they retained, there is a contract in writing within the statute. *People's Ice & Mfg. Co. v. Interstate Cotton Oil Refining Co.* (Civ. App.) 182 S. W. 1163.

There is a contract in writing to perform an obligation in G. county, where a seller ships with draft attached to bill of lading obligating delivery of possession there. *Id.*

Under exceptions 5 and 24, a corporation can be sued only in the county of its residence for breach of a written contract made and to be performed there. *Texas Moline Plow Co. v. Biggerstaff* (Civ. App.) 185 S. W. 341.

Where a bond incorporated by reference a contract declaring that bond should be enforceable in county of owner's residence, sureties, though nonresidents, could be sued in such county under fifth exception. *Hillyer-Deutsch Lumber Co. v. Clark* (Civ. App.) 185 S. W. 1038.

In action by buyer of apples for breach of seller's oral agreement to make good damage if buyer would accept shipment, seller's plea of privilege held properly sustained. *Gensberg v. Neely* (Civ. App.) 187 S. W. 247.

Where plaintiff sold cotton to defendants residing in the same county to be delivered at place of business of defendants' partnership in another county and tendered it at time fixed for delivery, and the firm refused to accept, plaintiff's action for damages should be brought in county where he and defendants resided, and not in the other county. *Hughes v. Turner* (Civ. App.) 189 S. W. 87.

Where plaintiffs purchased cattle in Tarrant county, giving draft on a Comanche county bank in payment, their action should be brought in Tarrant county. *Graves v. McCollum & Lewis* (Civ. App.) 193 S. W. 217.

Bank in which money to pay for silo was deposited, held entitled to be sued in its own county by seller, who claimed right under forfeiture clause in contract to collect price in another county. *Ames Portable Silo & Lumber Co. v. Worrall* (Civ. App.) 194 S. W. 480.

Exceptions Nos. 3, 5, and 12, and paragraph 30, construed, and held that, in action against nonresident on purchase money notes payable in named county, and to foreclose vendor's lien, plaintiff had option to bring suit in another county in which he lived. *Holcomb v. Williams* (Civ. App.) 194 S. W. 631.

### 6. Executors, administrators, etc.

**Representatives included.**—This subdivision does not require a suit instituted against a deceased to be transferred to the county of administration after his personal representative is substituted as defendant pursuant to article 1838. *Williams v. Harris* (Civ. App.) 193 S. W. 403.

**Actions included.**—Claim of defendant creditor on insurer's interpleader to establish right to proceeds of policy as between the creditor and the widow and administratrix of insured held not a money demand against the estate so that administratrix was not entitled to have the cause transferred to the county of her residence. *Joy v. Citizens' Life Ins. Co.* (Civ. App.) 178 S. W. 590.

### 7. Cases of fraud, and defalcation.

*Cited, Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

**Place of commission of fraud or defalcation.**—Defendant's act in stopping payment of checks executed to plaintiff by him for the purpose of gambling with plaintiff with the proceeds, while intoxicated and doped by plaintiff, held not to constitute a fraud. *Lloyd v. Robinson* (Civ. App.) 160 S. W. 128.

In a suit in a county other than that of defendant's residence, evidence held insufficient to show that the fraudulent misrepresentations upon which the action was based were made in the county wherein the venue was laid. *Durango Land & Timber Co. v. Shaw* (Civ. App.) 165 S. W. 490.

Where defendant induced plaintiff to purchase an orchestral piano by false representations that it was a new one, and later refused to keep it in repair in B. county as it contracted to do, plaintiff was entitled to sue in B. county for rescission and a temporary injunction, returnable there, restraining a transfer or suit on unpaid purchase-money notes pendente lite, under subds. 5 and 7. *Royal Amusement Co. v. Columbia Piano Co.* (Civ. App.) 170 S. W. 278.

A suit to rescind for fraud a contract for the exchange of stock held properly brought in the county where the fraudulent representations were made. *Continental Trust Co. v. Cowart* (Civ. App.) 173 S. W. 588.

Petition held not to allege a cause of action for fraud within this subdivision. *Cloyd v. Sacra* (Civ. App.) 175 S. W. 456.

Wife's action charging husband's fraud upon her in B. county, that some of the property was there situated, and seeking to establish a resulting trust, held properly brought in B. county. *Fox v. Fox* (Civ. App.) 179 S. W. 883.

Under art. 2308, venue of action on itemized account for debt was properly changed to county of defendant's residence, though plaintiff charged fraud, conversion, and a swindle perpetrated upon him in another county by defendant; article 1830, subds. 7, 9, having no application. *Neal v. Barbee* (Civ. App.) 185 S. W. 1059.

Defendant insurance company was not chargeable with any fraud of its soliciting agent, in his individual contract to obtain a loan for plaintiff. *San Antonio Life Ins. Co. v. Trammell* (Civ. App.) 188 S. W. 718.

Any fraud of defendant insurance company's president, through telephoning from E. county to plaintiff in H. county, that it would do what its agent promised in B. county, was not committed in B. county. *Id.*

**Burden of proof.**—Plaintiff has the burden of proving that the misrepresentations were made in the county where suit was brought. *Durango Land & Timber Co. v. Shaw* (Civ. App.) 165 S. W. 490; *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

### 8. When attachment sued out or levied.

**Wrongful suits and writs.**—An action for damages for wrongfully suing out a writ of garnishment could not be maintained in the county in which the garnished funds were levied upon instead of that of defendant's domicile, under subdivision 9, construed with this subdivision. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

### 9. Cases of crime, offense, or trespass.

**Trespass.**—An action for damages for wrongfully suing out a writ of garnishment could not be maintained in the county in which the garnished funds were levied upon instead of that of defendant's domicile, under art. 1830, cl. 9, construed with subd. 8. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

Assignee of a bank held entitled to sue in Titus county a copartnership resident elsewhere whose agent had converted securities pledged by the partnership with the bank. *Carver Bros. v. Merrett* (Civ. App.) 184 S. W. 741.

Under art. 2308, venue of action on itemized account for debt was properly changed to county of defendant's residence, though plaintiff charged fraud, conversion, and a swindle perpetrated upon him in another county by defendant; article 1830, subds. 7, 9, having no application. *Neal v. Barbee* (Civ. App.) 185 S. W. 1059.

Where a party elects to sue on a contract, rather than for his damages for fraud, trespass, or conversion in relation thereto, he waives the tort as a fact fixing the venue of his suit. *Id.*

Action for conversion of personalty may be brought in the county of plaintiff's residence if one defendant has converted some of the property there. *Garden Valley Mercantile Co. v. Falkner* (Civ. App.) 189 S. W. 300.

### 12. Foreclosure of mortgage or other liens.

**Foreclosure.**—This subdivision does not deprive the District Courts of jurisdiction of the subject-matter of suits to enforce liens on land situated in other counties, but only gives the defendant a privilege to be sued in the county in which the land is situated, which may be waived. *Brophy v. Kelly*, 211 Fed. 22, 128 C. C. A. 382.

Where a vendor delivered a deed in connection with a contract of sale, an action to foreclose a vendor's lien, based on the assumption of acceptance of the deed, was not a personal one for specific performance which must be brought in the county of defendant's residence. *Capps v. Edwards* (Civ. App.) 180 S. W. 137.

This subdivision includes foreclosure of equitable vendors' liens. *Id.*

In action against nonresident on purchase money notes payable in named county, and to foreclose vendor's lien, plaintiff had option to bring suit in another county in which he lived. *Holcomb v. Williams* (Civ. App.) 194 S. W. 631.

**13. Suits for partition.**

Cited, *McDade v. Vogel* (Civ. App.) 173 S. W. 506; *Teel v. Brown* (Civ. App.) 185 S. W. 319.

**14. Suits concerning lands.**

In general.—The statute fixing the venue of actions against nonresidents in the county of plaintiffs' residence is subordinate to the statute requiring suits concerning realty to be brought in the county where the land lies, when invoked by defendants. *Knoles v. Clark* (Civ. App.) 163 S. W. 369.

This subdivision does not affect jurisdiction of other courts in such suits, furnishing only venue privilege of which party may avail himself. *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

Actions included.—The venue of trespass to try title is in the county where the land lies. *Lester v. Hutson* (Civ. App.) 167 S. W. 321; *Knoles v. Clark* (Civ. App.) 163 S. W. 369.

A suit to enjoin a judgment alleged to be void for alteration and to remove the cloud cast by a record of such judgment upon plaintiff's land should be removed in its entirety to the county where the judgment was rendered, under art. 4653, and article 1830, subd. 17, and not retained as to the removal of the cloud in the county where the land was situated, under this subdivision. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

The district court of the county in which land lies has jurisdiction of a suit of trespass to try title to the land, and to remove a cloud from the title, cast by a claim of defendant to a lien under a deed of trust, and a judgment of the district court of another county foreclosing it. *Clarke v. A. B. Frank Co.* (Civ. App.) 168 S. W. 492.

Where the main purpose of an action was to set aside a trust deed, and injunction against sale by the trustee was ancillary, suit was properly brought in county where land lay, instead of in county of residence of trustee or beneficiary as provided for injunction cases by art. 4653. *Palmer v. Jaggaers* (Civ. App.) 180 S. W. 907.

A suit upon purchase-money notes and to foreclose vendor's lien held suit to fix lien on land, and not governed by exception 14. *Holcomb v. Williams* (Civ. App.) 194 S. W. 631.

Under subs. 14, 24, 28, and 30, and article 2147, held, that a suit against the receiver of a foreign corporation to cancel deed of trust and a note given for stock was properly brought in county where land was situated. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

**17. Injunctions, etc.**

See art. 4653, post, and notes.

Application in general.—A suit to enjoin a judgment alleged to be void for alteration and to remove the cloud cast by a record of such judgment upon plaintiff's land should be removed in its entirety to the county where the judgment was rendered, under art. 4653 and article 1830, subd. 17, and not retained as to the removal of the cloud in the county where the land was situated, under art. 1830, subd. 14, fixing the venue of suits to remove clouds upon title. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

Where a suit to enjoin the execution of a judgment was not brought in the county in which the judgment was rendered, as required by art. 4653, and article 1830, subd. 17, the objection is one of venue, and not of jurisdiction, and it was proper to transfer the suit to the proper county, instead of dismissing it. *Id.*

Art. 4653, and article 1830, subd. 17, do not apply where the judgment is void on its face or upon the record, but do apply where the alleged invalidity is an alteration which is not shown to be material. *Id.*

**19. Suits against counties.**

See *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

School district.—In view of art. 2822 school district may be sued in other courts than those of its domicile. *Crowell Independent School Dist. v. First Nat. Bank of Benjamin* (Civ. App.) 174 S. W. 878.

**20. Heads of departments.**

Head of department.—The game, fish, and oyster commissioner is not the head of an executive department within the meaning of this subdivision. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

Nature of suit.—This subdivision does not apply to a suit for damages and injunction. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

**24. Private corporations, associations, etc.**

Cited, *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119; *Texas & P. Ry. Co. v. Conway* (Civ. App.) 182 S. W. 52.

Application in general.—Under subs. 14, 24, 28, and 30, and article 2147, held, that a suit against the receiver of a foreign corporation to cancel deed of trust and a note given for stock was properly brought in county where land was situated. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

Agency, representative, or office.—A railroad corporation required by art. 6423 to maintain its general offices in a designated county may not rely on a plea of privilege to be sued in another county. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

Where officers of Arizona corporation resided in Ft. Worth, Tarrant county, Tex., and from office there proceeded all company's business, county was seat of principal office of company in Texas within this subdivision and special statutes applicable to receiverships for corporations and suits against receivers (articles 2146, 2147, 2150). *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

**Place of contract or performance.**—Suit on claim for defendant's delivery of damaged goods bought in C. county to be delivered there, and paid for by taking up draft, might be brought in C. county. *Rhame Milling Co. v. Cunningham* (Civ. App.) 171 S. W. 1081.

A corporation can be sued only in the county of its residence for breach of a written contract made and to be performed there. *Texas Moline Plow Co. v. Biggerstaff* (Civ. App.) 185 S. W. 341.

Cause of action growing out of contract for insurance, application for which was made in B. county and accepted in E. county held not to arise in B. county, within this exception. *San Antonio Life Ins. Co. v. Trammell* (Civ. App.) 188 S. W. 718.

Plaintiff's application for insurance in defendant providing that it shall not be bound by any statements unless incorporated therein, verbal statements of the soliciting agent to plaintiff give rise to no cause of action against defendant, within exception 24. *Id.*

Part of the cause of action for breach of warranty of a silo arose in the county where it was constructed and became defective, so that the company which sold the material for it could be sued therein. *Texas Kalamazoo Silo Co. v. Alley* (Civ. App.) 191 S. W. 774.

## 25. Suits for damages against two or more railroad, etc., companies or receivers, etc.

Cited, *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 165 S. W. 546; *Gulf C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

**Injury to freight or other property.**—The object of this exception is to relieve a shipper of the burden of proving the damage accruing on each line, and the initial carrier is liable to him for all the damage, and an apportionment is necessary only as between the initial and connecting carriers. *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925.

## 26. Suits for personal injuries, against railroad corporations, assignees, receivers, etc.

**Application in general.**—Where a switchman was injured in interstate commerce, and could under subd. 26 have sued in any county where the carrier had an agent, and he sued in one county, his cause did not continue transitory, but, being fixed, survived to his administrator in that county. *St. Louis Southwestern Ry. Co. of Texas v. Smitha* (Civ. App.) 190 S. W. 237.

**Residence.**—"Residence," within this subdivision, means living in a particular locality, as distinguished from "domicile," which means living in such locality with intent to make it a fixed and permanent home. *Pecos & N. T. Ry. Co. v. Thompson*, 167 S. W. 801, 106 Tex. 456, reversing judgment (Civ. App.) 140 S. W. 1148.

A nonresident suing a railroad company in a county in which it operates its road, or has an agent, must show that he was a resident of some other state, territory, or country at the time of the accident. *Id.*

A laborer who went from place to place in search of work, and working at short intervals, and who obtained work as a brakeman at a town, and continued in such employment for something over a month to the time of an injury, was either a resident or a transient, and an action for his injury must be brought in the county in which it occurred or in the county in which he resided. *Id.*

Provision that nonresident may sue railroad in any county where operating or having agent, refers to residence at time suit is commenced, allowing plaintiff, resident in Texas when injured but removing from state thereafter, to commence action in county other than that of injury or residence at time of injury. *Texas & P. Ry. Co. v. Conway* (Civ. App.) 182 S. W. 52.

## 28. Foreign, private or public corporations, etc.

Cited, *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

**Application in general.**—A foreign railway corporation may be sued in a county in which it is doing business through the instrumentality of a domestic corporation which operates a line of railway connecting with the foreign corporation's line at the state boundary. *Atchison, T. & S. F. Ry. Co. v. Ayers* (Civ. App.) 192 S. W. 310; *Atchison, T. & S. F. Ry. Co. v. Stevens* (Civ. App.) 192 S. W. 304.

Under subsds. 14, 24, 28, and 30, and article 2147, held, that a suit against the receiver of a foreign corporation to cancel deed of trust and a note given for stock was properly brought in county where land was situated. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

## 30. Venue prescribed by particular law.

**Venue expressly given.**—Under subd. 30 of this article and article 47<sup>44</sup>, a suit on an accident certificate held maintainable in the county where the insured died, though the certificate and the company's by-laws provided that all suits should be instituted in Dallas county, Tex. *International Travelers' Ass'n v. Branum* (Civ. App.) 169 S. W. 389.

Suits against receivers, venue for which is prescribed by art. 2147, come within terms of this subdivision. *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

Exceptions Nos. 3, 5, and 12, and paragraph 30, construed, and held that, in action against nonresident on purchase money notes payable in named county, and to foreclose vendor's lien, plaintiff had option to bring suit in another county in which he lived. *Holcomb v. Williams* (Civ. App.) 194 S. W. 631.

Under subsds. 14, 24, 28, and 30, and article 2147, held, that a suit against the receiver of a foreign corporation to cancel deed of trust and a note given for stock was properly brought in county where land was situated. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

**Art. 1831. Issuing process and taking depositions, no waiver of plea; use of deposition; cause transferred when; costs.**

Cited, *Hickman v. Swain* (Sup.) 167 S. W. 209.

**Transfer of cause.**—In view of arts. 1903, 2308, articles 1831-1833 authorize the transfer, on defendant's plea of privilege, of a case pending in the justice court in one county, to such a court in another. *Dalhart Ice & Electric Co. v. Tinsley* (Civ. App.) 180 S. W. 619.

**Art. 1832. If plea sustained, no dismissal, but transfer.**

Cited, *Hickman v. Swain*, 106 Tex. 431, 167 S. W. 209; *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

**Transfer.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1830, providing that transfer or assignment of a chose in action shall not change the venue, in an action on contract against a school district in which the receiver of plaintiff's assignor is a party defendant, the school district may claim a transfer under this article to the county of its situs notwithstanding nonresidence of such receiver. *Roaring Springs Independent School Dist. v. McAbee* (Civ. App.) 187 S. W. 431.

**Art. 1833. When plea sustained, order changing venue, record transmitted.**

Cited, *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119; *Durango Land & Timber Co. v. Shaw* (Civ. App.) 165 S. W. 490; *Hickman v. Swain* (Sup.) 167 S. W. 209.

**Transfer in general.**—In view of arts. 1903, 2308, articles 1831-1833 authorize the transfer, on defendant's plea of privilege, of a case pending in the justice court in one county, to such a court in another. *Dalhart Ice & Electric Co. v. Tinsley* (Civ. App.) 180 S. W. 619.

**Appeal.**—Under this article an order sustaining a plea of privilege to be sued in another county is appealable before trial. *Hickman v. Swain*, 106 Tex. 431, 167 S. W. 209.

Under this article judgment of district court sustaining plea of privilege to the venue held reviewable in Court of Appeals. *Woelfel v. McKean, Eilers & Co.* (Civ. App.) 175 S. W. 476.

Under arts. 1827, 1830, 1832, 1833, 1903, 2062, and District Court Rules 53, 55 (142 S. W. xxi), bill of exceptions to overruling of plea of privilege held unnecessary. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

**Art. 1834. [1195] [1199] When water course or highway is county boundary.**

Cited, *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

CHAPTER FIVE

PARTIES TO SUITS

<p>Art. 1835. Suits by and against counties, etc. 1836. Suits by executors, etc. 1839. Suits for wife's separate property. 1840. Against husband and wife for necessities, etc. 1841. For wife's debts, etc.</p>	<p>Art. 1842. Several obligors in any contract may be joined, etc. 1843. Parties conditionally liable may be sued, when. 1848. Additional parties may be brought in, when.</p>
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**Article 1835. [1196] [1200] Suits by and against counties, cities, etc.**

**Actions by or for use of county.**—Where a county was the owner of an undivided interest in certain land, it could maintain trespass to try title to recover the entire land as against one deraining title under a void grant to another county. *Yoakum County v. Slaughter* (Civ. App.) 160 S. W. 1175.

**Suits against cities.**—Where city purchased land for reservoir, failed to pay part of price, and vendor sought to foreclose implied lien on part of land not used for reservoir, foreclosure was not in conflict with Const. art. 11, § 9, prohibiting forced sale of city's property owned for public purposes. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

**Suit against school district.**—A school district is a necessary party to a suit to enjoin the collection of taxes assessed in the district, since, under art. 2853, a school district is a municipal corporation, and under this article all suits against such corporations must be against it in its corporate name. *Vance v. Miller* (Civ. App.) 170 S. W. 838, judgment reversed (Sup.) *Miller v. Vance*, 180 S. W. 739.

**Garnishment.**—The provisions in the charter of a city that it and its officers, or agents, shall not be "required to answer any writ of garnishment against the city" exempts absolutely the city from garnishment. *Morgan v. City of Beaumont* (Civ. App.) 157 S. W. 207.

**Liability and consent of state to be sued.**—The state, under the law, cannot be sued without permission of the Legislature. *Rowland v. Klepper* (Civ. App.) 189 S. W. 1033.

**Art. 1836. [1197] [1201] Suits by executors, etc.**

**Authority of administrator to sue—To cancel deed.**—Where property is conveyed by a decedent during his lifetime, whether bona fide or in fraud of creditors, such property forms no part of estate, and administrator is without authority to sue for its recovery. *Powell v. Stephenson* (Civ. App.) 189 S. W. 570.

**Capacity in which to sue.**—An executor, in his individual capacity, may sue to establish his title to the property of the estate claimed by a cestui que trust. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

**Foreign executor.**—In suit by divorced wife for funds paid into bank for husband in payment for community property, executors named in such husband's will, one qualified in another state, but neither in Texas, had no standing to sue for the fund. *Eaber v. Galbraith* (Civ. App.) 186 S. W. 345.

**Suits by guardian.**—The general guardian of minors may maintain suit against them, a guardian ad litem being appointed for them. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

**Art. 1839. [1200] [1204] Suits for wife's separate property.**

**Actions by husband.**—Under this article, the husband may sue for personal injuries to the wife; recovery therefor being, by Acts 34th Leg. c. 54, art. 4621, declared her separate property. *Texarkana Telephone Co. v. Burge* (Civ. App.) 192 S. W. 807.

**Actions by wife.**—Where a husband's brutality forced his wife to leave him, he was guilty of abandonment, and she might thereafter sue as a feme sole. *Texas City Terminal Co. v. Thomas* (Civ. App.) 178 S. W. 707.

**Joinder of husband and wife.**—In a suit to recover homestead property, the wife was not a necessary party, as her claim of homestead would have been no defense thereto, and she was bound by the judgment rendered against her husband. *Brown v. Foster Lumber Co.* (Civ. App.) 178 S. W. 787.

Art. 1841 was not repealed by Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624); therefore a husband was a necessary party to a suit to partition land claimed by his wife. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

In husband's suit, making purchaser at tax sale defendant, to vacate and set aside judgment under which sale was made, and for a decree for land, though wife of owner was not a necessary party making her a party did not injuriously affect defendant, but purchaser, while not a party to the tax suit, was a necessary party. *Rowland v. Klepper* (Civ. App.) 189 S. W. 1033.

In action to vacate judgment against wife and others, husband was a necessary party, and other defendants in former action were not necessary parties. *Shaw v. Proctor* (Civ. App.) 193 S. W. 1104.

**Art. 1840. [1201] [1205] Against husband and wife, for necessities, etc.**

**Venue.**—Under Rev. St. 1911, art. 1840, action against husband and divorced wife for necessities purchased during the marriage held properly brought in the county of the wife's residence. *Trammell v. Neiman-Marcus Co.* (Civ. App.) 179 S. W. 271.

**Art. 1841. [1202] [1206] For wife's debts, etc.**

**Repeal.**—This article was not repealed by Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624); therefore a husband was a necessary party to a suit to partition land claimed by his wife. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

**Competency as witness.**—Under this article, a husband, being a necessary party to a suit to partition land claimed by his wife, was not rendered a competent witness concerning an alleged gift to his wife by a decedent, notwithstanding Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624). *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

**Art. 1842. [1203] [1207] Several obligors to any contract may be joined, but, etc.**

**Construction and application.**—In an action on note, person not shown to be either maker or indorser held not a necessary or proper party, though pencil notation recited that he had assumed its payment. *Grisham v. Connell Lumber Co.* (Civ. App.) 164 S. W. 1107.

The maker of a note is the proper party defendant in an action thereon, and, if he desires that the payee shall be made a party, he must request it. *Tardio v. First Nat. Bank of Bryan* (Civ. App.) 166 S. W. 1180.

In an action on a note and to foreclose the lien upon a collateral note, the payor of the collateral note, who indorsed it in blank, was not a necessary defendant. *Baldwin v. Jordan* (Civ. App.) 171 S. W. 1016.

Where the contractors had indorsed the draft drawn on the trustees of a school district and transferred by them to the plaintiff bank, they were properly joined with the trustees as defendants. *Crowell Independent School Dist. v. First Nat. Bank of Benjamin* (Civ. App.) 174 S. W. 878.

Guarantors are bound by a separate contract to that of their principal, and cannot as a rule be made parties in suit against him. *Young v. Bank of Miami* (Civ. App.) 175 S. W. 1102.

In an action against a railroad ticket agent to recover money converted to his own use, the surety company which had guaranteed the railroad against loss by the agent's defalcation was properly joined as a party defendant. *Stephenville North & South Texas Ry. Co. v. Orier* (Civ. App.) 178 S. W. 984.

In action on note, parties alleged by defendant to be primarily liable thereon held proper parties to the action. *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993.

Under arts. 1830 and 1842, a bona fide holder for value of an account could bring suit thereon against a bank, assignor and guarantor of the account, jointly with the parties



primarily liable thereon, resident elsewhere, in the county of the residence of the bank. *Carver Bros. v. Merrett* (Civ. App.) 184 S. W. 741.

Arts. 587, 1842, 1843, 6336, and 6337, providing the manner of suing obligors other than the principals on notes, bills, etc., apply only to suits against obligors not primarily liable, so that it is not necessary before suing the absolute guarantor of a note to sue the principal, nor to make him a party. *Slaughter v. Morton* (Civ. App.) 185 S. W. 905.

There was no misjoinder of parties, where a life insurance company sued together its agent and the sureties on his bond securing his indebtedness to the company. *Shaw v. Southland Life Ins. Co.* (Civ. App.) 185 S. W. 915.

If, for valuable consideration, party assumes debt of another to third party, third party may sue his debtor and party assuming debt jointly, or either separately. *Roberts v. Abney* (Civ. App.) 189 S. W. 1101.

**May sue one or more joint promisors.**—A dismissal as to one bondsman in a bail bond does not prevent judgment being entered against another. *Hodges v. State*, 73 Cr. R. 634, 165 S. W. 613.

A bail bond is a joint and several obligation, and the dismissal as to one bondsman thereby does not prevent judgment being entered against another. *General Bonding & Casualty Ins. Co. v. State*, 73 Cr. R. 649, 165 S. W. 615.

Without discontinuance as to principal on note, who had not appeared, for some reason mentioned in arts. 1842 and 1843, the judgment against the surety was erroneous. *Dunn v. Home Nat. Bank* (Civ. App.) 181 S. W. 699.

### **Art. 1843. [1204] [1208] Parties conditionally liable may be sued, when.**

Cited, *Young v. Bank of Miami* (Civ. App.) 161 S. W. 436; *Dunn v. Townsend* (Civ. App.) 163 S. W. 312; *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 933.

**In general.**—Under this article held, that replevy bond, if not enforceable against nonresident defendant, can at least be enforced by judgment against sureties. *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Sup.) 180 S. W. 101, answer to certified questions conformed to (Civ. App.) 181 S. W. 567.

In an action on a note executed by defendant's father which was claimed defendant agreed to pay, the father is not a necessary party. *Thornburg v. Moon* (Civ. App.) 180 S. W. 959.

Without discontinuance as to principal on note, who had not appeared, for some reason mentioned in arts. 1842 and 1843, the judgment against the surety was erroneous. *Dunn v. Home Nat. Bank* (Civ. App.) 181 S. W. 699.

Arts. 587, 1842, 1843, 6336, and 6337, providing the manner of suing obligors other than the principals on notes, bills, etc., apply only to suits against obligors not primarily liable, so that it is not necessary before suing the absolute guarantor of a note to sue the principal, or to make him a party. *Slaughter v. Morton* (Civ. App.) 185 S. W. 905.

Under Const. art. 5, § 16, and Rev. St. 1911, arts. 3206, 3457, held, that county court had exclusive original jurisdiction of claim against administrator of deceased principal in a note signed by sureties and secured by mortgage, in view of this article, giving right to sue sureties alone, though one of the sureties was dead, and administration was pending on his estate. *Putney v. Livingston* (Civ. App.) 192 S. W. 259.

**Principal a fugitive from justice.**—In view of this article, permitting suit against the surety on a bail bond alone, he cannot complain that the proceeding was dismissed as to the principal, where the latter was a refugee from justice. *General Bonding & Casualty Ins. Co. v. State*, 73 Cr. R. 649, 165 S. W. 615.

**Insolvency of principal.**—Even though the maker of a note was insolvent, held, that a surety who gave notice to the payee and others as to whom he was surety upon non-payment, requesting that suit be brought, pursuant to art. 6329, was discharged from liability upon failure to bring suit within the time provided by article 6330 against all parties; the bringing of such suit not being excused by articles 6336 or 1843. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

### **Art. 1848. [1208] [1209] Additional parties may be brought in, when.**

**Bringing in new parties—In General.**—In an action for an accounting by an agent against another agent, both being interested in commissions on the sale of stock, joinder of another agent as defendant, who had been brought into the transaction by the first defendant after plaintiff had left the country, held proper. *Harless v. Haile* (Civ. App.) 174 S. W. 1020.

There is no misjoinder of parties where the original payee of the note is brought in after suit by the indorsee against the maker, and the maker prays either that the note be canceled, or that he have judgment against the payee. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

One who, as between himself and a defendant in any suit, is the principal obligor may be impleaded by such defendant, who may have judgment over against such primary obligor. *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 933.

Under this article the court may refuse to allow additional parties defendants, when not necessary parties, where such action would prejudice plaintiff's right by delaying the trial. *Id.*

In action by bank on note, where maker alleged as defense agreement with payee for deposit with plaintiff bank of moneys realized from sale of lands out of which note was to be paid, the payees of such note were proper parties to be impleaded as cross-defendants. *Seabrook v. First Nat. Bank of Port Lavaca* (Civ. App.) 192 S. W. 314.

Where makers of note are sued thereon, if they desire to recover against a stranger to note primarily liable therefor, the proper method is to make him a party to suit, and plea in abatement for misjoinder of parties cannot be sustained. *Randals v. Pecos Valley State Bank* (Civ. App.) 192 S. W. 363.

— **Application and proceedings thereon.**—Under this article the court may, in its discretion, determine whether plaintiff shall be compelled to delay the trial to meet

new matter set up by a third person, not a necessary party for the first time at the moment of the trial. *Coleman v. Garvin* (Civ. App.) 158 S. W. 185.

**Time for bringing in new parties.**—Under this article, where court abused its discretion in determining whether delay was reasonable in bringing in party, the appellate court will review it. *Grand Lodge, Colored K. P. of Texas v. Cleo Lodge No. 222, Colored K. P.* (Civ. App.) 189 S. W. 764.

**Substitution.**—Where a defendant is in court in his individual capacity, an amended petition complaining of him in his capacity as executor and trustee, based on the same facts, is properly allowed. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

**Intervention.**—Where the district court had jurisdiction it may, under this article, allow one asserting a laborer's lien against defendant's property which was less than the jurisdictional amount, to become a party. *Ferrell-Michael Abstract & Title Co. v. McCermac* (Civ. App.) 184 S. W. 1081; see, also, notes at end of this chapter.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**1. Persons who may or must sue as plaintiffs—Capacity and interest in general.**—The holder of a bare legal title to a chose in action may sue thereon although he has no beneficial interest. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549.

**2. — Assignee.**—An attorney to whom was assigned a contingent interest in the amount to be recovered was not such an interested party as to require that he be made a party to the action or to make the petition, which failed to make him a party subject to a plea in abatement for defect of parties. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

**3. — Consignor.**—The real parties in interest may recover in their own right for loss or damage to a shipment of live stock, though the contract of shipment was made in the name of another. *Gulf, C. & S. F. Ry. Co. v. Drahm* (Civ. App.) 163 S. W. 330.

**9. — Agent.**—Where title to land remains in his principal, a broker whose commission is contingent on closing sale has not such an interest in the sale contract as entitles him to sue for its breach, although the contract is made in the broker's name. *Hardie v. Dan Sonnentheil Co.* (Civ. App.) 192 S. W. 1161.

**10. — Partnership.**—A judgment for two partners, one of whom was not a party to the action, is invalid. *Western Grocery Co. v. K. Jata & Co.* (Civ. App.) 173 S. W. 518.

Where a sum of money was paid over by one member of a firm with the consent of the others an action to recover the same does not abate on the death of one of the partners, and judgment is valid, though neither his heirs nor legal representatives were made parties. *Broussard v. Le Blanc* (Civ. App.) 182 S. W. 78.

An action by plaintiffs individually to recover property purchased by defendant from a firm composed of the plaintiffs would not be abated, as the fact, if any, that there was no partnership when the suit was brought was a matter of evidence to be shown at the trial. *James v. Doss* (Civ. App.) 184 S. W. 623.

**15. Persons who may join as plaintiffs—In general.**—A purchaser who has transferred his interest to a subsequent purchaser, who assumed and agreed to pay the vendor's lien note, may nevertheless seek a rescission of the sale to him, in which action the subsequent purchaser may join to enable him to make complete restitution to the vendor. *Hurst v. Knight* (Civ. App.) 164 S. W. 1072.

Joinder of number of banks and their stockholders in suit to enjoin collection of tax levied upon their property at a higher proportionate value than upon that of other owners held proper. *Brown v. First Nat. Bank of Corsicana* (Civ. App.) 175 S. W. 1122.

Such joinder held proper, though one bank further alleged that defendants sought to tax it on stock in other corporations held by it. *Id.*

A joint owner of a shipment of live stock was properly joined as plaintiff in a suit for damages to the shipment; nothing in the Carmack amendment depriving him of his right to join in the suit and recover. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

All parties necessary to final disposition of main issue in a suit should be joined, and their omission will require either a dismissal or a stay of proceedings until brought in. *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216.

**20. — Joint owners, when.**—In suit for breach of landlord's written contract to rent land and furnish animals, tools, and seed for cultivation, where plaintiff alleged that land was leased to him and another jointly; such other should have been joined as plaintiff. *Dawson v. George* (Civ. App.) 193 S. W. 495.

**29. — State or United States.**—The state superintendent of public buildings and grounds could be restrained by injunction from interfering with the exercise of a right granted by a resolution of the Legislature; the action not being one against the state. *Conley v. Texas Division of United Daughters of the Confederacy* (Civ. App.) 164 S. W. 24.

Under arts. 7737 and 7738, a plaintiff may maintain trespass to try title against agents for the state in possession, where he has title and right of possession, although the state has not consented to the suit. *Imperial Sugar Co. v. Cabell* (Civ. App.) 179 S. W. 83.

**34. Persons who may be joined as defendants—In general.**—Where G. is only a stakeholder, and the question is whether defendant W. is entitled to all G. is holding, or whether plaintiff, under his contract with W., is entitled to half of it, plaintiff may join both as defendants, and have judgment against both; garnishment not being necessary. *Woolley v. Canyon Exch. Co.* (Civ. App.) 159 S. W. 403.

The bank was not a proper defendant in an action by the maker of a check given for goods purchased to cancel the check and shipping order and enjoin the prosecution of a suit to enforce payment of the check by the seller of the goods. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

In an action to recover bonus donated to trustees by real estate promoter to encourage building of railroad, purchasers in reliance thereon held proper parties. *West Texas Bank & Trust Co. v. Matlock* (Civ. App.) 172 S. W. 162.

It is proper for all parties claiming an interest in the fund in suit to be joined as defendants in order that all rights may be determined in one suit. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549.

In suit for breach of written contract to rent land and furnish animals, tools, and seed for cultivation to plaintiff and another jointly, if such other refused to join as plaintiff he should have been made a defendant. *Dawson v. George* (Civ. App.) 193 S. W. 495.

37. — **Principal and agent.**—In a suit on a contract made by an agent, where his authority to make it is questioned, the agent is a proper party defendant if sued in the alternative as liable in the event of determination that he had no such authority. *San Angelo Cotton Oil Co. v. Houston County Oil Mill & Mfg. Co.* (Civ. App.) 185 S. W. 887.

44. — **Foreclosure proceedings.**—In a proceeding to enforce a chattel mortgage, others claiming a prior lien to the mortgaged property are proper parties, and it is immaterial if the mortgagee has sold the mortgaged property. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

In an action on a note and to foreclose a vendor's lien securing it, a bank which had possession of the note and was wrongfully claiming to own it was a proper party. *Buckholts State Bank v. Harris* (Civ. App.) 194 S. W. 961.

45. **Persons who must be joined as defendants.**—In general.—Attachment plaintiffs held necessary parties to a suit to recover from the sheriff the proceeds of a sale under execution on a judgment in favor of the attachment defendant. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

If reformation of transfer of interest in business to include claim sued on was desired, held that the transferor should have been made a party. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

All parties necessary to the final disposition of main issue in a suit should be joined. *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216.

46. — **Actions on contract.**—Where defendants guaranteed certain assets of a bank on transferring them to plaintiff, the principal debtors were not necessary parties to a suit on the guaranty. *Young v. Bank of Miami* (Civ. App.) 161 S. W. 436.

50. — **Against corporation.**—Where, in a suit to cancel a note given for railroad stock, the company's assets, franchises, and charter were sold, and a receiver discharged, it was plaintiff's duty to join the managers and directors of the company, and, not having done so, a judgment of cancellation was a nullity. *Jones v. Abernathy* (Civ. App.) 174 S. W. 682.

Where, in a suit on a note secured by a deed of trust, recovery is denied because held as collateral security for a railroad note which was void, cancellation of the note and deed of trust cannot be had in the absence of either the railroad or the receiver, as parties, under *Vernon's Sayles' Ann. Civ. St. 1914, arts. 6630, 6631*. *Jones v. Nix* (Civ. App.) 174 S. W. 685.

52. — **Suits to set aside sale.**—The remaindermen who joined with a life tenant in a conveyance of the property are necessary parties without whose appearance the court cannot decree a rescission in favor of the purchasers for misrepresentation of the title. *Hurst v. Knight* (Civ. App.) 164 S. W. 1072.

In a suit for the conversion of certain horses, upon which plaintiff alleged a lien, the owner, who had contracted with plaintiff for their care, and of whom the defendant purchased, while a proper, was not a necessary, party. *Liberal Loan & Realty Co. v. Meyers* (Civ. App.) 186 S. W. 433.

53. — **Conversion.**—In suit by chattel mortgagees against purchaser of mortgaged property, for conversion, mortgagors were not necessary parties defendant, though proper parties. *T. W. Marse & Co. v. Flockinger* (Civ. App.) 189 S. W. 1017.

55. — **Principal and agent.**—In an action to foreclose chattel mortgages on machinery sold to a contractor with a county, in which the county claimed to have been an undisclosed principal, the agent was not a necessary party to a determination of the issues as between plaintiff and the county. *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

59. — **Garnishment proceedings.**—Defendant in the principal suit is not a party to garnishment proceedings, unless he voluntarily intervenes or is required to intercede. *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

60. — **Action to determine water rights.**—In suit to enjoin interference with an irrigation ditch across defendants' land, water company held not a necessary party. *Houk v. Robinson* (Civ. App.) 160 S. W. 120.

63. — **Creditors' suits.**—Adverse claimants or lienholders are necessary parties to a suit to compel the delivery of property to the judgment creditor only when such delivery would destroy the lien or claim. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

In creditor's suit on theory that note was delivered in trust for payees' creditors, payees who had transferred the note, held necessary parties. *Barcus v. Parlin-Orendorf Implement Co.* (Civ. App.) 184 S. W. 640.

65. — **To enjoin sale under execution.**—In suit to restrain sale by constable under execution to satisfy judgment, judgment creditor held necessary party defendant. *Allen v. Carpenter* (Civ. App.) 182 S. W. 430.

69. — **Suits on negotiable instruments.**—In action on note, there was no defect in parties by failure to join as defendant one not a party to note in suit, but who had been maker of note, in renewal of which note in suit had been executed by defendants, his sureties on original note. *Randals v. Pecos Valley State Bank* (Civ. App.) 192 S. W. 363.

70. — **Foreclosure proceedings.**—In a suit against a purchaser of real estate on purchase-money notes executed by him and to foreclose a vendor's lien, a subsequent purchaser of the land from the purchaser is not a necessary party. *Coleman v. Garvin* (Civ. App.) 158 S. W. 185.

The wife of the purchaser is not a necessary party to action to enforce the vendor's lien, though the purchaser has used the property as a homestead. *Waldon v. Davis* (Civ. App.) 185 S. W. 1000.

71. **Interpleader.**—That defendants pleaded on information and belief that money was due H. and not plaintiff held not to show such partiality as prevented them from interpleading H. Pulkrabeck v. Griffith & Griffith (Civ. App.) 179 S. W. 282.

Where a bank interpleaded parties claiming to own a fund, each occupied position of plaintiff, and became entitled only upon showing good title, it not being enough that the adversary party had no right. Baber v. Galbraith (Civ. App.) 186 S. W. 345.

72. **Persons entitled to intervene and grounds of intervention.**—In general.—In a tax-payers' suit to enjoin a city's enforcement of an illegal tax plan, the request of another taxpayer to intervene by a petition not seeking identical relief held properly denied. City of Houston v. Baker (Civ. App.) 178 S. W. 820.

73. — **Interest in subject of action in general.**—In a suit by a riparian proprietor to enjoin the removal of a sand bar, which obstructed the flow of salt water into the fresh-water stream by which his land was located, held, that an adjoining landowner might intervene as party plaintiff. Houston Transp. Co. v. San Jacinto Rice Co. (Civ. App.) 163 S. W. 1023.

Interveners, under their allegation that they were jointly interested with plaintiff in lands and waters in controversy, held proper parties. Moore v. Toyah Valley Irr. Co. (Civ. App.) 179 S. W. 530.

74. — **Grantees or purchasers.**—Where plaintiff asserted misrepresentations in selling him stock and mismanagement on the part of the corporate directors, others who acquired stock at different times cannot intervene as parties plaintiff. Thomas v. Barthold (Civ. App.) 171 S. W. 1071.

The purchase of a cause of action during the pendency of a suit does not vest the purchaser with a right to intervene. Duke v. Trabue (Civ. App.) 180 S. W. 910.

Where grantor suing to set aside deed claimed to have been secured through grantee's fraud, sold the land, and his pendens purchaser intervened, intervention merely added party to action, and did not change its character. Gabb v. Boston (Sup.) 193 S. W. 137.

75. — **Creditors.**—In a suit involving the disposition of the proceeds of moneys held in trust for deceased life tenant, a creditor of the life tenant may intervene, for he would be entitled to compel administration, and thus determine the right to the property. Barnett v. Elliott (Civ. App.) 160 S. W. 671.

82. **Status and rights and liabilities of interveners.**—The rights of an intervener are limited. Reinertsen v. E. W. Bennett & Sons (Civ. App.) 185 S. W. 1027.

Where, in an action to recover money, the defendant disclaims any interest and intervener claims it, but neither plaintiff nor intervener establishes title, the money should be left in the hands of the defendant. Carranza v. Hicks (Civ. App.) 190 S. W. 540.

83. **Defects and grounds of objection to parties in general.**—Mode of objection.—Omission of necessary parties is a defect rendering petition subject to general demurrer. Minear v. McVea (Civ. App.) 185 S. W. 1048; Brown v. First Nat. Bank of Corsicana (Civ. App.) 175 S. W. 1122; Oliver v. Smith (Civ. App.) 187 S. W. 528.

Objection to error in rendering judgment for two partners, one of whom was not a party to the action, may be reached by plea in abatement, demurrer, or appeal. Western Grocery Co. v. K. Jata & Co. (Civ. App.) 173 S. W. 518.

In action against owner of realty to recover commissions under contract joined with action of tort against owners and others, demurrers addressed to the question of misjoinder of parties and causes of action held properly overruled. Madden v. Shane (Civ. App.) 185 S. W. 908.

A suggestion to trial court that defendant corporation was nonexistent may be considered as raising question of right of such corporation to prosecute an appeal. Corsicana Transit Co. v. Walton (Civ. App.) 189 S. W. 307.

All parties necessary to the final disposition of main issue in a suit should be joined, and their omission will require either a dismissal or a stay of proceedings until brought in. Collin County School Trustees v. Stiff (Civ. App.) 190 S. W. 216.

84. — **Time for objection.**—A defect in parties plaintiff may be taken advantage of on appeal, even though the nonjoinder was not pleaded or the question raised in the court below. Chicago, R. I. & G. Ry. Co. v. Oliver (Civ. App.) 159 S. W. 853.

Where defendant went to trial without objecting to nonjoinder of other parties, his plea in abatement, not being filed until four days after the trial had begun, his right to object on appeal to the nonjoinder was waived. Sullivan v. State (Civ. App.) 164 S. W. 1120.

In an action by a widow for the wrongful death of her husband, an objection that she was not entitled to sue for any damages sustained by his parents should be raised upon the filing of the petition showing that the suit was on behalf of the parents; it not appearing that they were under any disability whatsoever. Galveston, H. & S. A. Ry. Co. v. Pennington (Civ. App.) 166 S. W. 464.

A defendant held not entitled to complain first on appeal of the misjoinder of plaintiff's wife. Galveston, H. & S. A. Ry. Co. v. Brassell (Civ. App.) 173 S. W. 522.

The rendering of a decree without the presence of necessary parties can be considered on appeal, though no objection was raised. Needham v. Cooney (Civ. App.) 173 S. W. 979.

Where the petition discloses on its face that there are necessary parties who were not made parties to the suit, the objection may be raised for the first time on appeal. *Id.*

In action against maker of note, plaintiff, failing to object for over a year to the joinder of cross-defendants, held to have waived its right to object on the ground that their joinder would delay the trial. Adams v. First Nat. Bank of Waco (Civ. App.) 178 S. W. 993.

In trespass to try title against a married woman sued as a feme sole, where her plea in reconvention did not disclose her coverture, plaintiff's objection, that defendant, on account of coverture, could not recover the damages set up in the plea of reconvention, came too late when first made in the motion for new trial. Hamlett v. Coates (Civ. App.) 182 S. W. 1144.

Where defendant in an action by an abandoned wife to recover damages for slander made no effort to abate the suit upon the ground of her coverture, he could not, after

judgment on the merits, first raise that objection; that being a defense which he might waive. *Davis v. Davis* (Civ. App.) 186 S. W. 775.

85. — **Pleas.**—A plea in limine by a defendant, sued in his individual capacity, which sets up a pending action by him in his individual capacity and as executor and trustee, and prays for a dismissal for want of proper parties on the ground that he should have been sued in his representative capacity, does not show defect of parties, but authorizes an amended petition stating a cause of action against him in his representative capacity to support a judgment against him in that capacity. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

86. — **Want of capacity or interest.**—The right of an executor to sue and recover property of the estate may only be questioned under a plea in abatement. *Purinton v. Broughton* (Civ. App.) 158 S. W. 227.

Where plaintiff conveyed a portion of the land in controversy to his attorneys for fees, and they prosecuted the suit successfully, defendant could not complain that the attorneys were not made formal parties. *Wickizer v. Williams* (Civ. App.) 173 S. W. 288, rehearing denied 173 S. W. 1162.

General demurrer to petition did not raise issue of form and manner of presenting suit, such as right of district trustees to maintain suit in capacity in which they sued. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

87. — **Nonjoinder of parties plaintiff.**—Want of necessary parties may be raised for the first time on appeal, and it is not necessary to plead nonjoinder. *Dawson v. George* (Civ. App.) 193 S. W. 495.

88. — **Nonjoinder of parties defendant.**—Where plaintiff showed that he held an equitable assignment of certain funds belonging to defendant in the hands of G., who was not a party, a provision of the judgment for plaintiff that he was entitled to the fund as against G. was a nullity as to G., though such fact did not invalidate the judgment; G. being a proper, though not a necessary, party. *McLane v. Haydon* (Civ. App.) 160 S. W. 1146.

94. **Waiver of defects and objections—Nonjoinder of parties plaintiff.**—Defendant must plead nonjoinder of necessary parties plaintiff. *Industrial Cotton Oil Co. v. Lial* (Civ. App.) 164 S. W. 40.

95. — **Misjoinder of parties plaintiff.**—Under rule 24 for district courts (142 S. W. xix), objection to petition for misjoinder of plaintiffs, if raised by demurrer, held waived, where it was not called to the court's attention until the filing of a special exception after several intervening terms of court. *Garner v. Jamison* (Civ. App.) 162 S. W. 940.

96. — **Nonjoinder of parties defendant.**—Where, in an action on notes, and to foreclose a mechanic's lien, the answer of the makers disclosed that they relied upon a release from their grantee, the original lienor and payee of the notes, and the defendant present owner of the property did not ask for additional parties, he could not complain after judgment because such grantee was not made a party. *Hartfield v. Greber* (Civ. App.) 160 S. W. 603.

Where a member of a firm is sued alone on its obligation, by his failure to take advantage of the omission to join his partner or the firm by proper plea in abatement he waives his right to such joinder. *Sellers v. Puckett* (Civ. App.) 180 S. W. 639.

Defect of the petition in suing one partner alone on the firm's obligation is waived by defendant not interposing plea in abatement. *Carr v. Wright* (Civ. App.) 190 S. W. 254.

97. — **Misjoinder of parties defendant.**—A misjoinder of parties may be waived. *Madden v. Shane* (Civ. App.) 185 S. W. 908.

98. — **Misnomer.**—In a suit by a private citizen under authority of Rev. St. 1911, art. 4674, to enjoin an incorporated club from maintaining a liquor nuisance, if club desired to avail itself of a misnomer in petition, it should have pleaded it in abatement, and, having appeared and answered in its proper name, it is concluded from objecting to misnomer, and court properly entered judgment against it by its proper name. *Rowan v. Stowe* (Civ. App.) 193 S. W. 434.

## CHAPTER SIX

### PROCESS AND RETURNS

Art.	Art.
1850. Requisites of citation; when to issue.	1868a. Time of answer in suit against soldier or sailor.
1851. One citation to each county where there is a defendant.	1869. Citation to defendants without the state.
1852. Citation shall contain, what.	1870. By whom served.
1853. Defendant out of county to have copy of petition.	1871. Service in such cases.
1855. Duty of officer receiving citation.	1873. Effect of such service.
1856. Service of citation within the county.	1874. Citation by publication.
1857. Service without the county.	1875. For unknown heirs or stockholders of defunct corporation.
1860. Against incorporated companies, etc.	1876. Citation by publications; requisites.
1861. Foreign corporations, how served.	1878. Return of citation by publication.
1863. Against partners.	1879. Mistake in return may be corrected.
1864. Return of citation.	1881. Entering appearance in open court.
1865. Return of citation not served.	1882. Answer constitutes appearance.
1866. Alias process.	1883. Motion constitutes appearance, when.
1867. Time of service of citation.	1885. No judgment without service.
1868. Same.	

**Article 1850. [1212] [1213] Citation to issue, when.**

Prayer for citation.—Citation directing service on defendant corporation held proper, though petition prayed that citation be served on its president. *National Equitable Society of Belton v. Tennon* (Civ. App.) 174 S. W. 978.

Allegation as to residence.—Under arts. 1827, 1850, 1852, petition in suit in county court failing to allege the residence of either of the defendants held not to authorize the clerk to command the sheriff to execute the citation therein. *Friend v. Thomas* (Civ. App.) 187 S. W. 986.

**Art. 1851. [1213] [1214] One citation to each county where there is a defendant.**

Effect of issuance to another county.—The issuance of a citation to a county other than that in which an action was tried did not establish that defendant's residence was in the county to which it was issued. *Guerra v. Guerra* (Civ. App.) 158 S. W. 191.

**Art. 1852. [1214] [1215] Citation shall contain what.**

Cited, *Pierson v. Beard* (Civ. App.) 181 S. W. 765; *Rudolph v. Hively* (Civ. App.) 188 S. W. 721.

Allegation in petition as to residence of defendants.—Under arts. 1827, 1850, 1852, petition in suit in county court failing to allege the residence of either of the defendants held not to authorize the clerk to command the sheriff to execute the citation therein. *Friend v. Thomas* (Civ. App.) 187 S. W. 986.

Effect of appearance.—Under arts. 1720, 1723, 1724, and 1852, held, that the district court had jurisdiction at a special term of a suit just begun and returnable to a succeeding term; the defendant having voluntarily appeared and requested such term. *Browder v. Memphis Independent School Dist.* (Sup.) 180 S. W. 1077, affirming judgment (Civ. App.) 172 S. W. 152.

Provisions mandatory.—The statutory requirements regarding citations must be strictly followed to acquire jurisdiction. *Kimmell v. Edwards* (Civ. App.) 193 S. W. 363; *Smith v. Buckholts State Bank* (Civ. App.) 193 S. W. 730.

Requisites and sufficiency in general.—The want of proper certainty in a citation cannot be supplied by construction or intendment. *Smith v. Buckholts State Bank* (Civ. App.) 193 S. W. 730.

Indicating time and place for appearance.—A citation, commanding defendants to answer the petition five days before it was filed, which was an impossibility, was fatally defective. *Smith v. Buckholts State Bank* (Civ. App.) 193 S. W. 730.

Indicating date of filing petition.—Under this article a citation in partition of land which failed to give true date of filing of petition held fatally defective, and court acquired no jurisdiction. *Simms v. Miers* (Civ. App.) 190 S. W. 544.

A citation was fatally defective where it failed to state the true date of the filing of plaintiff's petition, as required by this article, as such requirement is mandatory and must be observed. *Smith v. Buckholts State Bank* (Civ. App.) 193 S. W. 730.

Indicating file number.—The statute requiring the citation to contain the file number of the case is satisfied if the number is indorsed on the back thereof, though not in the body, and such citation will support a judgment by default. *Baugh v. Baugh* (Civ. App.) 175 S. W. 725.

Indicating names of parties.—Where a petition alleges that plaintiff was doing business in a trade-name, giving both his individual and trade-name, a citation issued only in the trade-name is not invalid. *McManus v. Southern Fruit Julep Co.* (Civ. App.) 171 S. W. 1033.

Where a citation did not state the name of plaintiff correctly and did not state the names of defendants at all as defendants, it was too defective to support a judgment by default. *McCauley v. Western Nat. Bank* (Civ. App.) 173 S. W. 1000.

The failure to give the names of defendants in the style of the suit in a citation will be cured if they are correctly named in the latter part of the writ. *Id.*

Where citation issued in a suit against a railroad company and the receiver did not recite that the individual defendant was receiver, such citation, though accompanied by an officer's return showing service, will not support a default judgment against the receiver as such; arts. 1852-1864 prescribing generally the requirements of citation, declaring that in suits against receivers of railroad companies service may be had upon the receiver as such. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 186 S. W. 333.

— **Must plead misnomer.**—Plaintiff, the "Abilene Independent Telephone & Telegraph Company," held not entitled to enjoin a default judgment against the "Abilene Independent Telephone Company," entered upon citation served upon it, on the ground that it was not a party to the judgment, where the employé intended to sue plaintiff, and plaintiff knew that service was intended for it. *Williams v. Abilene Independent Telephone & Telegraph Co.* (Civ. App.) 168 S. W. 402.

A person erroneously sued by an improper name is effectually bound by the judgment rendered until vacated or set aside by some legal method. *Id.*

Indicating nature of plaintiff's suit or demand.—Citation held sufficient in point of stating nature of plaintiff's cause of action, where it referred defendant to the accompanying petition for further particulars. *National Equitable Society of Belton v. Tennon* (Civ. App.) 174 S. W. 978.

Under this article citation stating that nature of plaintiff's demand was "suit to foreclose a vendor's lien retained in one certain promissory note," etc., was insufficient to support judgment by default on the note itself. *Simms v. Miers* (Civ. App.) 192 S. W. 623.

— **Variance between petition and citation.**—Under Code Cr. Proc. 1911, art. 497, and Rev. St. 1911, art. 1852, providing the procedure on the forfeiture of bail bonds and defining the requisites of citations, there is no variance between a bail bond, which

states that accused stands charged with a felony, and a judgment nisi and citation, which recite that he is by indictment accused of keeping premises for gaming. *Hodges v. State*, 73 Tex. Cr. R. 634, 165 S. W. 613.

**Art. 1853. [1215] [1216] Defendant out of county to have copy of petition.**

Cited, *National Equitable Society of Belton v. Tennison* (Civ. App.) 174 S. W. 978; *Lang v. Collins* (Civ. App.) 190 S. W. 784.

**Art. 1855. [1217] [1218] Duty of officer receiving citation.**

**Erroneous indication of date of receipt.**—Arts. 1855 and 1864 not requiring return of citation to show when it was received, a return showing it was received July 17th, instead of June 17th, held an inadvertence, so that it could not be claimed that the service made on June 22d was made at an impossible date. *Miller v. Davis* (Civ. App.) 180 S. W. 1140.

**Service by acting constable.**—Service by a person generally recognized as the acting constable is sufficient. *Kimmell v. Edwards* (Civ. App.) 193 S. W. 363.

**Art. 1856. [1218] [1219] Service of citation within the county.**

**Compliance with statutory requirements.**—The statutory requirements regarding service of citations must be strictly followed to acquire jurisdiction. *Kimmell v. Edwards* (Civ. App.) 193 S. W. 363.

**Art. 1857. [1219] [1220] Service without the county.**

Cited, *National Equitable Society of Belton v. Tennison* (Civ. App.) 174 S. W. 978.

**Service without copy of petition.**—Service of a citation without a copy of the petition certified to be such, is insufficient where defendant lives in another county, although a copy of the petition was attached to the citation and certified to state the nature of plaintiff's demand. *Kimmell v. Edwards* (Civ. App.) 193 S. W. 363.

**Art. 1860. [1222] [1223] Against incorporated companies and joint stock associations.**

Cited, *National Equitable Society of Belton v. Tennison* (Civ. App.) 174 S. W. 978.

**Service—In general.**—Under this article a citation against a corporation showing service only upon the company by name is insufficient. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

Where the petition or citation in an action against a corporation fails to direct the manner of service, to sustain a default judgment proof of proper service must be made when judgment is entered. *Id.*

**— Upon manager, when.**—Under the statute, citation in error held properly served on general manager of domestic corporation's business. *Garner v. Jamison* (Civ. App.) 162 S. W. 940.

**— In suits against receivers.**—The agent of the receivers of a railway corporation is not its agent for the service of process, though before appointment he served the road in same capacity as he serves the receivers at the time of service of citation upon him. *Webster v. International & G. N. Ry. Co.* (Civ. App.) 184 S. W. 295.

Where citation issued in a suit against a railroad company and the receiver did not recite that the individual defendant was receiver, such citation, though accompanied by an officer's return showing service, will not support a default judgment against the receiver as such; arts. 1852-1864 prescribing generally the requirements of citation, declaring that in suits against receivers of railroad companies service may be had upon the receiver as such. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 186 S. W. 383.

Citation against a receiver of a railroad company accompanied by the petition, which set forth the nature of the action and that the receiver was acting as such, is sufficient to sustain judgment against the receiver. *Id.*

**— Petition stating name of local agent.**—Where the petition alleged that a firm composed of persons named, residing in the county, was the agent of defendant, a corporation, and the citation commanded service by delivering a copy to the local agent, and the return showed service by delivery of a copy to a partner, the service was sufficient to support a default judgment. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

**Art. 1861. [1223] Foreign corporations, how served.**

**Service—In general.**—Where the citation in an action against a corporation, gives the name of its agent, and the citation contains directions requiring service on him, judgment by default may be taken without proof that the person is the agent. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

The court, on suggestion that jurisdiction over a foreign corporation was not obtained by service on an individual as agent, may consider the affidavit of the individual denying agency. *Elliott v. Standard Steel Wheel & Tire Armor Co.* (Civ. App.) 173 S. W. 616.

Under this article jurisdiction of a foreign railroad company operating in another state in a personal injury action may be acquired by service upon its general manager within this state. *El Paso & S. W. Co. v. Chisholm* (Civ. App.) 180 S. W. 156.

That a foreign railroad company maintained offices in the state where its managing officers transact the company's business which is executive and departmental constitutes "doing business in the state." *Id.*

Where the general manager of a foreign railroad company doing business within the state maintained a residence and business office in the county, service upon such general manager conferred jurisdiction in a personal injury suit. *Id.*

— **Local agent.**—A representative of a foreign corporation, soliciting stock subscriptions and district sales agencies, held not an agent on whom service of process may be made. *Elliott v. Standard Steel Wheel & Tire Armor Co.* (Civ. App.) 173 S. W. 616.

### Art. 1863. [1224] [1224] Against partners.

**Service upon one member.**—Where a firm answered in its firm name, in which it was sued, it would be presumed, in the absence of anything to the contrary, that service was properly had on some member of the firm. *Houssels v. Coe & Hampton* (Civ. App.) 159 S. W. 864.

**Service on partnership.**—Under this article jurisdiction to enter judgment by default against a partnership cannot be obtained by service on the partnership itself. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

**Harmless error.**—Any error in overruling exception to petition, on the ground of the action being against a firm and not its members held harmless, under the circumstance, and in view of this article. *Wright Bros. v. Leonard* (Civ. App.) 183 S. W. 780.

**Judgment against partners when not all served.**—See Art. 2006 and notes.

### Art. 1864. [1225] [1225] Return of citation.

**Requisites and sufficiency in general.**—Arts. 1855 and 1864 not requiring return of citation to show when it was received, a return showing it was received July 17th, instead of June 17th, held an inadvertence, so that it could not be claimed that the service made on June 22d was made at an impossible date. *Miller v. Davis* (Civ. App.) 180 S. W. 1140.

To authorize a default judgment the sheriff's return must show service as required by statute. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

An objection to a return on a citation in a divorce case on ground that sheriff wrote and signed it, although service was made by deputy, held without merit. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

**Date of service.**—Under this article a writ showing execution of citation upon an impossible date will not support a default judgment. *Friend v. Thomas* (Civ. App.) 187 S. W. 986.

**Manner of service—Parties served.**—Where the petition alleged that a firm composed of persons named, residing in the county, was the agent of defendant, a corporation, and the citation commanded service by delivering a copy to the local agent, and the return showed service by delivery of a copy to a partner, the service was sufficient to support a default judgment. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

Where citation issued in a suit against a railroad company and the receiver did not recite that the individual defendant was receiver, such citation, though accompanied by an officer's return showing service, will not support a default judgment against the receiver as such; arts. 1852-1864 prescribing generally the requirements of citation, declaring that in suits against receivers of railroad companies service may be had upon the receiver as such. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 186 S. W. 383.

— **Agent of corporation.**—The return of service of citation, in an action against an insurance company having local agents in the county, which recites that the citation was executed by delivering to one of the local agents at a specified place, "the within named defendant, in person, a true copy" of the writ, is sufficient to show service on the company. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

— **Must show service on each party.**—Return of service of citation which does not show that a true copy was delivered to each defendant does not sustain a default judgment against them. *Mansfield v. Security Trust Co. of Houston* (Civ. App.) 175 S. W. 771.

Return of service of citation, showing service by delivering to two of the defendants "in person a true copy," is fatally defective in failing to show that each of such defendants received a copy. *Kellam v. Trail* (Civ. App.) 185 S. W. 988.

**Conclusiveness of return and impeachment thereof.**—The sheriff's return of service of process imports absolute verity. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

The return of service by a sheriff or a disinterested person, authorized by law to make it, is prima facie evidence of the material facts recited therein. *Pierce-Fordyce Oil Ass'n v. Staley* (Civ. App.) 190 S. W. 814.

Evidence held insufficient to set aside return of sheriff, since deceased, showing that plaintiff was properly served with citation and copy of petition in divorce action. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

— **By parol evidence.**—On a direct attack on a judgment, as for want of service, etc., it may be shown by extrinsic evidence that one part of the record contradicts another part, so that a recital of service or want of service in a judgment may be contradicted by producing the original summons and return. *Dean v. Dean* (Civ. App.) 165 S. W. 90.

— **Testimony of single witness insufficient.**—Return in due form of a sheriff on a citation cannot be impeached by the testimony of one witness only. *Gallagher v. Teuscher & Co.* (Civ. App.) 186 S. W. 409.

In order to set aside the return of an officer on a citation, the evidence must be clear and satisfactory, and there should be two witnesses or one witness with strong corroborating evidence. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

**Recitals in judgment.**—While, if citation was not served upon minor defendants in partition, the judgment would be invalid on direct attack as to the parties to the judgment, bona fide purchasers from such parties will be protected where the judgment recites service, though the judgment be invalid for want of service. *Dean v. Dean* (Civ. App.) 165 S. W. 90.

In a suit to restrain enforcement of a judgment, a recital in the judgment of due citation held not to control allegations in petition and return on citation served, showing service out of the state. *San Bernardo Townsite Co. v. Hocker* (Civ. App.) 176 S. W. 644.



**Art. 1865. [1226] [1226] Return of citation not served.**

See *Morgan v. Oliver*, 60 Tex. Civ. App. 210, 129 S. W. 156.

**Art. 1866. [1227] [1227] Alias process.**

To another county.—Without any amendment of the petition as to allegations of the defendants' residence, an alias writ may, under this article, be issued to another county where the first writ is returned unserved. *Pierson v. Beard* (Civ. App.) 181 S. W. 765.

**Art. 1867. [1228] [1228] Time of service of citation.**

Must be served ten days before term.—Service on first of defendants less than 10 days before the term to which process was returnable cannot support a default judgment, nor would a transfer of the cause to another judicial district, under art. 30, subd. 17, cure the defect. *McCaulley v. Western Nat. Bank* (Civ. App.) 173 S. W. 1000.

Under art. 1873, as to citations, art. 1867, allowing a defendant ten days' notice, and art. 1868, excluding day of service and of return, a judgment against a nonresident defendant served by notice eight, and not ten, full days before appearance day, is void. *Grubbs v. Marple* (Civ. App.) 185 S. W. 597.

**Art. 1868. [1229] [1229] Same subject.**

See *Grubbs v. Marple* (Civ. App.) 185 S. W. 597; note under Art. 1867.

**Art. 1868a. Time of answer in suit against soldier or sailor.**—If the citation issued be served upon a defendant after he is an enlisted sailor or soldier of the United States, he shall not be required to answer to the merits of the demand during the time he is actively engaged as a sailor or a soldier in the war between the United States and Germany; provided that he shall be required to make such answer within a period of ninety days from the signing of a treaty of peace between the United States and Germany or after being discharged from service, provided that the date and place of enlistment of the defendant, and the name of the command in which he is serving, shall be proved by sworn answer or otherwise to the court within ninety days from the date of service, and in either of such events, the cause shall remain upon the docket during the period of the war, unless the defendant shall agree by written answer that the cause may be taken up and disposed of sooner, and provided that the provisions of this Act shall apply only to such soldier and sailor defendants as are, in the discretion of the trial court, necessary parties defendant to the pending litigation, and then only to such debts as were contracted by such soldier or sailor prior to his enlistment or draft into the army or navy of the United States. [Act Sept. 17, 1917, ch. 5, § 1.]

**Explanatory.**—The act amends title 37, ch. 6, Rev. Civ. St. 1911 by adding thereto, after art. 1868, another article to be known as art. 1868a.

**Art. 1869. [1230] [1230] Citation to defendant without the state.**

See Art. 2370.

Cited, *Higginbotham Bros. & Co. v. Breed* (Civ. App.) 160 S. W. 117; *Odom's Unknown Heirs v. Crews* (Civ. App.) 163 S. W. 366; *Mabee v. McDonald* (Sup.) 175 S. W. 676.

**Constitutionality.**—Whether this and the following articles, in connection with art. 1904, deny due process of law to nonresidents personally served outside the state because of the possibility that they might have only 12 days in which to appear and answer, will not be determined at the instance of a nonresident defendant who had ample time in which to appear and answer. *Brophy v. Kelly*, 211 Fed. 22, 128 C. C. A. 382.

**Service of amended petition.**—Under this article held, that the service of an amended petition is not authorized where the notice does not mention the amendment. *Baker v. Hahn* (Civ. App.) 161 S. W. 443.

**Art. 1870. [1231] [1231] By whom served.**

Cited, *Baker v. Hahn* (Civ. App.) 161 S. W. 443; *Mabee v. McDonald* (Sup.) 175 S. W. 676. And see note under Art. 1869.

**Art. 1871. [1232] [1232] Service in such cases.**

Cited, *Baker v. Hahn* (Civ. App.) 161 S. W. 443. And see note under Art. 1869.

**Art. 1873. [1234] [1234] Effect of such service.**

**Constitutionality.**—See note under art. 1869.

**Personal judgment.**—A judgment awarding execution as on a personal judgment is unauthorized in an action against a nonresident commenced by substituted service and attachment. *Baker v. Hahn* (Civ. App.) 161 S. W. 443.

Under district court rules 13 and 14 (142 S. W. xviii), an original petition after amendment is no longer part of the pleadings, and hence, in an action against a nonresident begun by attachment, the service upon the nonresident of the original petition, after amendment, will not support a judgment. *Id.*

Service of process in Missouri on a nonresident of Texas alleged in petition to be a

resident held to support personal judgment in Texas against him. *McCaulley v. Western Nat. Bank* (Civ. App.) 173 S. W. 1000.

A personal judgment rendered against a nonresident on service of citation, or nonresident notice, served on him without the state, is void. *San Bernardo Townsite Co. v. Hocker* (Civ. App.) 176 S. W. 644.

A personal judgment, rendered against a nonresident on service of process without state, and without waiver of service, or entry of appearance, is subject to collateral attack. *Id.*

Where a nonresident was sued on a personal demand, and judgment rendered against him, the whole record will be examined to determine whether jurisdiction attached. *Id.*

Under this article and art. 1867, allowing a defendant ten days' notice, and article 1868, excluding day of service and of return, a judgment against a nonresident defendant served by notice eight, and not ten, full days before appearance day, is void. *Grubbs v. Marple* (Civ. App.) 185 S. W. 597.

**Art. 1874. [1235] [1235] Citation by publication.**—Where any party to a suit, his agent or attorney, shall make oath at the time of the institution of such suit, or at any time during its progress that any party defendant therein is a nonresident of the State, or that he is absent from the State, or that he is a transient person, or that his residence is unknown to affiant, the clerk shall issue a citation for such defendant, addressed to the sheriff or any constable of the county in which such suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of such citation in some newspaper published in his county, if there be a newspaper published therein, but if not, then in the nearest county where a newspaper is published, once in each week for four consecutive weeks previous to the return day thereof. [Acts March 16, 1848, p. 106, § 13; March 15, 1875, p. 170, § 1; Acts 1879, ch. 96, p. 103; P. D. 25; Act Feb. 13, 1917, ch. 13, § 1.]

**Explanatory.**—The act amends articles 1874 and 1875, chapter 6, title 37, Revised Statutes.

**In general.**—Erroneous statement of defendant's name in process served by publication will reverse the case. *Davenport v. Rutledge* (Civ. App.) 187 S. W. 988.

**Must be strictly followed.**—The statutes relating to citation by publication are strictly construed, requiring strict compliance with essential requirement of statute. *Davenport v. Rutledge* (Civ. App.) 187 S. W. 988.

**Time and number of publications.**—Under this article publication must exist for full 28 days before the return day. *Odom's Unknown Heirs v. Crews* (Civ. App.) 163 S. W. 366.

**Will not sustain personal judgment.**—In a suit in personam, a judgment on service by publication is void. *Banco Minero v. Ross*, 172 S. W. 711, 106 Tex. 522.

This article is valid, so that service by publication upon a defendant citizen, temporarily absent from the state, gave the county court jurisdiction to render a personal judgment against him. *Mabee v. McDonald* (Sup.) 175 S. W. 676, reversing judgment *McDonald v. Mabee* (Civ. App.) 135 S. W. 1089.

**Property attached.**—A personal judgment against a nonresident is not supported by constructive service, and attachment of property. *Findlay v. Lumsden* (Civ. App.) 171 S. W. 818.

When property of nonresident defendant is in possession of court by attachment or garnishment, court has jurisdiction to establish by its judgment plaintiff's demand, and to enforce its execution out of property seized. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

**Art. 1875. [1236] [1236] For unknown heirs or stockholders of defunct corporation.**—Where any property of any kind in this State may have been granted or may have accrued to the heirs, as such, of any deceased person, or to the stockholders of any defunct corporation, any party having a claim or cause of action against them relative to such property, if their names be unknown to him, may bring his suit or action against them, their heirs or legal representatives, describing them as the heirs of such ancestor, naming him or unknown stockholder of such corporation, and if the plaintiff, his agent, or attorney shall make oath at the time of the institution of such suit, or at any time during its progress that the names of such heirs or stockholders are unknown to the affiant, the clerk shall issue a citation for such heirs or stockholders, addressed to the sheriff or any constable of the county in which such suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of such citation in some newspaper published in his county, if there be a newspaper published therein, but if not, then in the nearest

county where a newspaper is published, once in each week for four consecutive weeks previous to the return day thereof. [Acts Nov. 9, 1866, p. 125, § 1; March 16, 1848, p. 106, § 26; P. D. 5460, 26; Act Feb. 13, 1917, ch. 13, § 2.]

See note under art. 1874.

Cited, *Mabee v. McDonald* (Sup.) 175 S. W. 676; *Odom's Unknown Heirs v. Crews* (Civ. App.) 163 S. W. 366.

**Art. 1876. [1237] [1237] Citation by publication to contain same requisites as other writs.**

Cited, *Mabee v. McDonald* (Sup.) 175 S. W. 676.

**Art. 1878. [1238] [1238] Return of citation by publication.**

**Showing manner of service.**—A sheriff's return reciting that a citation was published four successive weeks, the first date being given two days before the citation was issued, is sufficient on collateral attack of judgment, since such first date will be disregarded and a publication upon a possible date during the first week presumed. *Stockyards Nat. Bank v. Presnall* (Sup.) 194 S. W. 384.

**Art. 1879. [1239] [1239] Mistake in return may be corrected.**

**In general.**—Under this article the defect in a return of service of citation, in an action against a corporation, may be cured by an amendment showing proper service. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

Where the court, in action against a corporation, permitting an amendment of return of service, found that it appeared that the person on whom service was made was at the time a local agent of the corporation, the question whether such person was the agent was judicially determined, and a default judgment was proper. *Id.*

**Art. 1881. [1241] [1241] Entering appearance in open court.**

**What constitutes appearance and effect thereof in general.**—Where, in trespass to try title, a defendant, sued in his individual capacity, appeared in his representative capacity by filing a plea alleging facts showing his representative capacity, the court acquired jurisdiction to enter judgment against him in that capacity on plaintiff amending the petition, so as to state a cause of action against him in his representative capacity. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

Where, in trespass to try title, two defendants were sued in their individual and representative capacities, and one of them entered his formal appearance and disclaimer, and the other defendant filed a plea constituting an appearance in his representative capacity, the court could render judgment for plaintiff. *Id.*

Where a petition for damages for personal injuries was revived by plaintiff's heirs by a supplemental petition filed for damages for his death, a special exception for misjoinder of causes of action held an appearance in the action for the death. *Houston & T. C. R. Co. v. Walker* (Sup.) 173 S. W. 208, reversing judgment (Civ. App.) 167 S. W. 199, motion to retax costs granted (Sup.) 177 S. W. 954.

Where a defendant who filed no answer appeared at the trial and requested the submission of special issues to the jury, he waived any defect in the citation. *Baugh v. Baugh* (Civ. App.) 175 S. W. 725.

The execution and filing of a replevy bond with a surety is no such an appearance by the defendant whose property was attached as will authorize judgment by default against defendant and its surety on the replevy bond. *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Civ. App.) 181 S. W. 567.

**Plea to jurisdiction.**—The filing of a plea to the jurisdiction held an appearance. *Banco Minero v. Ross*, 106 Tex. 522, 172 S. W. 711.

**Appearance by attorney.**—Appearance of the regular attorney of a foreign corporation as *amicus curiae*, to object to the sufficiency of service of citation on the foreign corporation, is not an appearance of the corporation. *Elliott v. Standard Steel Wheel & Tire Armor Co.* (Civ. App.) 173 S. W. 616.

**Art. 1882. [1242] [1242] Answer constitutes appearance.**

**In general.**—See *National Equitable Society of Belton v. Tennison* (Civ. App.) 174 S. W. 978.

Defendant, answering the original petition in an action for personal injuries, thereby submitted itself to the jurisdiction of the court, and was bound to take notice of all amendments filed thereafter in term time under appropriate orders. *Houston & T. C. R. Co. v. Walker* (Civ. App.) 167 S. W. 199, judgment reversed (Sup.) 173 S. W. 208, motion to retax costs granted (Sup.) 177 S. W. 954.

In view of this article and rule 7 for district and county courts (142 S. W. xvii), held, that defendant in an action for personal injury, who answered the original petition, and though objecting to amended petitions for misjoinder of causes of action, appeared at the trial and examined witnesses, submitted himself to the court's jurisdiction as to any judgment which the pleadings and evidence justified. *Id.*

Motion to quash service of citation will not prevail where the defendants appeared and answered thereto. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

Where defendant answered on the merits after denial of his motion to quash the citation on the ground that it named an impossible date for his appearance, it waived any defect in the citation. *Boles v. Adams* (Civ. App.) 173 S. W. 561.

Though citation in an action against a receiver of a railroad company was defective, receiver by subsequently denying averments of petition waives inadequacies and renders himself subject to the jurisdiction of the court. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 186 S. W. 383.

Where suit is brought to a term too late for service, defendant waives his right not to answer at that term by filing a plea of privilege before adjournment thereof, under this article. *Smith v. First Nat. Bank of Waco* (Civ. App.) 187 S. W. 233.

Under this article plea in abatement of original attachment proceeding in suit against a nonresident brought under article 240, held appearance authorizing personal judgment against defendant. *Arnold v. Pike* (Civ. App.) 191 S. W. 207.

**Answer by nonresident.**—Jurisdiction over person of defendant, a resident of Mexico, was acquired by his appearance before the court, in person and by attorneys, and his answering to the merits. *Russek v. Wind, Ems & Co.* (Civ. App.) 192 S. W. 584.

#### Art. 1883. [1243] [1243] Motion constitutes appearance, when.

Cited, *Barnard & Moran v. Williams* (Civ. App.) 166 S. W. 910.

**Motion as appearance.**—Under this article the appearance at the succeeding term by a motion to quash the citation or service, does not prevent the defendant from thereafter pleading his personal privilege. *Kelly v. A. B. Crouch Grain Co.* (Civ. App.) 174 S. W. 630.

Under Rev. St. 1879, art. 1243, a special appearance of defendant in motion to attack a service operates as a general appearance. *Osvold v. Williams* (Civ. App.) 187 S. W. 1001.

Although not served or served with void process, appearance of a nonresident defendant, however limited, operates as a general appearance at the succeeding term under Rev. St. 1879, art. 1243, conferring jurisdiction over his person. *Id.*

#### Art. 1885. [1245] [1245] No judgment without service of process, etc.

Cited, *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Sup.) 180 S. W. 101.

**Process to sustain judgment—Necessity of process.**—See *Ivey v. Davis* (Civ. App.) 178 S. W. 972.

Where, in an action to foreclose vendor's lien notes, there was an independent cross-action by one of the defendants against another defendant who was not summoned and did not appear, there could be no judgment in the cross-action against such defendant. *Swift v. Beemer* (Civ. App.) 160 S. W. 989.

Where a judgment for plaintiff was rendered on an amended petition alleging a new cause of action not set up in the original pleadings, and of the filing of which defendant had neither actual nor constructive notice, and neither he nor his counsel were present in court at the time of trial, the judgment will be set aside. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

A failure to serve process on defendant, or the making of service in a manner not in substantial accordance with the statute, is, as a rule, ground for vacating a judgment. *Dean v. Dean* (Civ. App.) 165 S. W. 90.

Ordinarily where an action is brought against a nonresident by attachment of property within the state, judgment will not be rendered until jurisdiction and service has been procured for the required length of time before the court convenes for the term at which judgment is rendered. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

In trespass to try title, no affirmative relief can be granted to the defendant, where no citation or notice of the answer was served on plaintiff, and he did not appear in court after answer was filed. *Smith v. Carr* (Civ. App.) 173 S. W. 602.

A judgment is void when no jurisdiction is acquired over the property of defendant and there is no legal service of process or appearance. *Nesom v. City Nat. Bank* (Civ. App.) 174 S. W. 715.

The court had no jurisdiction to enter a judgment over in favor of cross-complainant against codefendant not cited as to such cross-action and not filing an answer or appearing therein, though he appeared in the main suit. *Ivey v. Davis* (Civ. App.) 178 S. W. 972.

Under arts. 258, 1885, filing of bond to replevy attached property held not such an appearance as authorizes judgment without the service of process personally or by publication. *American Surety Co. of New York v. Stebbins, Lawson & Spraggins Co.* (Sup.) 180 S. W. 101, answer to certified questions conformed to (Civ. App.) 181 S. W. 567.

In suit to foreclose a vendor's lien, amended petition, describing the land so differently from the original petition as to describe different land, set up a new cause of action, of which defendant should have had notice to make judgment by default valid. *Gilles v. Miners' Bank of Carterville, Mo.* (Civ. App.) 184 S. W. 284.

A judgment by default on a cross-action by one defendant against another can be set aside where the record is silent as to service of citation in that cross-action against the defendant. *Wood v. Love* (Civ. App.) 190 S. W. 235.

Where, in suit by the state for unpaid land taxes, the amended petition sued for larger amount than the original, claiming taxes for additional years, and a number of defendants sued in the first were not joined in the second, default judgment on the amended petition without service of citation thereon was unauthorized. *Hill v. State* (Civ. App.) 190 S. W. 255.

When an amendment to petition presents new cause of action, citation must be issued thereon and served on defendant, to authorize judgment by default thereon. *Id.*

Where one defendant entered his appearance in the main cause, he was before the court for all purposes, and another defendant, who brought a cross-action, was entitled to judgment against him without the necessity of citation. *Sullivan v. Doyle* (Sup.) 194 S. W. 136.

## CHAPTER SEVEN

## ABATEMENT AND DISCONTINUANCE OF SUIT

Art. 1886. Suit not to abate where plaintiff dies, if, etc.	Art. 1897. Discontinuance as to principal obligor.
1887. Scire facias to executor, etc.	1898. Discontinuance in vacation.
1888. Death of defendant.	1899. As to defendant served.
1890. Surviving parties.	1900. When defendant has filed counter claim.
1893. Marriage of defendant feme sole.	
1896. When some defendants not served.	

**Article 1886. [1246] [1246] Suit not to abate where plaintiff dies, if, etc.**

**Application.**—Arts. 1886 and 1887 apply only to cases in which there is only one plaintiff. *McAllen v. Crafts* (Civ. App.) 166 S. W. 3.

**Art. 1887. [1247] [1247] Scire facias to executor, etc.**

See *McAllen v. Crafts* (Civ. App.) 166 S. W. 3; note under art. 1886.

**Art. 1888. [1248] [1248] Death of defendant.**

**Actions which survive.**—An action for obtaining property by fraudulent representations is not abated by the defendant's death. *Williams v. Harris* (Civ. App.) 193 S. W. 403.

**Certification of judgment to probate court.**—Under this article defendant's death and administration of his estate does not require a new proceeding in the probate court upon the claim in suit, but the proper practice is to certify the judgment in the suit to the probate court. *Lauraine v. Ashe* (Civ. App.) 191 S. W. 563.

**Transfer of cause.**—Under this article suit on notes payable in G. county secured by deed of trust on land in another county where the deceased mortgagor had resided was properly continued in G. county as against his executrix appointed in such other county. *Taylor v. Ullmann, Stern & Krause* (Civ. App.) 188 S. W. 746.

Art. 1890, subd. 6, requiring suits against personal representatives to be brought in the county of administration, does not require a suit instituted against a deceased to be transferred to the county of administration after his personal representative is substituted as defendant pursuant to article 1888. *Williams v. Harris* (Civ. App.) 193 S. W. 403.

**Art. 1890. [1250] [1250] Surviving parties.**

**Suggestion of death.**—Under this article the suggestion of such death and its entry upon the record are conditions upon which any action is permitted by the court. *McAllen v. Crafts* (Civ. App.) 166 S. W. 3.

**Dismissal of suit.**—Under Rev. St. 1911, art. 1890, it was improper for the court to dismiss a suit instituted by two plaintiffs, one of whom died pending the suit, without giving the survivors any opportunity to appear and prosecute the suit. *McAllen v. Crafts* (Civ. App.) 166 S. W. 3.

**Art. 1893. [1253] [1253] Marriage of defendant feme sole.**

**Husband necessary party.**—Where a suit was instituted against "Louisa A. Filer," cited by publication, and judgment rendered against her in that name, she having during the pendency of the suit, but before the citation as to her upon an amended petition, married "Solomon E. Hively," she was not a party to the action, and judgment as to her is void. *Rudolph v. Hively* (Civ. App.) 188 S. W. 721.

**Art. 1896. [1256] [1256] Where some of defendants not served.**

**Dismissal as to party not served.**—On a bill to enjoin tort-feasors, when one of the defendants resides beyond the jurisdiction of the court, and has not been served with process, the suit may be dismissed as to him, and proceed as to the other. *Acme Cement Plaster Co. v. Keys* (Civ. App.) 167 S. W. 186.

**Art. 1897. [1257] [1257] Discontinuance as to principal obligor.**

Cited, *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

**Provision mandatory.**—This article is mandatory; and, in the absence of a pleading alleging the facts required by the statute, a judgment against a guarantor, after the suit had been dismissed as to the principal obligor, was erroneous. *First Nat. Bank v. Thurmond* (Civ. App.) 159 S. W. 164.

**Art. 1898. [1258] [1258] Discontinuance in vacation.**

**Effect in sequestration proceedings.**—Under arts. 1898–1900, 1955, relating to voluntary dismissal, and art. 7111 as to sequestration, held that though plaintiff in sequestration dismissed suit during vacation, defendant, though he did not answer, was entitled to have all issues settled and to proceed in original suit for relief on the bond. *Hill v. Patterson* (Civ. App.) 191 S. W. 621.

**Art. 1899. [1259] [1259] Discontinuance as to defendants served, etc.**

Cited, *Hill v. Patterson* (Civ. App.) 191 S. W. 621.

**Dismissal of cross-action.**—A defendant has the right to dismiss at any time his cross-action against a codefendant. *Taylor v. Hill* (Civ. App.) 183 S. W. 836.

**Art. 1900. [1260] [1260] Discontinuance when defendant has filed counter claim.**

Cited, *Hill v. Patterson* (Civ. App.) 191 S. W. 621.

**Dismissal does not affect counterclaim.**—A defendant's cross-action against a codefendant being dismissed, the case stands as though it had never been filed, as regards the codefendant's right to plead in off-set and cross-action against him. *Taylor v. Hill* (Civ. App.) 183 S. W. 836.

Plaintiff's dismissal of his suit as to certain defendants did not affect any cross-action pleaded by them. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

Under arts. 1900, 1955, a plaintiff is entitled to nonsuit, notwithstanding counterclaim, as to his own cause without dismissal of or prejudice to the defendant's counterclaim. *Apache Cotton Oil & Mfg. Co. v. Watkins & Kelly* (Civ. App.) 189 S. W. 1083.

**Plea of intervention.**—Under arts. 1900 and 1955, an intervener, in a suit where plaintiff sought to enforce a lien for the repair of an automobile, cannot withdraw her plea of intervention without prejudice, where plaintiff joined issue on the plea and prayed that its lien be declared a superior lien. *United Motor Dallas Co. v. Hendricks* (Civ. App.) 168 S. W. 878.

**DECISIONS RELATING TO SUBJECT IN GENERAL**

**Grounds of abatement.**—Appointment of receiver pending action to compel railroad corporation to construct its road through a county seat, as required by Const. art. 10, § 9, held not ground for abatement, dismissal or suspension of such action. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582.

That defendant signed his name to the note declared on by plaintiff, under a mistake of law, is no ground for abatement of the suit; being, at most, a matter of defense. *Wood v. Priddy* (Civ. App.) 164 S. W. 1099.

Discharge of receiver of railroad company pending action against him held to bar further liability and to require dismissal of the action against him. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

An action brought by authority of the commissioner of banking in the name of a bank in the hands of a special agent appointed by such commissioner to wind up its affairs will not abate on change of commissioner. *McWhirter v. First State Bank of Amarillo* (Civ. App.) 182 S. W. 682.

— **Another action pending.**—The rule of the common law that a suit pending between two parties on a cause of action would be cause for abating a second suit between the same parties on the same cause of action in courts of the same jurisdiction is not the rule in Texas. *Cole v. State* (Civ. App.) 163 S. W. 353; *Hartzog v. Seeger Coal Co.* (Civ. App.) 163 S. W. 1055; *Wilkerson v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 171 S. W. 1041. **CONTRA**, *Sparks v. National Bank of Commerce* (Civ. App.) 168 S. W. 48; *Blassingame v. Cattlemen's Trust Co.* (Civ. App.) 174 S. W. 900.

Pendency of an action by citizens of county seat to compel a railroad company to construct its road, located within three miles of the county seat, through the town, as required by Const. art. 10, § 9, was not ground for abating a subsequent action by the state to compel the construction of the road through the town, and to recover a penalty for failure to so construct it. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582.

Where plaintiffs were entitled to maintain an action of trespass to try title, the fact that they had resorted to an action of forcible entry and detainer in the county court, which was still pending, to recover possession will not deprive them of the remedy of trespass to try title in the district court. *Bull v. Bearden* (Civ. App.) 159 S. W. 1177.

Suits cannot be maintained at the same time in two counties in different courts having concurrent jurisdiction, where the parties and the subject-matter are the same, but the court first obtaining jurisdiction will have exclusive jurisdiction of the suit. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

A pending action in another county, brought by the payees of a check against the makers to enforce its payment, could be pleaded in abatement of an action by the makers against the payees and the bank on which it was drawn to cancel the check and enjoin the payees from prosecuting their suit and the bank from paying the check. *Id.*

Any ground of objection to right of A. to have the action of B. against him for land abated by reason of pendency of the prior action of A. against B. for practically the same land, because of certain other land, being claimed in the second action, is eliminated, by A. filing, in the second action, a disclaimer as to such excess. *Miller & Vidor Lumber Co. v. Williamson* (Civ. App.) 164 S. W. 440.

As regards abatement of a second action, it is immaterial that the parties plaintiff and defendant are reversed in the two actions.—*Id.*

Dismissal of action for pendency of prior action, without giving plaintiff an opportunity to elect which action she would prosecute, held erroneous. *Wilkerson v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 171 S. W. 1041.

The jurisdiction of the district court over a suit for partition brought by plaintiff held unaffected by a pending suit in another county in which plaintiff was not a party. *McDade v. Vogel* (Civ. App.) 173 S. W. 506.

Defendant, who did not appear and who did not prosecute writ of error, cannot defeat affirmation of the judgment on certificate by showing prior suit by him to cancel the note. *Blassingame v. Cattlemen's Trust Co.* (Civ. App.) 174 S. W. 900.

Where B. sues C. to cancel two notes, and C. then sues B. in another court, on one of the notes, and obtains default judgment, pending review of such judgment, B.'s suit should be stayed. *Cattlemen's Trust Co. v. Blasingame* (Civ. App.) 184 S. W. 574.

Where plaintiff had previously sued defendant to determine title to certain lands, and judgment had been rendered from which an appeal was pending a court of another district had no jurisdiction to restrain defendant from cutting timber from such lands. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 723.

In a mortgagee's action on notes and chattel mortgage, where it appears that another suit was pending in another county by the mortgagor to cancel the notes, judgment should not be entered for plaintiff, since irreparable loss might then result to the mortgagor should he ultimately get judgment in the other suit. *Wilson v. Avery Co. of Texas* (Civ. App.) 192 S. W. 1130.

Where the payee sued on notes and to foreclose a chattel mortgage securing them in one county, and the maker thereupon sued in another county to cancel the instruments, his suit was an election of remedy, and he was bound thereby, and pending his appeal from an adverse judgment in such suit he could not have the same matters again tried in the suit on the notes. *Id.*

A cause will not be dismissed upon motion because of another action pending, but such objection must be raised by plea in abatement or of *res judicata*. *General Bonding & Casualty Ins. Co. v. Lawson* (Civ. App.) 194 S. W. 1020.

**Involuntary dismissal.**—On sustaining a plea of misjoinder of parties, it was error to finally dismiss the action, but the court should have rendered judgment of dismissal without prejudice. *Ford v. Sutherland Springs Land & Town Co.* (Civ. App.) 159 S. W. 876.

In an action on a contract which was shown to be unlawful, it is proper to render judgment in favor of defendants rather than of dismissal. *Pictorial Review Co. v. Pate Bros.* (Civ. App.) 185 S. W. 309.

A petition which states two separate causes of action which were misjoined may be corrected by dismissal as to one of the causes of action. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 189 S. W. 997.

In action in county court on a note, there being a plea of failure of consideration in the answer in addition to cross-action in excess of the court's jurisdiction, such plea should have been submitted to the jury, notwithstanding dismissal of the cross-action. *Billings v. Southern Supply Co.* (Civ. App.) 194 S. W. 1170.

**Reinstatement.**—Where a case continued at the January term, 1911, was inexplicably dropped from the docket of the next term, which was in November, held, that plaintiff's motion filed in November, 1912, to reinstate should be granted. *William Finck & Co. v. Nacogoches Mercantile Co.* (Civ. App.) 163 S. W. 590.

The denial of plaintiff's motion to reinstate does not have the effect of the entry of an order dismissing it *nunc pro tunc*, on defendant's motion for dismissal for want of prosecution. *Id.*

Where a final judgment was rendered dismissing a cause for want of prosecution, and the term at which it was rendered had ended, the court had no authority to render a judgment denying or granting a motion to reinstate it without reasonable notice of the motion to all of the defendants. *McAllen v. Crafts* (Civ. App.) 166 S. W. 3.

## CHAPTER EIGHT

### PLEADINGS OF THE DEFENDANT

Art.		Art.	
1902.	Answer may include several matters; due order of pleading; general denial.	1905.	In cases of citation by publication.
1903.	Requisites of plea of privilege; prima facie proof; controverting plea by plaintiff; service; hearing; appeal.	1906.	Certain pleas to be verified by affidavit.
1904.	To be filed, when.	1907.	Plea of payment, counterclaim, etc.
		1908.	General denial need not be repeated.
		1909.	Pleas to be filed in due order.
		1910.	Certain pleas to be determined during the term at which filed.

**Article 1902. Answer may include several matters; due order of pleading; general denial.**—The defendant in his answer may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause; provided, that he shall file them all at the same time and in due order of pleading; provided, that a general denial of matters pleaded by the adverse party which are not required to be sworn to shall be sufficient to put the same in issue. [Act May 13, 1846, p. 363, § 29; P. D. 1441; Acts 1913, p. 256, § 4; Act March 22, 1915, ch. 101, § 4.]

See explanatory note under art. 1827; *Pugh v. Werner* (Civ. App.) 166 S. W. 693; *Order of Aztecs v. Noble* (Civ. App.) 174 S. W. 623.

Cited, *Tabet Bros. Co. v. Higginbotham* (Civ. App.) 170 S. W. 118; *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

**Inconsistent pleas and duplicity.**—In vendor's action for price, purchaser held entitled to plead inconsistent defenses seeking specific performance and rescission, though he might have been required to elect. *Sanford v. Cobe* (Civ. App.) 172 S. W. 584.

Under the provision that the answer may include several matters, etc., defendant may plea as many inconsistent matters of defense as he desires, provided he files them in due order of pleading. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 186 S. W. 368.

**Admissions.**—Plaintiffs held not entitled to judgment on the pleadings. *Taber v. Eyer* (Civ. App.) 162 S. W. 490.

In an action for ejection of a passenger, answer of defendant held not to be construed as an admission that plaintiff's ticket was delivered to an agent authorized to receive it. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

Where a paragraph of the petition alleged that the defendant had stated that plaintiff had stolen all he raised on defendant's place, and was a thief, an answer denying the language used as set forth in that paragraph, but pleading the truth of any charge made that the plaintiff had been guilty of fraudulent acquisition of property and conversion thereof to his own use, is not an admission of the speaking of the words charged. *Burkhiser v. Lyons* (Civ. App.) 167 S. W. 244.

Where plaintiff generally denied defendant's cross-petition which, though alleging that defendant deposited materials on plaintiff's premises, did not charge a conversion, the filing of a special plea, alleging that plaintiff purchased the material, is not an admission against interest authorizing recovery by defendant for the conversion. *Gordon v. Ratliff* (Civ. App.) 169 S. W. 372.

In suit by seller of land against his own agent and the buyer on the written contract, where the buyer confessed and avoided, asking affirmative relief, and the agent did neither, but, in effect, admitted his liability, the court should have entered judgment for the plaintiff against the agent. *Stockwell v. Melbern* (Civ. App.) 185 S. W. 399.

Allegations in cross-action by one defendant warehouseman against another adopting plaintiffs' allegations as to negligence of such other defendant held not an admission of the negligence alleged in the petition. *Thornton v. Daniel* (Civ. App.) 185 S. W. 585.

In suit for damages under Employers' Liability Act, interveners claiming under an assignment of part of cause of action were not excused from pleading and proving that plaintiff had a cause of action by the fact that defendant pleaded a settlement with plaintiff; such plea not amounting to an admission. *Phoenix Const. Co. v. Witt & Saunders* (Civ. App.) 190 S. W. 780.

In a suit for attorney's fees, the services rendered by plaintiff as alleged in the petition held to be the same as those which defendants admitted in their answer had been rendered. *Branham v. Hallam* (Civ. App.) 191 S. W. 158.

In suit for partition of land in which it was alleged that defendant had conveyed his interest in a portion, his answer that, while he had sold land, he had warranted title, and was therefore a proper party to the suit, held admission, and he may not insist that he is owner of the land. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

On plea to its jurisdiction, held, that the trial court should have treated allegations of petition as true. *Dupree v. Massey* (Civ. App.) 192 S. W. 790.

Where plea in abatement to allegation of damages occurring during receivership was overruled because of lack of proof, it was an admission of facts alleged in petition. *Schaff v. Nash* (Civ. App.) 193 S. W. 469.

— **Failure to traverse or deny.**—In an action for work and materials performed and furnished, where allegation that work was done on house owned by defendant was not denied, its ownership was admitted. *Ward Cattle & Pasture Co. v. Ford* (Civ. App.) 175 S. W. 784.

In action for amounts due under contracts, allegation that contracts were canceled not having been denied, proof thereof held unnecessary. *Plummer v. Simms* (Civ. App.) 177 S. W. 1037.

In broker's action for commissions, allegations of petition that the other party to the contract of exchange did not break it held admitted, where the answer failed to deny such allegation. *Levy v. Dunken Realty Co.* (Civ. App.) 179 S. W. 679, denying rehearing *Levy v. Duncan Realty Co.*, 178 S. W. 984.

Where the averments of a petition praying a temporary injunction were not denied, they must, for the purposes of an appeal from a judgment denying the writ, be treated as true. *David v. Timon* (Civ. App.) 183 S. W. 88.

Where the answer did not deny the averments of the petition that the holder of a note was a bona fide purchaser for value those averments are admitted, and unless the other defenses are good, the holder is entitled to judgment. *Henderson v. McDaniel* (Civ. App.) 186 S. W. 865.

— **Construction and operation of repealed act of 1913.**—See *First Texas State Ins. Co. v. Capers* (Civ. App.) 183 S. W. 794.

The allegations of a petition in equity which were not denied, and therefore to be taken as true under Acts 33d Leg. c. 127, § 4, held not to show that a purchaser was entitled to a return of the part of the price paid as a condition of the rescission of the contract by the vendor. *Moore v. First State Bank of Teague* (Civ. App.) 173 S. W. 231.

Under Acts 33d Leg. c. 127, § 4, amending Rev. St. 1911, art. 1902 (*Vernon's Sayles' Ann. Civ. St. 1914, art. 1902*), vague mention by plaintiff in his original petition of some unlawful claim asserted by defendant against land in question is not a sufficient advance denial of the allegations of defendant's cross-petition to prevent them being taken as confessed. *Page v. Vaughan* (Civ. App.) 173 S. W. 541.

Despite art. 1902, as amended by Acts 33d Leg. c. 127 (*Vernon's Sayles' Ann. Civ. St. 1914, art. 1902*), plaintiff, in case of defendant's default in filing an answer, is, under article 1932, bound to prove unliquidated damages. *R. R. Dancy & Co. v. Rosenberg* (Civ. App.) 174 S. W. 831.

Failure of defendant receivers of railroad to specifically deny their character as such at time of accident at railroad crossing held to excuse plaintiffs from proof on the point, under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1902*. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

A general denial to a petition on a note held to authorize a judgment for plaintiff; the facts pleaded not being put in issue by such answer. *Day v. Cooper* (Civ. App.) 175 S. W. 485.

Contributory negligence is not admitted under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1902*, by failure to deny an allegation thereof in a sworn answer, where the sworn petition, in effect, denies plaintiff's negligence. *Texarkana & Ft. S. Ry. Co. v. Rea* (Civ. App.) 180 S. W. 945.

A statement of a contract in plaintiff's petition not being pleaded to by defendant as required by *Vernon's Sayles' Ann. Civ. St. 1914, art. 1902*, was in the case as admit-



ted, and an instruction submitting its truth or falsity to the jury was not error. *American Mfg. Co. v. O. C. Frey Hardware Co.* (Civ. App.) 180 S. W. 956.

The provision of Act March 3, 1913, § 4, amending this article, that a fact alleged in the petition, not being denied by the answer, shall be taken as confessed, being remedial, is not available on appeal, where repealed after the trial. *Mutual Film Corp. v. Morris & Daniel* (Civ. App.) 184 S. W. 1660.

That plaintiffs may avail of the provisions of Act March 3, 1913, § 4, amending this article as to taking as confessed a fact alleged in the petition and not denied, the court's attention must be called thereto. *Id.*

Failure of plaintiff to request the court that an undenied allegation of the petition be taken as confessed is a waiver of the result, under Acts 33d Leg. c. 127, § 4 (*Vernon's Sayles' Ann. Civ. St. 1914, § 1902*), that it shall be taken as confessed, unless denied. *Rexall Drug Co. v. Butler Bros.* (Civ. App.) 185 S. W. 989.

Answer denying in toto each and every allegation and each and every paragraph in petition, is a sufficient denial of the allegation of the petition of a foreign corporation that it had a permit to do business in the state, to prevent it being taken as confessed under Acts 33d Leg. c. 127, § 4 (*Vernon's Sayles' Ann. Civ. St. 1914, art. 1902*). *Id.*

**Denials.**—See notes 13 and 14 following art. 1910, *Vernon's Sayles' Ann. Civ. St. 1914.*

A general denial puts in issue every material fact alleged in the petition. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275; *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 159 S. W. 137.

In an action on a note and to foreclose a mechanics' lien, an answer denying that plaintiff complied with his building contract, and alleging partial failure of consideration of the note in different respects, specifically setting out the items of such failure and the amounts thereof, was good as against a general demurrer. *Vickrey v. Dockray* (Civ. App.) 158 S. W. 1160.

That there was an agreement to waive all commissions under the agreement sued on—agreement of defendant to divide with plaintiffs all commissions or profits on sale by defendant of M.'s land—and to look to M. for commissions, is not matter of affirmative defense, but admissible under a general denial, as regards right to a special charge thereon. *Woolley v. Canyon Exch. Co.* (Civ. App.) 159 S. W. 403.

The defense of the statute of frauds is available under a general denial, if interposed by seasonable objection to testimony. *Johnson v. Tindall* (Civ. App.) 161 S. W. 401.

Under the general denial in a railroad passenger's action for personal injuries, the company could show any fact which would establish that plaintiff was not injured through its negligence. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

Evidence that the terminal carrier transported the goods with reasonable diligence to destination was admissible under the general denial. *Gulf, C. & S. F. Ry. Co. v. Brackett-Fielder Mill & Grain Co.* (Civ. App.) 162 S. W. 1191.

Where, in an action on notes given for corporate stock, a supplemental petition filed before an amended original answer replied to allegations in the original answer with reference to the stock subscription contract, after which an amended original answer was filed which was only a general denial, the pleadings presented no issue as to the validity of the subscription contract. *Hughes v. Four States Life Ins. Co.* (Civ. App.) 164 S. W. 898.

In an action for damage to land by the construction adjacent thereto of a railroad terminal, defendant could show under the general denial that the market value of the property for any use to which it might be put immediately after construction of the tracks was equal to or greater than its market value before such construction. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 165 S. W. 560.

On scire facias to forfeit a bail bond, a general denial by the surety put in issue all material allegations in the writ, and the burden is on the state, not only to introduce in evidence the judgment nisi, but the bail bond. *General Bonding & Casualty Ins. Co. v. State*, 73 Cr. R. 649, 165 S. W. 615.

In an action for injuries to a brakeman by defendant's violation of the safety appliance acts, evidence that the couplers required adjustment, which could be made with safety when the cars were not in motion, was admissible under defendant's general denial. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

In an action to foreclose, the defense that the property was a homestead, and that the wife of the owner did not execute any written contract for the work as required by statute to fix a lien thereon, was available under the general denial. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275.

In a suit to cancel defendant's purchase of certain school lands, he could, under his plea of not guilty, prove the actual value of improvements placed on the land within the three years succeeding the purchase, to show a compliance with the statutory requirement, though the value proved was greater than that alleged. *Elza v. State* (Civ. App.) 169 S. W. 633.

An allegation in plaintiff's petition being denied by the answer, an enlarged repetition of it in the supplemental petition need not be denied. *Word v. Bank of Menard* (Civ. App.) 170 S. W. 845.

A defendant relying on a mortgage executed by the husband alone may, under the general denial, put in issue every fact necessary to establish a homestead. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

In an action for damages by rain to dry corn during transit, answer alleging that the corn was shelled while too green, and was shipped in a green and unripe condition, held only a denial of the petition and to raise no new issue. *St. Louis, B. & M. Ry. Co. v. Evans* (Civ. App.) 173 S. W. 228.

An averment that defendants had no information or knowledge sufficient to form a belief as to the facts averred in two paragraphs of the petition alleging title by limitation under different statutes and a similar allegation attempting to answer different allegations in other paragraphs held insufficient. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

A carrier may, when sued for injuries to a shipment of live stock, prove under a general denial that the injuries occurred while its road was operated by a receiver. *Ft. Worth & R. G. Ry. Co. v. Ballou* (Civ. App.) 174 S. W. 337.

In an action for breach of contract, defendant cannot under a general denial claim

that plaintiff did not attempt to minimize his damages. *World's Special Films Corporation v. Fichtenberg* (Civ. App.) 176 S. W. 733.

Where an allegation in a pleading is once denied, it is not necessary that it should be denied again because the allegation is repeated. *Wm. Cameron & Co. v. Polk* (Civ. App.) 177 S. W. 1178.

Answer held a sufficient denial of the averments of the complaint to preclude judgment on the pleadings in an action for partition. *Teal v. Lakey* (Civ. App.) 181 S. W. 759.

In a suit to foreclose vendor's lien notes, a petition containing allegations on information and belief, denied only by a general denial held sufficient to support a default judgment. *Cooney v. Eastman* (Civ. App.) 183 S. W. 96.

In a suit for damages to shipment of cattle, proof of injury from their inherent propensities would be admissible under its general denial of negligence. *St. Louis Southwestern Ry. Co. of Texas v. Kerr* (Civ. App.) 184 S. W. 1058.

In an action for injuries to a shipment of peanuts, averments in the answer that the shipment was loaded when green held not an admission that the car furnished was unsuitable. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070.

A general denial puts the plaintiff upon proof of every material allegation in his petition, and the defendant can show any matter tending to disprove the case alleged. *Corpus Christi St. & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 185 S. W. 430.

In an action for damages for overflow caused by defendant's placing an embankment on his own land, his general denial is sufficient to warrant submission of the issue whether the embankment was formed by usual plowing necessary to cultivation. *Wellborn v. Wellborn* (Civ. App.) 185 S. W. 1041.

Where plaintiff alleged that defendant railroad was governed by art. 6495, passed in 1876, the duty devolved upon him to show that fact, so that defendant under general denial could prove that it had built its roadbed prior to 1876. *Galveston, H. & S. A. Ry. Co. v. Wurzbach* (Civ. App.) 189 S. W. 1006.

— **Construction and operation of repealed act of 1913.**—This article, as amended by the act of 1913, abolished general denial. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

In a suit to foreclose vendor's lien notes on land, of which defendant was not the owner of the equity of redemption, a general denial does not put in issue under this article, as amended by Acts 33d Leg. c. 127, averments on information and belief that defendant agreed with an owner of the equity to discharge such notes. *Cooney v. Eastman* (Civ. App.) 183 S. W. 96.

**All pleas to be filed at same time and in due order.**—Under this article defendants held to have waived misjoinder of parties plaintiff by pleading to the merits. *Garner v. Jamison* (Civ. App.) 162 S. W. 940.

A special exception to the petition as insufficient, which was filed after the general denial, was not filed in due order of pleading, as required by this article and district court rule 7 (142 S. W. xviii), and was waived. *Howard's Unknown Heirs v. Skolant* (Civ. App.) 162 S. W. 978. See, also, notes under art. 1909.

**Art. 1903. Requisites of plea of privilege; prima facie proof; controverting plea by plaintiff; service; hearing; appeal.**—A plea of privilege to be sued in the county of one's residence shall be sufficient, if it be in writing and sworn to, and shall state that the party claiming such privilege was not, at the institution of such suit, nor at the time of the service of such process thereon, nor at the time of filing such plea, a resident of the county in which such suit was instituted and shall state the county of his residence at the time of such plea, and that none of the exceptions to the exclusive venue in the county of one's residence mentioned in Article 1830 or Article 2308 of the Revised Statutes exist in said cause; and such plea of privilege when filed shall be prima facie proof of the defendant's right to change of venue. If, however, the plaintiff desires to controvert the plea of privilege, he shall file a controverting plea under oath, setting out specifically the fact or facts relied upon to confer venue of such cause on the court where the cause is pending. Upon the filing of such controverting plea the judge or the justice of the peace shall note on same a time for a hearing on the plea of privilege; provided, however, that the hearing thereon shall not be had until a copy of such controverting plea, including a copy of such notation thereon, shall have been served on each defendant, or his attorney, for at least ten full days exclusive of the day of service and day of hearing. If the parties agree upon a date for such hearing it shall not be necessary to serve the copy above provided for. Either party may appeal from the judgment sustaining or overruling the plea of privilege, and if the judgment is one sustaining the plea of privilege and an appeal is taken, such appeal shall suspend the transfer of the venue and a trial of the cause pending the final determination of such appeal. [Acts 1907, p. 248; Act April 2, 1917, ch. 176, § 1.]

**Explanatory.**—The act amends art. 1903, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**Sufficiency of plea.**—Where suit was brought against a nonresident of the county for fraudulent representations in an exchange of land, a plea of privilege, failing to allege that the allegation of the petition that the fraud was committed in the county where the suit was brought was inserted for the fraudulent purpose of conferring jurisdiction, was insufficient to entitle defendant to change of venue. *Sanders v. Dunn* (Civ. App.) 158 S. W. 1041.

In trespass to try title to land located in another county, a plea by defendants, who were nonresidents, held to sufficiently apprise the court that they thereby intended to plead their privilege to be sued in the county where the land was located. *Knoles v. Clark* (Civ. App.) 163 S. W. 369.

A plea of the privilege of the defendant, in an action before a justice of the peace, to be sued in the county of his residence, which did not show the proper precinct in the county in which he resided, was insufficient. *Leventhal v. Hollamon* (Civ. App.) 165 S. W. 6.

A plea of privilege, reciting that none of the exceptions to exclusive venue in the county of one's residence, mentioned in "articles 1194, 1535, of the Revised Statutes," instead of articles 1830, 2308, as required by Rev. St. 1911, art. 1903, existed in the case, was insufficient. *Anderson, Clayton & Co. v. Terry* (Civ. App.) 167 S. W. 1.

An allegation in a plea of privilege that the suit did not come within any of the exceptions provided by law, authorizing suit to be brought in the county of Milam or outside the county of Harris, held a conclusion of law, and ineffective. *Id.*

Where an alleged supplemental plea of privilege was filed, though no answer was filed to the original plea, and the supplemental plea was sufficient in itself as a plea of privilege, considered in connection with the allegations of the petition, it would be sustained as an amended plea, and was not subject to the objection that a supplemental plea was unauthorized. *Mellville v. Wickham* (Civ. App.) 169 S. W. 1123.

That a plea of privilege to be tried in another county failed to state that plaintiff's allegation that defendants were nonresidents of the state was fraudulently and knowingly made to fix the venue of the suit did not render it insufficient. *Weller v. Guajardo* (Civ. App.) 174 S. W. 673.

Plea of privilege of a nonresident defendant to be sued in a justice court of his own county need not show that the justice to whose court the case is sought to be transferred is not disqualified, Rev. St. 1911, art. 2312, having no application to a nonresident. *Dalhart Ice & Electric Co. v. Tinsley* (Civ. App.) 180 S. W. 619.

Defendant's plea of privilege, complying with this article, was sufficient, though it did not allege that the allegation of plaintiff's petition that suit was based on a written contract to be performed in the county of suit was fraudulently made to confer jurisdiction. *Gensberg v. Neely* (Civ. App.) 187 S. W. 247.

**Proof of allegations of plea.**—A plea of privilege to be sued in the county of defendant's domicile may be raised without an offer of proof to sustain it where plaintiff's pleadings disclose the facts. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

On a claim of privilege it is not necessary to introduce evidence as to residence which is admitted by the pleadings of both parties. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

Evidence in a bank's action on a draft drawn by contractors on a school district held to sustain a finding adverse to the defendant school district's plea of privilege. *Crowell Independent School Dist. v. First Nat. Bank of Benjamin* (Civ. App.) 174 S. W. 878.

Plaintiff, relying on fraud of defendant to sustain venue of the action, has the burden of proving fraud, or defendant's plea of privilege must be sustained. *Cloyd v. Sacra* (Civ. App.) 175 S. W. 456.

In a suit for conversion, plaintiff was bound to overcome a plea of privilege by proof that the conversion was committed in the county of suit. *Carver Bros. v. Merrett* (Civ. App.) 184 S. W. 741.

**Effect of sustaining plea.**—The granting of a plea of privilege applied for by certain defendants was effective to transfer the whole case, both as to all parties and subject-matter, to the county where the defendants filing such plea were entitled to have the case tried. *Hickman v. Swain*, 167 S. W. 209, 106 Tex. 431.

**Bill of exceptions.**—See *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

**Transfer of cause.**—In view of arts. 1903, 2308, articles 1831-1833 authorize the transfer, on defendant's plea of privilege, of a case pending in the justice court in one county, to such a court in another. *Dalhart Ice & Electric Co. v. Tinsley* (Civ. App.) 180 S. W. 619.

#### Art. 1904. [1263] [1263] Answer to be filed, when.

**Substitution of parties.**—On substitution of new plaintiffs and adoption by them of petition of original plaintiffs, entry of judgment by default without permitting opportunity to answer was error. *Cooney v. Van Deren* (Civ. App.) 182 S. W. 1190.

**Due process of law.**—Whether art. 1869 et seq. and this article denies due process of law to nonresidents personally served outside the state because of the possibility that they might have only 12 days in which to appear and answer will not be determined at the instance of a nonresident defendant who had ample time in which to appear and answer. *Brophy v. Kelly*, 211 Fed. 22, 128 C. C. A. 382.

**Art. 1905. [1264] [1264] Answer in cases of citation by publication.**—In all cases in which service of citation has been made by publication, the answer shall be filed on or before the appearance day of the term to which the citation is made returnable, the same as in cases of personal service. [Acts 1846, p. 363, § 12; Acts 1909, S. S., p. 324; Act Feb. 13, 1917, ch. 14, § 1.]

Sec. 2 repeals all laws in conflict.

**Art. 1906. [1265] [1265] Certain pleas to be verified by affidavit.**

**Necessity and effect of verification in general.**—An exception to an answer not verified as required by law should have been sustained. *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

**Who may verify and sufficiency of verification.**—A plea of privilege in behalf of two defendants, but verified only by one, is sufficient to make the plea available to both. *Queen Ins. Co. v. Keller* (Civ. App.) 186 S. W. 359.

**Officers authorized to take affidavits.**—See art. 13 and notes.

**Subdivision 1.**—See art. 1903 and notes.

**Subdivision 2.**—Cited, *El Paso & S. W. Co. v. La Londe* (Sup.) 184 S. W. 498. See *O'Connor v. City of Laredo* (Civ. App.) 167 S. W. 1091.

The question of lapsing of plaintiff's temporary administration is to be raised by sworn plea in abatement. *El Paso & Southwestern Co. v. La Londe* (Civ. App.) 173 S. W. 890.

In an action for taxes defendant may not urge want of authority to sue because of the absence of authorization by the commissioners' court of the county, in the absence of a verified plea and of proof. *State v. Cage* (Civ. App.) 176 S. W. 928.

This article does not apply to special pleas denying defendants capacity as receivers. *Schaff v. Nash* (Civ. App.) 193 S. W. 469.

**Subdivision 5.**—Cited, *Carr v. Wright* (Civ. App.) 190 S. W. 254.

Where petition in trespass to try title by partnership showed that title to two of the surveys was in one partner and title to the other in the other partner, held that it was not necessary that plea in abatement be sworn to. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

In view of this article, held that, though one of the original parties to a judgment of partition who had conveyed her interest was not party to a proceeding to revive it, defendants having consented to revive, cannot complain on appeal that she was not a party. *Teel v. Brown* (Civ. App.) 185 S. W. 319.

**Subdivision 6.**—Where in a suit against a firm the partnership is denied under oath, the burden rests on plaintiff to prove the partnership. *Staten Auto Co. v. Hogg* (Civ. App.) 160 S. W. 982.

In an action against several carriers, as partners, for negligent delay and rough handling of live stock, where the pleadings of defendants denying the charge were unverified, plaintiff could recover the whole sum against either of the defendants. *Ft. Worth & D. C. Ry. Co. v. Shank & Dean* (Civ. App.) 167 S. W. 1093.

In an action brought in the name of two partners, defendant could show without denying the partnership under oath as required by this article that there were other partners, each having an interest in the subject of the suit, so as to defeat the suit for want of parties. *Houston & T. C. R. Co. v. Corsicana Fruit Co.* (Civ. App.) 170 S. W. 849.

Where defendants did not deny under oath, as required by statute, plaintiff's allegation that they were partners, evidence to disprove such allegation held properly excluded. *Levy v. Dunken Realty Co.* (Civ. App.) 179 S. W. 679, denying rehearing *Levy v. Duncan Realty Co.*, 178 S. W. 984.

In action against bank and its president as partners, where neither denied partnership under oath, as required by this article, peremptory instruction to find for president, on ground that he had no connection with contract, held erroneous. *Tyler Box & Lumber Mfg. Co. v. City Nat. Bank of Paris* (Civ. App.) 185 S. W. 352.

**Subdivision 7.**—Cited, *O'Connor v. City of Laredo* (Civ. App.) 167 S. W. 1091.

Under this subdivision plaintiff held not required to prove defendant's corporate existence where the allegation of its incorporation was not denied by a sworn plea. *Sovereign Camp Woodmen of the World v. Ruedrich* (Civ. App.) 158 S. W. 170.

**Subdivisions 8 and 9.**—In view of this article, held that, where the answer did not deny the execution of a written instrument by which defendant recognized the title of a foreign administrator to the note in suit, mere proof of the right of the administrator's intestate to the note coupled with the introduction of the note itself in evidence bearing an indorsement is sufficient to show passing of title notwithstanding article 3480. *Webb v. Reynolds* (Civ. App.) 160 S. W. 152.

Petition against a carrier for nondelivery held to charge that bill of lading was in writing, under art. 710, and carrier not denying under oath its execution under article 1906, subd. 8, and article 3710, may not question it. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 858. See, also, notes under arts. 588, 3710.

**Subdivision 10.**—Under subd. 10 of this article, an answer setting up want of consideration as a defense to the cause of action on debt and to foreclose vendor's lien notes, should have been sworn to. *Browne v. McGuire* (Civ. App.) 181 S. W. 479.

Under art. 7093, providing that written contracts shall import consideration, and article 1906, concerning the impeachment of the consideration of a written instrument, in an action on a written policy, it was not necessary for the plaintiffs to allege in their pleadings that the written contract sued upon was based upon a sufficient consideration. *Royal Neighbors of America v. Heard* (Civ. App.) 185 S. W. 882.

**Subdivision 11.**—That plaintiff was in possession of the account books and would not permit defendant, his former partner, to inspect them was a sufficient excuse for not particularly itemizing the amount alleged by counterclaim to be due to defendant. *Reeves v. White* (Civ. App.) 161 S. W. 43.

Where plaintiff sued on a verified open account in compliance with art. 3712, defendant, not denying any items under oath, as required by this article, could not object to the items. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

**Art. 1907. [1266] [1266] Plea of payment, counterclaim, etc.**

**Payment.**—Where defendants failed to plead payment of water rent sued for, or to request submission of that issue to the jury, failure to submit it was not ground for reversal, in view of art. 1985. *Bennett v. Rio Grande Canal Co.* (Civ. App.) 182 S. W. 713.

Under arts. 1325, 1326, and 1907, a plea of payment to an undisclosed agent does not

authorize proof of set-off against the agent. *Hudgins Produce Co. v. J. R. Beggs & Co.* (Civ. App.) 185 S. W. 339.

Evidence of set-off admitted without objection under a plea of payment to an undisclosed agent held in effect to show payment. *Id.*

Where defendant, in an action on a verified account, admitted its correctness and did not allege any payment thereof, plaintiff was entitled to recover. *Bay Lumber Co. v. Artman & Buettner* (Civ. App.) 188 S. W. 279.

In a suit to foreclose a vendor's lien note, where plaintiff's own testimony was not conclusive that note had not been paid, defendant was entitled, without having pleaded payment, to show that he had fully paid note. *Key v. Jones* (Civ. App.) 191 S. W. 736.

**Set-off or counterclaim.**—In an action upon a check by the assignee thereof, an answer held to set up a partial payment and not a set-off. *Rahe v. Yett* (Civ. App.) 164 S. W. 30.

That the set-off and counterclaim pleaded by defendant did not distinctly state the nature of the counterclaim and the several items thereof as required by arts. 1326 and 1907 cannot be reached by general demurrer, but must be reached by special exception. *Ajax-Grieb Rubber Co. v. Hubbard* (Civ. App.) 181 S. W. 568.

In an action for possession of cotton seed in which writ of sequestration was levied, where a defendant bank alleged indebtedness against plaintiff for money advanced and used for his benefit, mere fact that dishonored draft made by principal defendant upon plaintiff was also set up did not present variance. *Guitar v. First State Bank of Hermligh* (Civ. App.) 191 S. W. 860.

— **In action on note.**—In an action on notes, defendants' answer held properly stricken, not setting forth any legal counterclaim. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

In a suit on a note an answer which failed in its object of setting up a counterclaim could not be held good as stating an equitable remedy independent of the statute allowing set-off where it failed to aver insolvency of the plaintiff. *Ray v. Cartwright* (Civ. App.) 180 S. W. 927.

— **Pleading damages.**—In an action begun by attachment, where defendant's plea in reconvention did not in terms allege that the attachment was sued out without probable cause but alleged facts showing that it was, such plea was sufficient to support a recovery of exemplary damages. *Johnson v. Tindall* (Civ. App.) 161 S. W. 401.

In counterclaim for wrongful issuance of writ of sequestration, allegations that writ issued because the party who sued it out desired to prevent sale by defendant and secure profit for himself are not bad as seeking remote damages. *Garlington v. Cotten* (Civ. App.) 189 S. W. 294.

#### Art. 1908. [1267] [1267] General denial need not be repeated.

**Admission of facts not denied.**—Under this article a defendant who had pleaded a general denial does not, where plaintiff filed an amended petition, admit all facts not specially denied upon filing special denials. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

#### Art. 1909. [1268] [1268] Pleas to be filed in due order, etc.

**In general.**—As parties cannot, by consent, confer jurisdiction a plea in abatement that plaintiff in his amended petition had fraudulently stated the amount of the damage at such an amount as would give the court jurisdiction will be sustained, even though it was not presented seasonably after the filing of the amended petition. *L. Grief & Bro. v. Texas Cent. R. Co.* (Civ. App.) 163 S. W. 345.

Where a plea of privilege is filed in due order of pleading, the subsequent filing of a plea over against plaintiff did not effect a waiver of the plea of privilege. *Hickman v. Swain*, 167 S. W. 209, 106 Tex. 431.

Notwithstanding this article, the court may hear exceptions before trying a plea in abatement, and a party who under such circumstances submits exceptions before submitting a plea in abatement does not waive his plea. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

A motion to vacate a default judgment, which alleged a meritorious defense, is not a waiver of defendant's right thereafter to plead his personal privilege to be sued in the county of his residence. *Kelly v. A. B. Crouch Grain Co.* (Civ. App.) 174 S. W. 630.

In view of U. S. Comp. St., Anno. 1916, § 1011, held, that the filing of a petition for removal and procurement of action thereon, before the filing of a plea of privilege, did not constitute a waiver of defendant's privilege to have the cause transferred to another county. *Weller v. Guajardo* (Civ. App.) 174 S. W. 673.

Defendant, by filing a motion to quash citation and a plea in abatement in an action in the district court of K. county, held not thereby deprived of any privilege to be sued in D. county. *Joy v. Citizens' Life Ins. Co.* (Civ. App.) 178 S. W. 590.

In garnishment proceedings, where supplement, so called, and other portion of traverse were attached, and made part of each other by allegation, in absence of special exception as to order of pleading, or that they were attached, entire answer should be looked to by trial court. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

**Answer to merits as waiver of matter in abatement.**—Pleas of misjoinder, in abatement, set up first in amended answer filed by defendants after answering to merits, came too late. *Baber v. Galbraith* (Civ. App.) 186 S. W. 345.

Where, after defendant had answered on the merits, it asked leave to file a plea in abatement, but failed to ask leave to withdraw its pleadings, the plea in abatement must be overruled. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549. See, also, notes under Arts. 1902, 1947.

#### Art. 1910. [1269] [1269] Certain pleas to be determined during the term at which filed.

Cited, *Johnson v. Waggoner* (Civ. App.) 190 S. W. 835.

**Construction and application.**—Under County and District Court Rule 24 (142 S. W. xix), providing that all dilatory pleas shall be tried at the first term at which the atten-

tion of the court shall be called thereto, a plea of privilege filed in justice's court, not brought to the attention of the court at the trial de novo on appeal to the county court was waived. *Edwards v. Youngblood* (Civ. App.) 162 S. W. 1164.

Where defendant files his plea for removal of the cause to another court, but fails to call it up for hearing at the term at which it is filed, he waives his plea, so that refusal to grant it cannot thereafter be alleged as error. *Parrott v. Peacock Military College* (Civ. App.) 180 S. W. 132.

Where defendant, through no fault of the clerk or plaintiff or his attorneys, fails to call the court's attention to a plea of privilege at the term at which filed, and there was time for the court to have passed on it, and the case is not continued without prejudice to such plea, he waives his right to have the plea passed on at a subsequent term, under this article and district and county court rule 24 (142 S. W. xix). *Smith v. First Nat. Bank of Waco* (Civ. App.) 187 S. W. 233.

In such case defendant cannot file an amended plea of privilege after the case has been continued for that term. *Id.*

Where a verdict found defendant's residence in accordance with plaintiff's contention, and judgment was entered for plaintiff without mentioning the plea of privilege, defendant waived the plea by not invoking the court's action upon it at the first term of court. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

1. **Necessity of pleading in defense in general.**—It is only where a defendant seeks affirmative relief upon the issues he desires adjudicated that he is required to specially plead his equities. *Birge-Forbes Co. v. Wolcott* (Civ. App.) 176 S. W. 605.

6. **Anticipation of defensive matter.**—As against general demurrer, answer pleading alteration of note held good, though not alleging that alteration was without defendant's consent and by a party to the note. *Bolt v. State Savings Bank of Manchester* (Civ. App.) 179 S. W. 1119.

7. **Joint or separate pleas or answers of codefendants.**—Where the amount in controversy is below jurisdiction of the county court, the action will be dismissed upon the plea in abatement of only one of the defendants that plaintiff fraudulently misstated the amount so as to give the court jurisdiction. *L. Grief & Bro. v. Texas Cent. R. Co.* (Civ. App.) 163 S. W. 345.

10. **Plea to the jurisdiction.**—Where, as presented, the same facts which would sustain a plea to the jurisdiction would defeat the whole cause of action, the case should be submitted on the merits and the plea in abatement disregarded. *Johnson v. Miller* (Civ. App.) 163 S. W. 592.

A special plea in an action in the district court alleging that the amount in controversy is not within the jurisdiction of the court, but in fact less than \$200, held sufficient to charge want of jurisdiction. *Day v. Mercer* (Civ. App.) 175 S. W. 764.

Sufficiency of service will not be considered on appeal where not raised in the motion to set aside a default nor in the answer. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

12. **Plea in abatement.**—The fact that plaintiff corporation had not paid its franchise tax, so that it was not entitled to maintain an action under art. 7399, could only be urged by a plea in abatement. *Clegg v. Roscoe Lumber Co.* (Civ. App.) 161 S. W. 944.

A plea of pending action between the same parties, involving the same cause of action, is available only as in abatement. *Blassingame v. Cattlemen's Trust Co.* (Civ. App.) 174 S. W. 900.

In habeas corpus for the custody of a child, held, that a plea setting up want of jurisdiction because of pending divorce suit was no plea in abatement, and the only question was whether the court had jurisdiction over the subject-matter, and the pendency of other suit involving the same question could not be considered. *Ex parte Garcia* (Civ. App.) 187 S. W. 410.

A petition which states two separate causes of action which were misjoined may be corrected by plea in abatement, subject to the discretion of the court. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 189 S. W. 997.

13. **Denials.**—See notes under Art. 1902.

16. **Cross-complaint against plaintiff.**—The transferee of secured lien notes could in trespass to try title against himself and his transferrer, who had conveyed to plaintiff's grantor, have in a cross-action the lien enforced for the attorney's fees stipulated for in the notes, and other sums due thereon. *Childs v. Juenger* (Civ. App.) 162 S. W. 474.

Exceptions to allegations in cross-complaint seeking rescission of a contract of purchase, which exceptions were based on the ground that the allegations did not constitute a defense, were properly overruled, where the allegations were set up as a basis for the relief sought by the defendants. *Hurst v. Knight* (Civ. App.) 164 S. W. 1072.

Where the answer specially pleads lien on stock as defense to action for damages for refusal to transfer it on the corporation books, no affirmative relief foreclosing the lien can be awarded. *Milner v. Brewer-Monaghan Mercantile Co.* (Civ. App.) 188 S. W. 49.

17. **Cross-complaint against codefendant.**—Where a contractor gave a bond to a school district conditioned to complete the building free from mechanics' liens, and a materialman sued the contractor, his surety, and the school district, the school district can maintain no cross-action on the bond, for the materialman could not acquire a lien against the building. *Garrett v. A. G. McAdams Lumber Co.* (Civ. App.) 163 S. W. 320.

Matters alleged in a cross-bill filed in an action on a note and to foreclose a chattel mortgage held extraneous to the issues made by the petition and answer, so that an exception to the cross-bill should have been sustained. *Carla Land & Irrigation Co. v. Dimmit County State Bank* (Civ. App.) 165 S. W. 897.

A cross-action must contain allegations which, given every reasonable intendment, would justify evidence of facts essential to be shown to obtain a judgment. *Reserve Loan Life Ins. Co. v. Benson* (Civ. App.) 167 S. W. 266.

In an action by plaintiff against two defendants, with one of whom he had been associated under an agreement to share commissions on the sale of stock, such defendant's cross-petition against his codefendant held not to cause a misjoinder of causes of action. *Harless v. Haile* (Civ. App.) 174 S. W. 1020.

In action on a note, allegations of defendant in cross-petition held to state a cause of action against the cross-defendants for breach of their guaranty or surety contract. *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993.

In an action on a note wherein defendant made his alleged sureties cross-defendants, he need not allege that the suretyship agreement was in writing, as, if required to be in writing, written evidence would be admissible to prove the alleged agreement. *Id.*

In action on a note, an answer held to support a judgment for defendants against codefendants. *Clevenger v. Commercial Guaranty State Bank* (Civ. App.) 183 S. W. 65.

24. **Withdrawal or abandonment of pleading.**—Mere filing of plea in abatement without sustaining allegations amounts to waiver of plea. *Schaff v. Nash* (Civ. App.) 193 S. W. 469.

26. **Variance between pleading and proof.**—Where the contract with the initial carrier provided for notice of claim within 91 days, and it was not alleged that two of the carriers did not acquiesce in the through bill of lading, it was binding on them, as provided by Rev. St. 1911, arts. 731, 732; and hence an allegation that their contracts provided for notice within 120 days, followed by introduction of the 91-day contract, constituted a variance. *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

In an action for work done and materials furnished on a house, where defendant's answer did not deny ownership, but the court improperly allowed it to introduce evidence in denial, it could not complain of disregard of such evidence by the jury. *Ward Cattle & Pasture Co. v. Ford* (Civ. App.) 175 S. W. 784.

30. **Form and sufficiency of allegations—Conclusions.**—An answer held not bad on general demurrer as stating only the pleader's conclusion. *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

Answer to suit on note that defendants were accommodation makers signing for sole accommodation of payee held bad as pleading conclusion. *Magill v. McCamley* (Civ. App.) 182 S. W. 22.

33. — **Irrelevancy and surplusage.**—In an action to recover the balance of the purchase price of a business, an answer held irrelevant. *McLane v. Haydon* (Civ. App.) 160 S. W. 1146.

41. **Pleading particular facts or defenses—Assumption of risk.**—A railroad cannot avoid liability for injuries to an invitee on the ground of assumption of risk, where it did not plead that defense. *Missouri, K. & T. Ry. Co. of Texas v. Kinslow* (Civ. App.) 172 S. W. 1124.

42 $\frac{1}{2}$ . — **Bona fide purchase.**—A chattel mortgagee held entitled to foreclosure as against purchasers not pleading defense of innocent purchasers. *Murray Co. v. Randolph* (Civ. App.) 174 S. W. 825.

44. — **Consideration and want or failure thereof.**—Purchaser sued for purchase price, in support of plea of failure of consideration, held entitled to rely upon material misrepresentations. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

46. — **Damages and mitigation thereof.**—An allegation that a claim was fraudulently assigned to give jurisdiction over the action, in a county where the defendant did not reside, is not sufficient to authorize an allowance to the defendant of attorney's fees, or expenses in attending the trial. *Leventhal v. Hollamon* (Civ. App.) 165 S. W. 6.

Right of broker to have damages diminished by unpaid premiums held defensive matter which should have been pleaded. *Diamond v. Duncan* (Sup.) 177 S. W. 955, denying rehearing 172 S. W. 1100.

47. — **Discharge of surety.**—In action against surety on note, answer relating to agreement as to collateral held not a defense to the note, and not too indefinite and uncertain, as failing to particularize the collateral alleged to have been misapplied. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

Where defendant alleged his signature was secured as surety on certain notes by fraud, it being represented to him that certain others would sign as sureties with him, and they did not so sign, that was no defense to an action on the notes in the absence of a further allegation that plaintiff had notice of the fraud. *Gulf Live Stock Ins. Co. v. Love* (Civ. App.) 181 S. W. 766.

The maker of a vendor's lien note, if he can avail of an extension thereon to his grantee of the land as a release of him, must plead and prove it was without his consent or notice to him. *Newby v. Harbison* (Civ. App.) 185 S. W. 642.

48. — **Estoppel, waiver, and ratification.**—An estoppel must be pleaded. *B. W. McMahan & Co. v. State Nat. Bank of Shawnee* (Civ. App.) 160 S. W. 403; *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

In an action by owner of bills of lading for cotton against one to whom a third person, having obtained the bills of lading by fraud, transferred the cotton, plea that defendant was an innocent purchaser held insufficient to raise the issue of estoppel. *B. W. McMahan & Co. v. State Nat. Bank of Shawnee* (Civ. App.) 160 S. W. 403.

A pleading that defendant acquired a way by parol agreement upon the conveyance to plaintiff of the land over which he asserted it is not good as a plea of an easement by estoppel, because alleging no fact showing the injustice of a revocation of the way. *Bowington v. Williams* (Civ. App.) 166 S. W. 719.

In action for breach of contract, estoppel of plaintiff, to be available as defense, must be pleaded. *Crews v. Gulf Grocery Co.* (Sup.) 182 S. W. 1096.

The principal, seeking to defeat the broker's claim for a commission, cannot rely upon alleged representations of the broker's agent to her that he waived his commission, where she failed to plead such representations as against the broker. *Goodwin v. Gunter* (Sup.) 185 S. W. 295.

Buyer of engine seeking to cancel purchase-money notes, relying upon written warranty of engine's power, must have complied with warranty's terms relative to notice of

rejection, unless alleging and proving waiver by the seller. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

In action on note for price of stallion, in absence of pleading to support defense of waiver of requirement of guaranty limiting defendants' remedy to return of horse by fixed date, testimony of defendant that sellers' agent promised that defendants would receive another horse when shipment was received in Texas held inadmissible. *Adams v. Crittenden* (Civ. App.) 191 S. W. 833.

51. — **Fraud and mistake.**—In a suit against the makers and indorser of notes given for the price of certain school land, the makers having pleaded an unpaid claim of the state as an incumbrance, an answer by the indorser that the makers assumed and agreed to pay such claim, but that the covenant was omitted from the deed by mistake, was sufficient. *Alston v. Pierson* (Civ. App.) 158 S. W. 1165.

Where defendant filed only a plea of privilege which did not allege fraud, accident, or mistake, fraud in obtaining the execution of the note could not be proved. *Newman v. Buffalo Pitts Co.* (Civ. App.) 160 S. W. 657.

Under allegations of fraud or mutual mistake in the execution of a contract, evidence would be admissible to show that it did not express the real agreement of the parties and to show what the agreement in fact was. *Conn v. Rosamond* (Civ. App.) 161 S. W. 73.

In an action for the breach of a contract, defendant's allegation that he intended that a deposit should be the extent of his liability, and that if the contract did not show that, it was a mistake of the parties, held not sufficient as an allegation of mutual mistake. *Id.*

Answer, in action for deficiency after foreclosure, alleging collusion between defendant primarily liable on the notes and plaintiff, held subject to some of the special exceptions which were sustained. *Bray v. Sewall* (Civ. App.) 171 S. W. 795.

An answer in an action by a vendor for the purchaser's deposit, alleging failure to furnish a good title and false representations as to character of the land is good. *Cline v. Booty* (Civ. App.) 175 S. W. 1081.

The answer of defendant in an action on a note given for the purchase price of mules, held to allege fraud by the seller in making the sale, so as to authorize an instruction on that issue. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

In an action on a note, an answer averring misrepresentations held to present a good defense. *Brown v. Davis* (Civ. App.) 178 S. W. 842.

Where, in action against county, defendant pleaded minutes of commissioners' court showing written contract in supplemental petition to which no plea of fraud or mistake was filed, parol evidence that there was no contract held inadmissible. *Mosler Safe Co. v. Atascosa County* (Civ. App.) 184 S. W. 324.

In an action for the price of machinery, answer held to apprise plaintiff of the defense of fraudulent representations, warranting admission of parol evidence thereof, though the contract was written. *Willett v. Browning Engineering Co.* (Civ. App.) 186 S. W. 352.

In suit on note, parol evidence supporting allegations of answer, in addition to plea of non est factum, that defendants had been defrauded into signing a note for more than that which should have been drawn, held properly admitted. *Farmers' & Citizens' Sav. Bank v. Smith* (Civ. App.) 188 S. W. 1026.

In an action for price of silo, allegations of answer held sufficient to charge fraud in obtaining defendant's signature to contract of purchase. *Ames Portable Silo & Lumber Co. v. Gill* (Civ. App.) 190 S. W. 1130.

52. — **Homestead.**—Where a plea to set aside a homestead out of a larger tract did not designate the particular portion selected, but merely asked that his right be protected, and the plaintiff creditors did not except to the plea, the debtor is entitled to have his homestead set off. *Coburn v. Stevens* (Civ. App.) 167 S. W. 207.

Allegations of answer in action to restrain sale under deed of trust, to foreclose deed of trust and vendor's liens, held insufficient, as against a general demurrer, to set up acquisition of homestead in 200 acres of part remaining after sale of 199 acres from 413-acre tract. *Crawford v. Spruill* (Civ. App.) 187 S. W. 361.

54. — **Illegality of contract.**—The court will not enforce an illegal contract where the illegality appears in the proof, though not pleaded. *Bishop v. Japhet* (Civ. App.) 171 S. W. 499.

57. — **Laches.**—In suit to rescind exchange of property for false representations, in the absence of any issue of laches or limitation, evidence as to time when plaintiff discovered their falsity held incompetent. *Kirkland v. Rutherford* (Civ. App.) 171 S. W. 1031.

58. — **Limitation of liability of carrier.**—Where plaintiff's cattle were injured as the result of a failure to properly bed the cars, and the carrier pleaded that the shipping contract required the shipper to bed the cars, the answer was defective for failure to further allege that the shipper was given an opportunity to do so, and that, if the cars were not properly bedded, it was through his default. *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

In an action for injury to shipment of live stock, a contract of shipment, part of the stipulations of which were void, and the other portion of which were not properly pleaded, is properly rejected. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

60. — **Marshaling securities.**—Crop mortgagee cannot, as against a landlord's lien, first raise on appeal the question of marshaling. *Frith v. Wright* (Civ. App.) 173 S. W. 453.

61. — **Negligence and contributory negligence.**—Untraversed allegations in the answer, that deceased, run down at a crossing, did not stop, look, and listen, though warned by reflections from the headlight of the approaching train, held not to show him to have been guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Pennington* (Civ. App.) 166 S. W. 464.



Burden is on railroad company to plead and establish by evidence its defense that it was landowner's duty to maintain gate through which cattle went on its tracks, or that the open condition of the gate was due to some other agency. *Ft. Worth & D. C. Ry. Co. v. Scheer* (Civ. App.) 169 S. W. 1069.

The contributory negligence of a shipper of live stock must be pleaded to be relied on. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

Plaintiff's contributory negligence in failing to call in a consulting physician must be pleaded to entitle defendant to have an instruction submitting the question. *Missouri, K. & T. Ry. Co. of Texas v. Whitsett* (Civ. App.) 185 S. W. 406.

Plaintiff's contributory negligence in failing to call in a consulting physician must be pleaded to entitle defendant to have an instruction submitting the question. *Id.*

In action against a street railway company, an answer alleging that plaintiff was in plain view of the car, and that he negligently drove his wagon upon the track without making any effort to avoid collision, was a good plea of contributory negligence continued after discovered peril by plaintiff, at least where no exception was taken. *Southern Traction Co. v. Wilson* (Civ. App.) 187 S. W. 536.

In action for damages to shipment of live stock under contract requiring shipper to feed and care for them and hold the carrier harmless for damages, except from its negligence, allegations held to sufficiently set up shipper's contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 189 S. W. 765.

Although the evidence tended to show contributory negligence of plaintiff in failing to properly care for his injury, which aggravated it, the defendant could not invoke this as a defense, where contributory negligence was not pleaded. *Roscoe, S. & P. Ry. Co. v. Taylor* (Civ. App.) 191 S. W. 1175.

In absence of special exception defendant, in action for injuries in a crossing accident, held not required to specify particulars of plaintiff's contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Harrell* (Civ. App.) 194 S. W. 971.

62. — **Non est factum.**—See notes under art. 3710.

63. — **Notice or knowledge of facts.**—An answer held sufficient to charge that the holder of a note was not a bona fide purchaser without notice and in view of district and county court rule 17, to sufficiently charge that the holder of the note had knowledge of its infirmities before he acquired it. *Brown v. Davis* (Civ. App.) 178 S. W. 842.

66. — **Res judicata.**—*Res judicata*, to be available, must be pleaded. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491.

In an action for breach of an irrigation contract, a plea held a sufficient plea of *res judicata*. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 168 S. W. 28.

Where a bill to set aside a sale of infants' property did not show that the infants were estopped by a judgment in a prior suit prosecuted by their guardian, defendants must plead and prove such adjudication if they rely thereon. *Mullinax v. Barrett* (Civ. App.) 173 S. W. 1181.

67. — **Statute of frauds or in avoidance thereof.**—The statute of frauds must be pleaded when relied upon to defeat a contract. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423; *Johnson v. Tindall* (Civ. App.) 161 S. W. 401; *Larrabee v. Porter* (Civ. App.) 166 S. W. 395; *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

If there are exceptions taking case of prescriptive easement of way out of statute, they must be pleaded. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

68. — **Tender and offer of equity.**—Though an insurer which proves the amount of its liability to be less than the face of the policy and tenders such amount to the plaintiff is entitled to a judgment limited to the amount of the tender, such rule is of no avail where the amount was not tendered to the court, and the insurer pleaded nullity of the contract, although there had been a tender to plaintiff's attorney. *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* (Civ. App.) 192 S. W. 607.

70. **Defense or relief in particular actions.**—An owner of chattels in possession of another is entitled to recover the same, unless the latter shows his right to possession on grounds alleged in his special defenses. *Killman v. Young* (Civ. App.) 171 S. W. 1065.

72. — **Against railroad companies.**—The defense that defendant had made an honest effort to light it, but trespassers had destroyed the lights, should have been pleaded; that being matter in avoidance. *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 163 S. W. 338.

73. — **Against surety.**—In suit to enforce claim for material against a railroad company, answer held not to raise issue of suretyship between the lessee, who had contracted for the material, and the company. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

76. — **By foreign corporation.**—Where the petition in an action by a foreign corporation fails to disclose the character of the transaction sued on, and does not allege that it has a permit to transact business in the state, the issue of its right to do business in the state may be raised by appropriate pleading and proof. *First State Bank of Teague v. Hadden* (Civ. App.) 158 S. W. 1168.

77½. — **By or against receivers.**—In absence of special plea denying defendants' capacity as receivers, proof to sustain such allegations was not required. *Schaff v. Nash* (Civ. App.) 193 S. W. 469.

78½. — **For divorce.**—In wife's divorce suit for cruel treatment, husband's answer alleging facts as to wife's cruelty toward him as justification of his having her tried on charge of insanity held to plead such cruel acts of wife sufficiently to admit evidence of them. *Hartman v. Hartman* (Civ. App.) 190 S. W. 846.

79. — **For injuries to servant.**—Although interstate shipment was not alleged by either party, defendant railroad may avail itself of the federal Employers' Liability Act, where evidence requires finding that employé was engaged in interstate commerce at time of injury. *Geer v. St. Louis, S. F. & T. Ry. Co.* (Sup.) 194 S. W. 939.

80. — **For libel or slander.**—In an action for slander, justification must be specially pleaded with such particularity as to notify the plaintiff as to what charge he will be compelled to meet. *Burkhisser v. Lyons* (Civ. App.) 167 S. W. 244.

84. — **Mandamus.**—Whether mandamus should issue to compel an officer to perform an official duty must depend on a petitioner's allegation and proof of all facts showing an affirmative right to the relief sought, and not on the officer's failure to set up a valid defense. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

85. — **On bonds and notes.**—Allegations of the answer in an action against two defendants on a note given for stock held to sufficiently allege, in the absence of a special exception, that the stock was purchased by only one of defendants, *J. O. G., alone. Cowboy State Bank & Trust Co. v. Guinn* (Civ. App.) 160 S. W. 1103.

In an action against maker of note, held that he was bounting to plead and prove a pencil notation thereon that it was secured by a deed of trust, and that a third person had assumed payment if this would constitute a defense. *Grisham v. Connell Lumber Co.* (Civ. App.) 164 S. W. 1107.

An allegation of the defendant's answer that he did not owe the amount of the notes, and that he had signed notes thinking that a further accounting would be made, held not to set up a collateral agreement, whereby the notes were delivered in part performance of an agreement for credits on the notes. *Baldwin v. W. H. Coyle & Co.* (Civ. App.) 185 S. W. 426.

86. — **On contracts in general.**—In an action for extracting turpentine on lands on which defendants were not entitled to enter by their lease, the answer, alleging that the land leased contained less acreage than was represented, held to state a good defense. *Conn v. Rosamond* (Civ. App.) 161 S. W. 73.

Where purchasers of motor truck contended that it was secondhand and wholly unfit for use, they may plead and prove amounts expended in attempting to operate the motor as a circumstance establishing that it was defective; no recovery for such amounts being sought. *Avery Co. of Texas v. Staples Mercantile Co.* (Civ. App.) 183 S. W. 43.

In an action for the price of machinery, defendants' answer held sufficient to authorize proof of breach of warranty. *Willett v. Browning Engineering Co.* (Civ. App.) 186 S. W. 352.

87. — **On insurance contracts.**—Where defendant insurer admitted liability, paying the amount of the certificate into court, it could not on appeal assert that the beneficiary was not entitled to the full amount so paid. *Wright v. Grand Lodge K. P., Colored* (Civ. App.) 173 S. W. 270.

Where the life insurance policy introduced by plaintiff was the one sued on, and defendant did not plead the issuance of another policy, there was no error in excluding evidence offered by defendant to show that there were two policies issued. *American Nat. Ins. Co. v. Bird* (Civ. App.) 174 S. W. 939.

In action on life insurance policy, defense that insured was not in sound health when policy issued held not sufficiently pleaded to justify admission of evidence to establish it. *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170.

The insurer, who did not set up in the trial court a provision of the policy that it assumed no obligation unless insured was in good health, could not urge the defense on appeal. *American Nat. Ins. Co. v. Anderson* (Civ. App.) 179 S. W. 66.

Allegation of the answer, in an action on a life policy, that the coroner found that insured committed suicide, presents no defense, his finding not being proof or evidence of suicide. *De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.* (Civ. App.) 180 S. W. 153.

Defense under policy held affirmative. *Ætna Life Ins. Co. v. El Paso Electric Ry. Co.* (Civ. App.) 184 S. W. 628.

## CHAPTER NINE

### CHANGE OF VENUE

Art.

1911. By consent of parties.

1912. Granted on application, when.

Art.

1913. Shall be granted unless.

#### Article 1911. [1270] [1270] By consent of parties.

Cited, *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

**Agreement.**—See *Texas Moline Plow Co. v. Biggerstaff* (Civ. App.) 185 S. W. 341.

In view of this article, provision in a power of attorney and agreement for formation of a reciprocal fire insurance association that all suits on policies shall be brought in county where association is located was reasonable, and while fact that a suit is instituted in another county will not defeat policy or be a defense, upon a plea of privilege agreement, will be enforced by changing venue. *Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank* (Civ. App.) 192 S. W. 1098.

In action on a fire policy, where defendant reciprocal insurance association established its domicile and an agreement that actions against it on policies should be brought only in such domicile, plaintiff must then show that defendant was not such an organization as could then do business at that place or any other under the laws of the state. *Id.*

#### Art. 1912. [1271] [1271] Granted on application, when.

Cited, *Sands v. Sedwick* (Civ. App.) 174 S. W. 894.

**Application and determination.**—Under arts. 1912 and 1913, held that, on the statutory showing, change of venue was mandatory. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

#### Art. 1913. [1272] [1272] Shall be granted, unless, etc.

**Issue and determination.**—Under arts. 1912 and 1913, held that, on the statutory showing, change of venue was mandatory. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

**Burden of proof.**—Under this article, where motion for change of venue was opposed, moving party held to have burden of proving the facts upon which it was based. *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819.

**Counter affidavits and other evidence.**—Denial of defendant's application for change of venue held proper, under this article, though plaintiff's written contest of the application was supported only by his affidavit. *Sands v. Sedwick* (Civ. App.) 174 S. W. 894.

**Discretion of court.**—In an action for breach of a lease of property to be used as a saloon, the court's denial of an application for change of venue held not an abuse of discretion. *Taber v. Eyler* (Civ. App.) 162 S. W. 490.

As change of venue is in discretion of trial court, and it must be made to appear that court has abused its discretion before its action will be set aside, order refusing an application to change venue will not be disturbed in absence of evidence upon which it was based. *Colgrove v. Falfurrias State Bank* (Civ. App.) 192 S. W. 580.

DECISIONS APPLICABLE TO SUBJECT IN GENERAL

**Statutory right.**—A court has no authority to change the venue except when expressly given by law. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

CHAPTER TEN  
CONTINUANCE

Art. 1917. Continuance not to be granted, except, etc.	Art. 1918. Application for continuance, requisites of.
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**Article 1917. [1276] [1276] Continuance not to be granted, except, etc.**

**In general.**—Where an order continuing a case to the next term was made after an order was passed by the commissioners' court changing the time of the next term from August to the intervening June, the continuance was to the June term, although the parties were not apprised of the change in the date of the term. *Guerra v. Guerra* (Civ. App.) 158 S. W. 191.

Denial of an application held not erroneous. *Schubert v. Voges* (Civ. App.) 169 S. W. 409.

In a consolidated suit to quiet title, request of defendants, made after various dismissals and interlocutory judgment against them, for permission to withdraw their announcement of ready, for trial and continue the case that they might again add parties as to whom they had dismissed, held properly refused. *Brady v. Cope* (Civ. App.) 187 S. W. 678.

Under arts. 4698 and 4699, as to parties in death action, where surviving wife sues for her sole benefit, and it appears at the trial that deceased's parents are living, defendant is entitled to postponement to have them made parties. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 191 S. W. 599.

In a servant's action for injuries where plaintiff testified at the trial, court's refusal to grant continuance because of plaintiff's alleged failure to sign and swear to a deposition held not error. *Santa Fé Tie & Lumber Preserving Co. v. Burns* (Civ. App.) 192 S. W. 348.

**Amendment of pleadings.**—Allowing plaintiff to amend his petition after the case had gone to trial, without granting defendant a continuance, is largely a matter of discretion, where the amendment simply enlarges on the cause of action, and does not require of defendant any evidence not before required. *Gulf, C. & S. F. Ry. Co. v. James B. & Charles J. Stubbs* (Civ. App.) 166 S. W. 699.

The overruling of a motion for continuance, made on the ground of the filing of an amended petition on the day of trial, held not an abuse of discretion. *St. Louis Southwestern Ry. Co. of Texas v. Williams* (Civ. App.) 170 S. W. 1069.

There was no error in overruling defendant's motion to continue an action on an insurance policy on the ground of surprise at facts set out in trial amendment, where they were at all times known to defendant. *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169.

Amendment of petition in action for personal injuries held not to entitle defendant to continuance, especially where application was not supported by affidavit, as required by this article. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

The denial of a continuance sought by defendant to meet amendment held improper. *McWhorter v. Estes* (Civ. App.) 175 S. W. 846.

Defendant held not entitled to a continuance on the ground of surprise after the amendment of the petition at the trial so as to deny contributory negligence which the answer had pleaded. *Terrell Sewerage Co. v. Stiles* (Civ. App.) 177 S. W. 1053.

Where defendants in a foreclosure suit were not surprised or misled by a trial amendment correcting a misdescription of the note as to date and amount, it was not error to refuse to permit them to withdraw their announcement of ready for trial and great a continuance. *Memphis Cotton Oil Co. v. Gist* (Civ. App.) 179 S. W. 1090.

Refusal of continuance for amendment of petition not setting up a new cause of action and constituting no cause for surprise, but merely stating larger damages, held not abuse of discretion. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

In action for negligent transportation of stock, a trial amendment alleging defendant's refusal to permit them to be unloaded for feed, water, and rest held to require continu-

ance to procure evidence when requested by defendants. *Kansas City, M. & O. Ry. Co. of Texas v. James* (Civ. App.) 190 S. W. 1136.

**Absence of party.**—The absence of a party does not give a party an absolute right to a continuance. *Apache Cotton Oil & Mfg. Co. v. Watkins & Kelly* (Civ. App.) 189 S. W. 1083.

**Absence of counsel.**—The absence of a party's leading attorney does not give a party an absolute right to a continuance, but the mere fact that secondary counsel are present does not alone warrant refusal of continuance for absence of leading counsel, where those in attendance are unfamiliar with the case. *Apache Cotton Oil & Mfg. Co. v. Watkins & Kelly* (Civ. App.) 189 S. W. 1083.

Voluntary absence of counsel on account of important professional business in Court of Civil Appeals is not ground for continuance, especially where it is not affirmatively shown that his client will suffer by his absence. *Texas & N. O. R. Co. v. Cummins* (Civ. App.) 193 S. W. 161.

**Absence of witness or evidence.**—Overruling defendant's motion for a continuance, based upon the sickness of one of its witnesses, who was present in court although sick, held not an abuse of discretion. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

The denial of continuance requested to obtain evidence to sustain defense held not an abuse of the trial court's discretion. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

An application for a continuance, made on ground of correcting depositions because a witness failed to locate definitely the injuries to plaintiff, need not be granted, and no error or prejudice would result where the depositions showed that there was some injury to plaintiff's forehead. *Texas Midland R. Co. v. Truss* (Civ. App.) 186 S. W. 249.

— **Competency or materiality.**—Where indorsee of note by making inquiry would not have learned of fraud, the makers not then knowing thereof, held, that it was not an abuse of discretion to refuse to delay the trial to allow a witness to procure the indorsee's books to show the exact amount of the discount. *Lock v. Citizens' Nat. Bank* (Civ. App.) 165 S. W. 536.

In an action for the price of horses, where it was not shown that cattle transactions between the parties were material, the denial of a continuance for absence of witnesses who could testify as to such transactions was not error. *Hazelrigg v. Naranjo* (Civ. App.) 184 S. W. 316.

Where testimony expected from absent witness is immaterial to any defense defendant had right to interpose, it is not error to deny him second continuance. *Houston Transp. Co. v. Paine* (Civ. App.) 193 S. W. 188.

— **Cumulative evidence.**—Defendant cannot obtain a continuance on the ground of the absence of material witnesses, where other witnesses could testify to the same fact. *Missouri, K. & T. Ry. Co. of Texas v. Pitkin* (Civ. App.) 158 S. W. 1035.

A party's first application for continuance cannot be denied because the evidence of the absent witness was cumulative. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

— **Contradictory evidence.**—The refusal of a continuance for absent witness who would testify that plaintiff's condition was due to injury received prior to entering defendant's employ held not error, where defendant's witnesses testified that plaintiff was suffering from no injury, and that at the time he entered defendant's employ a thorough physical examination disclosed no injury. *Missouri, K. & T. Ry. Co. of Texas v. Cornelius* (Civ. App.) 188 S. W. 34.

— **Diligence.**—Defendant cannot obtain a continuance on the ground of absence of material witnesses where due diligence has not been used. *Missouri, K. & T. Ry. Co. of Texas v. Pitkin* (Civ. App.) 158 S. W. 1035.

Refusal of continuance to enable defendant to secure experts to examine fixtures, asked for six months after commencement of the action, is warranted on the ground of lack of diligence; the litigation primarily involving the question of plaintiff's compliance with his contract to make and install the fixtures, and defendant having been in exclusive possession thereof. *Banner v. Thomas* (Civ. App.) 159 S. W. 102.

Defendant's application for a continuance was properly overruled, where the case had been on file for more than a year and no process had been issued for any witnesses and the application did not give the names or residences of any witnesses wanted. *Citizens' Planing Mill Co. v. Tunstall* (Civ. App.) 160 S. W. 424.

Denial of continuance held not error, where no diligence to procure the absent witnesses was shown, though the adverse party did not comply, until the case was called for trial, with an order requiring a bond for costs. *Etheridge v. Campbell* (Civ. App.) 179 S. W. 1144.

Denial of continuance to procure absent witness was not abuse of discretion, where application did not show evidence could not be obtained from other source and case was tried when set. *Barnhart v. Kansas City, M. & O. Ry. Co. of Texas* (Sup.) 184 S. W. 176.

A continuance on account of the absence of a witness will be denied when no process had been issued for the witness, no effort was made to secure his testimony, and defendant who was applying for the continuance declined offer of privilege of using the testimony of the witness taken on a former trial. *San Antonio, U. & G. R. Co. v. Hagen* (Civ. App.) 188 S. W. 954.

Failure of defendant railroad to notify attorney of discharge of employé, an important witness, that process might issue, was such negligence as justified trial court in finding that proper diligence to have witness at trial was not exercised, so that continuance for his absence was properly denied. *Texas & N. O. R. Co. v. Cummins* (Civ. App.) 193 S. W. 161.

Party cannot be charged with lack of due diligence in not securing witness where it appears from his motion, made when case is called, that witness is sick. *Houston Transp. Co. v. Paine* (Civ. App.) 193 S. W. 188.

Where a continuance is sought for absence of a witness, it will be refused, in the absence of a showing of diligence in attempting to procure such evidence. *International & G. N. Ry. Co. v. Mudd* (Civ. App.) 194 S. W. 960.

**Surprise.**—Surprise as a ground for further continuance cannot be claimed because the special setting of the case, agreed on when the case was first continued, was not known of by associate counsel, called into the case after such setting, till five days before the day for which it was so specially set. *Banner v. Thomas* (Civ. App.) 159 S. W. 102.

In an action for injuries to cattle en route, defendant was not entitled to a continuance for surprise because of evidence that the rough handling was due to sudden stoppages on account of a preceding train being pulled by a broken-down engine. *St. Louis & S. F. R. Co. v. White* (Civ. App.) 160 S. W. 1128.

Facts set up in plaintiff's trial amendment, not constituting a defense to the policy sued on, could not be made the basis for a continuance on the ground of surprise. *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169.

Plaintiff, coming to second trial prepared to prove testimony on former trial of deceased witness only by the statement of facts on a former appeal, which was inadmissible, could have a continuance on the ground of surprise, to obtain proper evidence of the former testimony. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

A supplemental petition, in response to an amended answer, both bearing on total disability of plaintiff and both filed the day before trial, held not to entitle defendant to a continuance on the ground of surprise, it having from the first known that total disability was claimed. *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979.

Where defendant made no showing that a continuance would enable it to secure evidence to rebut a reply to a defense urged, the denial of a continuance, though the reply was first made at trial, is not an abuse of discretion. *New Jersey Fire Ins. Co. v. Baird* (Civ. App.) 187 S. W. 356.

In suit by assignee of legal title to chose in action, where defendant by cross-examination developed the fact that such holder held for the benefit of the real owner, it was not error to overrule defendant's application to withdraw announcement of ready and continue the cause on the ground of surprise. *City of San Antonio v. Reed* (Civ. App.) 192 S. W. 549.

**Admissions.**—The mere admission that an absent witness would, if present, testify to the facts set out in an application for a continuance is no sufficient reason for refusing a continuance. *Missouri, K. & T. Ry. Co. of Texas v. Cornelius* (Civ. App.) 188 S. W. 34.

**Successive applications.**—Where a case has been continued several times because of the intoxication of defendant, it was not an abuse of the court's discretion to refuse a further continuance on the same ground. *Ramsey v. Bird* (Civ. App.) 170 S. W. 1075.

In action on note refusal of defendant's second motion for a continuance held not an abuse of trial court's discretion, where there was evidence in the record entitling plaintiff to recover, and where the testimony of defendant, if present, would only have raised a conflict in the evidence. *Ball v. Miller* (Civ. App.) 187 S. W. 688.

Tender of witness fees is necessary to show diligence in an application for a second continuance to secure attendance of such witness. *Houston Transp. Co. v. Paine* (Civ. App.) 193 S. W. 188.

**Discretion of court.**—The discretion of the trial court, where the application for a continuance is not a statutory one, is not subject to review unless abused. *St. Louis Southwestern Ry. Co. of Texas v. Williams* (Civ. App.) 170 S. W. 1069.

#### Art. 1918. [1278] [1278] Application for continuance, requisites of.

**Affidavits and motion for continuance.**—Where a witness, on the ground of whose illness a continuance was asked, was present in court, it was nevertheless error to refuse to permit a physician to testify that the witness' physical and mental condition was such that he could not testify clearly and accurately. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

Affidavit for postponement held such that while the plaintiff might not have been entitled to continuance for the term, yet postponement should have been granted. *Apache Cotton Oil & Mfg. Co. v. Watkins & Kelly* (Civ. App.) 189 S. W. 1083.

— **Amendment.**—An application for continuance based on surprise in the filing of an amended petition must show that defendant had a meritorious defense, which by continuance could be made to appear. *St. Louis Southwestern Ry. Co. of Texas v. McDermitt* (Civ. App.) 175 S. W. 509.

— **Surprise.**—Application for continuance on ground of surprise by new matter in amended petition held not to state sufficient cause. *El Paso & S. W. R. Co. of Texas v. Ankenbauer* (Civ. App.) 175 S. W. 1090.

— **Materiality of evidence.**—Where an application for a continuance for absence of witnesses did not state that the testimony expected was material or that the applicant used diligence to procure it, it was not a statutory application within this article, and it was within the discretion of the court to grant it or not. *Wauhov v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

A motion for continuance, which alleges the materiality of the testimony of the absent defendant and states generally that defendant was absent for some cause over which he has no control, is properly overruled. *Muldoon v. J. E. Bray Land Co.* (Civ. App.) 171 S. W. 1027.

A motion for a continuance held insufficient where it did not show that either of the absent witnesses would testify to any facts material to the issues. *Allen v. Rettig* (Civ. App.) 177 S. W. 215.

A mere statement of a conclusion as to what would be proven by an absent witness is not a compliance with the statute entitling a party to a continuance to procure such witness. *Hazelrigg v. Naranjo* (Civ. App.) 184 S. W. 316.

Application for continuance, not stating testimony is material, showing materiality thereof, and that applicant "has used due diligence to procure such testimony," etc., as required by this article, is insufficient. *McKinnon v. Porter* (Civ. App.) 192 S. W. 1112.

— **Diligence.**—An application for a continuance, failing to show diligence and to state the facts which the applicant expected to prove by the absent witness, was insufficient. *Paige v. Menke* (Civ. App.) 158 S. W. 1030.

Application for continuance, which showed that absent witness was not summoned and failed to show what he would testify or what was expected to be proved by him, held properly overruled. *Hunter v. Holt* (Civ. App.) 160 S. W. 608.

Refusal of a continuance for absent witnesses, not a statutory one, within this article, held not an abuse of discretion, where the case was decided November 28th and a new trial granted on December 5th; the court having told counsel several days before that he would grant it, and the motion for continuance made on December the 6th. *St. Louis Southwestern Ry. Co. of Texas v. Williams* (Civ. App.) 170 S. W. 1069.

— **Absence of witness.**—Application for a continuance for absence of a nonresident witness not being a statutory application under arts. 1918, 3649, the discretion of the court will not be disturbed in the absence of abuse. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

Testimony that the absent witness stated that he would not swear to the facts set forth in the first application for continuance is not admissible. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

Where application for continuance on ground of absent witnesses is made on information and belief, and is indefinite, the granting thereof is within the court's discretion, and such discretion held not abused. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

## CHAPTER ELEVEN

### STENOGRAPHIC REPORTERS

Art.	Art.
1920. District judges may appoint official reporters, when.	1930. Special stenographer appointed, when.
1923. Duties of reporters.	1932. Stenographer for county court, etc., in civil cases, appointed when; oath; compensation.
1924. Same subject.	1933. In felony cases reporter to keep stenographic record to be made when and how; transcript for appointed attorney, when, and compensation for same.
1925. Compensation of shorthand reporter; Bexar county; fees; salary in certain counties.	
1926. Reporters to make transcript for any person; compensation.	

#### Article 1920. District judges shall appoint official reporters, when.

**Constitutionality.**—Acts 32d Leg. c. 119, does not violate Const. art. 1, § 3, guaranteeing equal protection of the law, or art. 1, § 19, and Const. U. S. Amend. 14. *Rice v. Roberts* (Civ. App.) 177 S. W. 149.

#### Art. 1923. Duties of reporter.

Cited, *Canode v. Sewell* (Civ. App.) 170 S. W. 271.

**Record of objections to charge.**—Under *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 1923, 1924, it is not reporter's duty to make a record of objections to charge, and his notes thereof, even if in record, cannot be considered. *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739.

#### Art. 1924. Same subject; preparation of transcript; compensation.

Cited, *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 160 S. W. 108; *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 816; *J. B. Farthing Lumber Co. v. Illig* (Civ. App.) 179 S. W. 1092.

**Record of objections to charge.**—See *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739; note under art. 1923.

**Duty to transcribe notes.**—Under Acts 32d Leg. c. 119, §§ 5, 8, preparation free of charge of transcript of testimony upon request of pauper appellant held to be duty of such stenographer. *Rice v. Roberts* (Civ. App.) 177 S. W. 149.

A court stenographer may be compelled by mandamus to transcribe his shorthand notes of proceedings in court taken by him by virtue of his appointment. *Otto v. Wren* (Civ. App.) 184 S. W. 350.

**Statement of facts, how prepared.**—Under Acts 32d Leg. c. 119, §§ 5, 6, the statement of facts must be reduced to narrative form, and a statement in question and answer form cannot be sanctioned. *Mooney v. State*, 73 Cr. R. 121, 164 S. W. 823.

Under Acts 32d Leg. c. 119, §§ 5, 6, and 13 (*Vernon's Sayles' Ann. Civ. St.* 1914, arts. 1924, 2070, 2072), where appellant had the official stenographer prepare a narrative form of a statement of facts from the shorthand notes, the reporter acted as appellant's agent, and the statement so prepared was a statement of facts, independent of the transcript of the reporter's notes, permitted by section 13. *Canode v. Sewell* (Civ. App.) 170 S. W. 271.

Arts. 1924, 2070, and 2072 must be construed together, and, where the parties on appeal have agreed to a statement of facts by virtue of article 2072, they lose the right to object that articles 1924 and 2070 have not been complied with. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 170 S. W. 859.

Under arts. 1924, 2070 and 2072, held, that appellant could not require appellee to agree to a statement of facts prepared by him independently of the official transcript, which statement would not be considered as a statement of facts. *Buffalo Bayou Co. v. Lorentz* (Civ. App.) 170 S. W. 1052.

Under *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 1924, 2070, 2072, an appellant may, without procuring the reporter's transcript of the proceedings, prepare a statement of

facts, though the appellee did not consent thereto. *Ft. Worth Pub. Co. v. Armstrong* (Civ. App.) 175 S. W. 1113.

**Art. 1925. Compensation of shorthand reporters; Bexar County; fees; salary in certain counties.**—The official shorthand reporter of each judicial district in Bexar and Travis counties shall receive a salary of \$1800.00 per annum, in addition to the compensation for transcript fees as provided for in this Act, said salary to be paid monthly by the commissioners' court of the county, out of the general fund of the county, upon the certificate of the district judge. Provided, however, in other judicial districts composed of one county, the official shorthand reporter shall receive a per diem compensation of five dollars for each and every day he shall be in attendance upon the court for which he is appointed, in addition to the compensation for transcript fees as provided for in this Act, said compensation shall be paid monthly by the commissioners' court of the county in which the court sits, out of the general fund of the county, upon the certificate of the District Judge; provided, further, however, that in the 22nd, 25th and 26th Judicial Districts and the Criminal District Court of Travis and Williamson counties the official shorthand reporter shall receive a salary of \$1800.00 per annum, in addition to the compensation for transcript fees as provided for in this Act, said salary shall be paid monthly by the counties of the district in proportion to the number of weeks provided by law for holding court in the respective counties; and provided further, that in all other judicial districts in this State composed of two or more counties, the official shorthand reporter shall receive a salary of \$1500.00 per annum, in addition to the compensation for transcript fees as provided for in this Act, such salary shall be paid monthly by the counties of the district in proportion to the number of weeks provided by law for holding court in the respective counties. Provided, that in a district wherein any county in the district the term may continue until the business is disposed of, each county shall pay in proportion to the time court is actually held in such county. [Acts 1911, p. 264, § 8; Act April 3, 1917, ch. 189, § 1; Act May 19, 1917, 1st C. S., ch. 27, § 1. (sec. 8).]

**Explanatory.**—The act amends sec. 8, ch. 119, general laws, regular session, 32nd Leg. 1911, as amended by ch. 189, regular session, 35th Leg. The above text is a part of section 8 as amended. The other parts of the section are set forth post as art. 2071, Civil Statutes, and art. 845a, Code Cr. Proc. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1926. Reporters to make transcript for any person; compensation.**

Cited, *Canode v. Sewell* (Civ. App.) 170 S. W. 271.

**Art. 1930. [1295] [1295] Special stenographer appointed, when.**

Cited, *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

**Art. 1932. Stenographer in civil case in county court; appointment; oath; compensation; other provisions applicable.**

Cited, *Buffalo Bayou Co. v. Lorentz* (Civ. App.) 170 S. W. 1052.

**Constitutionality.**—Acts 32d Leg. c. 119, providing for the appointment of official stenographers for district and county courts, does not violate Const. art. 1, § 3, guaranteeing equal protection of the law, and art. 1, § 19, and Const. U. S. Amend. 14. *Rice v. Roberts* (Civ. App.) 177 S. W. 149.

**Appointment and nature of office.**—A stenographer sworn to take the testimony in a cause in the county court, but not in the manner prescribed by statute for an official court stenographer, which is more enlarged and broader in scope than the oath administered, is not an official court stenographer within the meaning of the statutes relating to official court stenographers. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 160 S. W. 108.

Under the statutes an official court stenographer is to be appointed by the judge of the county court upon demand of either party in a civil action, and hence the appointment of an official stenographer is a judicial act, manifested by the judge before rendition of judgment. *Id.*

**Art. 1933. In felony cases reporter to keep stenographic record, to be made when and how; transcript for appointed attorney, when, and compensation for same.**

See notes under Code Cr. Proc. art. 846.

## CHAPTER TWELVE

## TRIAL OF CAUSES

Art.	Art.
1934. Appearance day.	1950. Cases brought up from inferior courts tried de novo.
1936. Judgment by default.	1951. Order of proceedings on trial by jury.
1937. Where some defendants answer and others do not.	1952. Additional testimony allowed, when.
1938. Damages on liquidated demands, how assessed.	1953. Order of argument.
1939. On unliquidated demands.	1954. Charge and instructions.
1941. Procedure in case of service by publication where no answer.	1955. Nonsuit may be taken, when.
1942. Guardian ad litem for minors, lunatics, etc.	1957. Jury may take certain papers.
1943. Suits called in their order, etc.	1958. Jury to be kept together.
1949. Agreed case.	1959. Duty of officer in charge of jury.
	1962. May ask further instructions.
	1963. May have witness recalled.
	1964. May have depositions, etc., re-read.
	1965. Disagreement of jury.

**Article 1934. [1280] [1280] Appearance day.**

**Default judgment.**—Notwithstanding arts. 1934 and 1936, court held not to have abused discretion in denying default judgment upon defendant's failure to file its answer on the appearance day of the April term and in treating the case as for the July term, where, at the January term, he had ordered that civil matters should not be called for trial at the April term. *Schattenberg v. Houston E. & W. T. Ry. Co.* (Civ. App.) 168 S. W. 8.

**Art. 1936. [1282] [1282] Judgment by default.**

Cited, *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

**Pleading to sustain judgment.**—In an action on a note given for premium on insurance policy, application for which was rejected, in which recovery over against the company was sought, allegations of company's cross-action against R., to whom its agent paid a part of the proceeds of the note as a commission, held insufficient to support a default judgment. *Reserve Loan Life Ins. Co. v. Benson* (Civ. App.) 167 S. W. 266.

In determining the sufficiency of the allegations of a cross-action to support a default judgment against a third party, evidence on the trial of the action against defendant could not aid the pleadings in the cross-action. *Id.*

A petition good as against general demurrer will sustain a default judgment. *Findlay v. Lumsden* (Civ. App.) 171 S. W. 818.

A petition praying for judgment on notes against "plaintiff" is not bad on general demurrer, and will sustain a default judgment. *Id.*

A default judgment on a petition not signed by plaintiff or his attorney and not excepted to is not void or voidable. *Shipp v. Anderson* (Civ. App.) 173 S. W. 598.

A petition which fails to state a cause of action will not support a judgment by default. *Texas Auto & Supply Co. v. Magnolia Petroleum Co.* (Civ. App.) 191 S. W. 573.

**Default in pleading.**—Entry of default judgment against defendant, who did not show, when requesting the day to answer, that it had a meritorious defense, was proper. *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

On substitution of new plaintiffs and adoption by them of petition of original plaintiffs, entry of judgment by default without permitting opportunity to answer was error. *Cooney v. Van Deren* (Civ. App.) 182 S. W. 1190.

— **Time of answering or filing answer.**—Notwithstanding arts. 1934 and 1936, court held not to have abused discretion in denying default judgment upon defendant's failure to file its answer on the appearance day of the April term and in treating the case as for the July term, where, at the January term, he had ordered that civil matters should not be called for trial at the April term. *Schattenberg v. Houston E. & W. T. Ry. Co.* (Civ. App.) 168 S. W. 8.

Where a lumber company sued by a railroad for freight charges delayed answering for nearly a year, although its attorney was in court several times securing continuances, entry of default judgment for the road was proper. *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

**Jurisdictional matters.**—Ordinarily where an action is brought against a nonresident by attachment of property within the state, judgment will not be rendered until jurisdiction and service has been procured for the required length of time before the court convenes for the term at which judgment is rendered. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

Where the petition or citation in an action against a corporation fails to direct the manner of service, to sustain a default judgment proof of proper service must be made when judgment is entered. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

To authorize a default judgment the sheriff's return must show service as required by statute. *Id.*

Return, showing service of citation by delivering to two defendants "in person a true copy," would not support a default judgment. *Kellam v. Trail* (Civ. App.) 185 S. W. 988.

**Record and recitals.**—In trespass to try title, judgment against plaintiffs tending to show title in defendants' predecessor held not inadmissible because reciting that the "defendant" was served with notice of the suit while the judgment, which was by de-



fault, purported to be against three persons. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

In case of a judgment by default, the court's jurisdiction over the defendant must affirmatively appear. *Friend v. Thomas* (Civ. App.) 187 S. W. 986.

**Art. 1937. [1283] [1283] Where some defendants answer and others do not.**

**Answer by part of defendants.**—Under this article the fact that one of defendants defaulted in an action to quiet title would not relieve plaintiffs from proving title as against the answering defendants, who pleaded not guilty. *Atkinson v. Shelton* (Civ. App.) 160 S. W. 316.

Where one of the several defendants, though duly cited, made default, the court should have rendered judgment against him by default. *A. J. Birdsong & Son v. Allen* (Civ. App.) 166 S. W. 1177.

Where one of the several defendants, though duly cited, made default, the judgment for plaintiff was properly amended so as to include him though the verdict failed to mention him. *Id.*

Art. 7750, as to judgment of title on default without proof by plaintiff, in trespass to try title, does not purport to prescribe the rights of defendants who do answer, and their rights are controlled by article 1937 as to answering and defaulting defendants. *Hodges v. Moore* (Civ. App.) 186 S. W. 415.

In action against two defendants, where demurrer of one was sustained and plaintiff did not request judgment against other defendant, who did not answer, his right to judgment against such defendant was waived. *W. T. Rawleigh Medical Co. v. Mayberry* (Civ. App.) 193 S. W. 199.

**Correction of judgment.**—Under arts. 1937, 1938, 2015, petitioner held not entitled to the correction of a final judgment entered on a default. *Mallory v. Mantius* (Civ. App.) 174 S. W. 692.

**Art. 1938. [1284] [1284] Damages on liquidated demands, how assessed.**

**Liquidated damages.**—Cause of action of a railroad for freight charges fixed in accordance with arts. 6656, 6659, held for a liquidated demand rendering proper entry of default judgment without proof under arts. 1938, 1939. *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

A stipulation for liquidated damages for delay in completing wells to be used for irrigation held to be compensation and not penalty. *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (Civ. App.) 185 S. W. 382.

A contract for sale of land having fixed a certain amount as liquidated damages for vendee's refusal to accept deed, the vendor cannot have greater damages. *Nelson v. Butler* (Civ. App.) 190 S. W. 811.

Stipulation in contract for sale of land for forfeiture as liquidated damages of earnest money for failure to accept deed, money to be returned if a good merchantable title could not be shown, held valid stipulation for liquidated damages. *Id.*

**Proof of cause of action.**—Awarding default judgment, in action to foreclose a mechanic's lien based on a note mentioning a contract for mechanic's lien for labor and material, was improper, where the mechanic's lien was not put in evidence, and there was no evidence that improvements were made as contracted for. *Herring v. Herring* (Civ. App.) 189 S. W. 1105.

**Correction of judgment.**—Under arts. 1937, 1938, 2015, petitioner held not entitled to the correction of a final judgment entered on a default. *Mallory v. Mantius* (Civ. App.) 174 S. W. 692.

**Art. 1939. [1285] [1285] On unliquidated demands, etc.**

**Inquest of damages.**—Cause of action of a railroad for freight charges fixed in accordance with arts. 6656 and 6659 held for a liquidated demand rendering proper entry of default judgment without proof under arts. 1938, 1939. *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

**Evidence.**—Despite art. 1902, as amended by Acts 33d Leg. c. 127, plaintiff, in case of defendant's default in filing an answer, is, under this article, bound to prove unliquidated damages. *R. R. Dancy & Co. v. Rosenberg* (Civ. App.) 174 S. W. 831.

**Art. 1941. [1346] [1212, 1345] Procedure in case of service by publication where no answer, etc.**

Cited, *Mabee v. McDonald* (Sup.) 175 S. W. 676.

**Art. 1942. [1211] [1211] Guardian ad litem for minors, lunatics, etc.**

**Application and appointment in general.**—Failure to appoint a guardian ad litem for a defendant of unsound mind held not to require a reversal, where she filed a cross-action "represented by her husband"; this article not prohibiting the cross-action from being so brought, where there is no guardian. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

The general guardian of minors may maintain suit against them, a guardian ad litem being appointed for them. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

**Duty and power of court.**—In a suit against infants cited to appear and answer, the court, in the absence of a general guardian of their estate, must, as required by this article, appoint a guardian ad litem. *Simmons v. Arnim* (Civ. App.) 172 S. W. 184.

Where the court appointed a guardian ad litem for infant defendants cited to appear and answer, the court could, without further representation or service on them, allow compensation to the guardian. *Id.*

**Validity of judgment.**—A judgment adjusting rights of property between an infant and his guardian, rendered pursuant to an agreement in open court, while the infant was represented only by the guardian, is void. *Pearce v. Heyman* (Civ. App.) 158 S. W. 242.

That no guardian of her estate or guardian ad litem has been appointed to represent a defendant of unsound mind does not render void a judgment for plaintiff. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

Where infants sued as adults were duly served with process and the proceedings of the trial did not disclose that they were infants, a judgment against them was voidable only. *Kelly v. Kelly* (Civ. App.) 178 S. W. 686.

The remedy against a judgment voidable because against a minor not represented by a guardian ad litem, the fact of infancy appearing on the face of the record, is by writ of error, and not bill of review. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

**Compensation for services.**—Where adult and infant defendants in trespass to try title had no interest in real estate, the fees of the guardian of the infants appointed on the motion of plaintiff must be taxed against plaintiff. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

Where plaintiff in trespass to try title against an adult and infants filed a motion to have a guardian appointed for the infants who had no guardian, the compensation to the guardian was costs incurred by plaintiff. *Id.*

Under arts. 1942 and 2048, the court may tax as costs against successful infant defendants the compensation allowed their guardian ad litem, and this, without further representation or service on them. *Simmons v. Arnim* (Civ. App.) 172 S. W. 184.

A judgment against infant defendants for compensation to their guardian ad litem may be collected by execution where there is no guardianship pending. *Id.*

A fee of \$500, allowed an attorney ad litem, held not excessive. *Baber v. Galbraith* (Civ. App.) 186 S. W. 345.

#### Art. 1943. [1287] [1287] Suits called in their order, etc.

**Vacation of judgment entered.**—Decree in action for divorce on ground of wife's abandonment, within jurisdiction of district court under arts. 4630 and 4631, the cause being called out of its regular order and tried at an unusual place, without notice to defendant or her counsel, etc., while not a nullity, held so irregular as to authorize its vacation. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

#### Art. 1949. [1293] [1293] Agreed case.

Cited, *Johnson v. Goldstein* (Civ. App.) 173 S. W. 458; *Lindsey v. Rose* (Civ. App.) 175 S. W. 829; *Craver v. Greer* (Civ. App.) 178 S. W. 699.

**Submission of controversy.**—The court may examine the pleadings in determining a case on an agreed statement of facts. *El Fresno Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

**As constituting statement of facts.**—An agreed statement in the trial court cannot, under arts. 1949, 2068, be considered as a statement of facts on appeal, where not showing the approval of the trial judge. *Lingo Lumber Co. v. Garvin* (Civ. App.) 181 S. W. 561.

#### Art. 1950. [1294] [1294] Cases brought up from inferior courts, tried de novo.

Cited, *Southwestern Land Corp. v. Neese* (Civ. App.) 161 S. W. 1090; *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133.

**Jurisdiction dependent on jurisdiction below.**—Under Const. art. 5, § 16, and this article, held that, on appeal from a judgment void because in excess of jurisdiction, the county court could only order the appeal dismissed. *Parker v. Watt* (Civ. App.) 178 S. W. 718.

#### Art. 1951. [1297] [1297] Order of proceedings on trial by jury.

**Right to open and close.**—As to argument, see notes under Art. 1953.

Where, in a suit on purchase-money notes and to foreclose a vendor's lien retained in the deed, the purchaser admitted the execution of the notes and liability thereon, but did not admit the execution and delivery of the deed, the vendor had the right to open and close. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

In an action on notes, pleadings held to constitute placing burden on plaintiff to prove the transfer, so that defendants were not entitled to open and close. *Jines v. Astle* (Civ. App.) 170 S. W. 1081.

One seeking to establish a parol trust, having the burden of proof, is entitled to open and close. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

Motion by contestants for right to open and close held properly denied under rule 31 for district and county courts (142 S. W. xx), because they manifestly did not intend to admit everything the proponent was required to prove. *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819.

Under art. 1953, and district court rule No. 31 (142 S. W. xx), plaintiff in suit upon an itemized account wherein defendant before trial filed a written acknowledgment of the correctness of the account except as to three items had the right to open and close. *Houston & T. C. R. Co. v. Montgomery* (Civ. App.) 185 S. W. 633.

In a broker's action for commissions, where interveners claimed a share of commission, and defendant had paid money into court, fact that defendant asked costs did not deprive interveners of their right to open and close, where they had the burden of proof. *Knight Realty Co. v. Williams* (Civ. App.) 193 S. W. 168.

**Discretion of court as to order of proof.**—The exclusion of testimony upon the motion of defendant before the introduction of its evidence rests largely within the discretion of the trial court, and its action is not reviewable in the absence of a showing of an abuse. *Fred A. Jones Co. v. Drake* (Civ. App.) 159 S. W. 441.

**Evidence dependent on preliminary proof.**—See notes under Art. 3687, rule 5, note 9.

**Scope of evidence in chief.**—It was within discretion of trial court to admit testimony of other fires on defendant's right of way, although admissible only in rebuttal in anticipation of testimony of defendant's master mechanic to support allegations in answer that all of its locomotives had been properly constructed. *St. Louis Southwestern Ry. Co. of Texas v. Wood* (Civ. App.) 192 S. W. 812.

**Evidence in rebuttal.**—In an action against a railroad company for injuries to a female plaintiff, certain evidence held competent in rebuttal. *Houston & T. C. Ry. Co. v. Fox* (Civ. App.) 156 S. W. 922, judgment reversed 106 Tex. 317, 166 S. W. 693.

Introduction of additional testimony of physicians as to nature and extent of plaintiff's injuries in rebuttal of testimony for defendant controverting original testimony for plaintiff on that subject was proper. *Caffarelli Bros. v. Bell* (Civ. App.) 190 S. W. 223.

**Admission in rebuttal of evidence proper in chief.**—Where the parties failed to offer parol evidence to explain a written instrument, because they understood that the court had not found it ambiguous, it was not improper, the instrument being ambiguous to allow the evidence to be admitted in rebuttal. *Barnett v. Elliott* (Civ. App.) 160 S. W. 671.

Evidence which would be admissible in chief when admitted by the court on rebuttal should be considered by it and given the same weight as any other evidence; the case being tried to the court without a jury. *Id.*

### Art. 1952. [1298] [1298] Additional testimony allowed, when.

Cited, *City of Ft. Worth v. Young* (Civ. App.) 185 S. W. 983.

**Reopening case for further evidence.**—The discretion of the court on motion to reopen a cause after the court has announced it will direct a verdict will not be reviewed unless an abuse appears. *Puckett & Wear v. City of Ft. Worth* (Civ. App.) 180 S. W. 1115.

In an action against a city, it was an abuse of discretion to refuse to reopen the cause to permit plaintiff to show that proper notice of claim had been given, notwithstanding the court had announced it would direct verdict for defendant. *Id.*

That the court, after reopening a case to hear testimony on a single issue, refused to hear additional testimony by the adverse parties who did not allege that their testimony was in rebuttal of that then introduced, but who sought to introduce new testimony which could not in any way affect the result, was not error. *Priddy v. Tabor* (Civ. App.) 189 S. W. 111.

It was not error for the court, on motion for new trial after judgment to open the case to hear additional evidence. *Id.*

— **After argument begun or closed.**—The admission of testimony pursuant to an offer made in answer to argument of opposing counsel is a matter of discretion with the court. *Fox v. Houston & T. C. Ry. Co.* (Civ. App.) 186 S. W. 852.

### Art. 1953. [1299] [1299] Order of argument.

**Right to open and close.**—Error in permitting defendant to open and conclude the argument was material and necessitated a reversal. *J. W. Carter Music Co. v. Bailey* (Civ. App.) 179 S. W. 547; *Houston & T. C. R. Co. v. Montgomery* (Civ. App.) 185 S. W. 633; *Cooper v. Marek* (Civ. App.) 166 S. W. 58; *Abernathy Rigby Co. v. McDougle Cameron & Webster Co.* (Civ. App.) 187 S. W. 503.

Under this article and rule 31 for district and county courts (142 S. W. xx), court held to have erred in permitting defendant to open and close the argument. *J. W. Carter Music Co. v. Bailey* (Civ. App.) 179 S. W. 547; *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

Under district court rule 31, and this article, referring to the right of parties to open and conclude, held, that defendant was not entitled to that right, even though he had the burden of proving his defense which was duress; the admission required by district court rule not being made until the conclusion of the evidence. *Caldwell v. Auto Sales & Supply Co.* (Civ. App.) 158 S. W. 1030.

Under district and county court rule 37 (142 S. W. xx), the position in the argument of counsel for an intervener is within the sound discretion of the court. *Cooper v. Marek* (Civ. App.) 166 S. W. 58.

The exercise of the trial court's discretion as to the position in the argument of counsel for an intervener is not subject to review unless abused. *Id.*

Where defendant admitted plaintiff's right to recover the amount of the note sued on but filed a plea in reconvention claiming damages for wrongful attachment, he was entitled to open and close the argument. *Fisher v. Scherer* (Civ. App.) 169 S. W. 1133.

Under rule 31 for district and county courts (142 S. W. xx), including the provision of this article, held, on the pleadings in an action on a note, that the granting to defendants of the right to open and close was error. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

It is the province of the court alone to determine the right to open and conclude the argument. *Minor v. Bishop* (Civ. App.) 180 S. W. 909.

Under Rules of Practice in the District and County Courts, rule 31 (142 S. W. xx), held, that defendant was properly permitted to open and close argument, where he admitted execution of the instrument sued on, and that plaintiff would be entitled to recover but for the fraud pleaded by defendant in avoidance. *J. I. Case Threshing Mach. Co. v. Webb* (Civ. App.) 181 S. W. 853.

Error, if any, in refusing defendant the right to open and close the evidence and argument was harmless, where the court properly took the case from the jury. *Abernathy Rigby Co. v. McDougle, Cameron & Webster Co.* (Civ. App.) 187 S. W. 503.

In a broker's suit for commissions on exchange of lands, where interveners claiming a share of commission had burden of proof on their affirmative allegations, they were entitled to the benefit of this statute, regarding right to open and close when party has burden of proof, and refusal to allow them right to open and close was reversible error. *Knight Realty Co. v. Williams* (Civ. App.) 193 S. W. 168. See, also, notes under art. 1952.

### Art. 1954. Charge and instructions before argument.

Cited, *Shaw v. Garrison* (Civ. App.) 174 S. W. 942; *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504; *Terrell v. Middleton* (Sup.) 191 S. W. 1138.

**Construction and operation.**—Under the direct provisions of Acts 33d Leg. c. 59, amending Rev. St. 1911, arts. 1954, 1970, and 1971, objections to instructions when not made before the charges are read to the jury are waived. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

The action of the court in directing the jury to return an answer to a special issue is not a violation of Acts 33d Leg. c. 59, requiring the court's instructions to be submitted to the jury before argument. *Richardson v. Wilson* (Civ. App.) 178 S. W. 566.

#### Art. 1955. [1301] [1301] Nonsuit may be taken, when.

**Request for nonsuit.**—Under this article held that after filing a request for a nonsuit it was necessary to actually notify the judge thereof before a nonsuit could be effectively claimed. *Towell v. Towell* (Civ. App.) 164 S. W. 23.

**Relief to defendant.**—Under arts. 1900 and 1955, a plaintiff is entitled to nonsuit, notwithstanding counterclaim, as to his own cause without dismissal of or prejudice to the defendant's counterclaim. *Apache Cotton Oil & Mfg. Co. v. Watkins & Kelly* (Civ. App.) 189 S. W. 1083.

Where allegations of counterclaim were insufficient to state a cause of action, the filing thereof could not cut off plaintiff's right to nonsuit. *Id.*

**Withdrawal of plea without prejudice.**—Under arts. 1900 and 1955, an intervener, in a suit where plaintiff sought to enforce a lien for the repair of an automobile, cannot withdraw her plea of intervention without prejudice, where plaintiff joined issue on the plea and prayed that its lien be declared a superior lien. *United Motor Dallas Co. v. Hendricks* (Civ. App.) 168 S. W. 878.

#### Art. 1957. [1303] [1303] Jury may take papers with them, except, etc.

See art. 1975.

**Pleadings.**—New trial should be granted for the taking into the jury room, contrary to this article, of a pleading in another case, not in evidence, influencing one juror, at least, to agree to a higher award. *City of Ft. Worth v. Young* (Civ. App.) 185 S. W. 983.

**Depositions and papers connected therewith.**—A written statement made by plaintiff shortly after his injury, cannot be treated as a deposition within this article. It was the duty of the court to send the statement with the jury on its retirement though the jury did not request it, especially where the jury knew that the court refused to permit it at counsel's request. The fact that the jury would probably have remembered the contents of the statement was no justification for refusing to permit the jury to take it in retirement. *Trinity & B. V. Ry. Co. v. Lunsford* (Civ. App.) 183 S. W. 112.

**Documentary evidence.**—Under this article refusal of court, in an action for the killing of mules, where plaintiff's ownership was in issue, to allow the jury to take to the jury room plaintiff's statement, conflicting with his oral testimony as to ownership, was error. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 182 S. W. 357.

In suit against railroad for killing mules, error in refusing to allow jury to take to the jury room plaintiff's written statement, as expressly permitted by this article, held not harmless within rule 62a for Courts of Civil Appeals (149 S. W. x). *Id.*

#### Art. 1958. [1304] [1304] Jury to be kept together.

Cited, *City of Ft. Worth v. Young* (Civ. App.) 185 S. W. 983.

#### Art. 1959. [1305] [1305] Duty of officer in charge of jury.

Cited, *City of Ft. Worth v. Young* (Civ. App.) 185 S. W. 983.

#### Art. 1962. [1308] [1308] May ask further instruction.

See art. 1975.

**Instructions during absence and without consent of party or his attorney.**—The action of the trial court in recalling the jury after they had received the charge and begun their deliberations, and, without the consent of the plaintiff, giving them additional instructions requested by defendant, was not error. *Gotoskey v. Grawunder* (Civ. App.) 158 S. W. 249.

Under this article action of trial court on communication from jury through officer in charge in replying in writing as to the meaning of a word inquired about, in the absence of and without the knowledge of defendant's attorneys, held error. *Corpus Christi St. & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 185 S. W. 430.

The giving of oral instructions concerning the law applicable to any issue in the absence of attorneys, and after the jury had retired and had reported that they could not agree, constitutes reversible error, but this did not apply where instructions did not relate to any law question or to merits of case. *Varn v. Gonzales* (Civ. App.) 193 S. W. 1132.

**Mode of giving instructions.**—The trial court's order that a dictionary be furnished to the jury, made on their request through an officer in charge, which was used in the jury room, was erroneous, as the trial judge is the only one authorized by law to give definitions and explanations to the jury. *Corpus Christi St. & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 185 S. W. 430.

**Form of instruction.**—Where the jury in fire insurance case inquired whether they were instructed to calculate the loss according to an inventory, an answer that they were to consider the inventory, together with all the other evidence, held unobjectionable as laying too much stress upon the inventory. *Fire Ass'n of Philadelphia v. Powell* (Civ. App.) 188 S. W. 47.

In a suit on notes and to foreclose a chattel mortgage, held, that court erred in informing jury, after they had retired, in response to a question after he had been called into jury room, that generally a jury could do whatever it wanted to do. *Dempster Mill Mfg. Co. v. Humphries* (Civ. App.) 189 S. W. 1110.

**Art. 1963. [1309] [1309] May have witness recalled.**

Reading stenographic notes.—Arts. 1963 and 1964 do not provide for the reading of stenographic notes to the jury, and, in the absence of any other statute on the subject, it is not error to refuse to have the stenographic notes read to the jury disagreeing as to the testimony of a witness. *San Antonio Traction Co. v. Badgett* (Civ. App.) 158 S. W. 803.

**Art. 1964. [1310] [1310] May have deposition, etc., re-read.**

See *San Antonio Traction Co. v. Badgett* (Civ. App.) 158 S. W. 803; note under art. 1963.

**Art. 1965. [1311] [1311] Disagreement of jury.**

Urging or coercing agreement.—The conduct of the trial court in retaining the jury which had stated they could not agree and asked to be discharged, and urging an agreement, held not reversible error. *Missouri, K. & T. Ry. Co. of Texas v. Barber* (Civ. App.) 163 S. W. 116.

Where the jury in a civil case announced that it was divided nine to three and could not agree, it was improper for the court to emphasize the difference between civil and criminal cases, as to deprivation of liberty and money judgments, thus minimizing the importance of the case on trial. *Texas Cent. R. Co. v. Driver* (Civ. App.) 187 S. W. 981.

When the jury had been out two days and asked to be discharged, it was highly improper for the judge to reply that the trial had been costly and that he would give them eight more days to reach a verdict, where, in view of terrific storm conditions and lack of communication with their homes, the jury might have been and apparently was coerced into rendering a compromise verdict. *Hunter v. Hunter* (Civ. App.) 187 S. W. 1049.

A court's statement to a jury, reporting, after a day's deliberation, without verdict, that it had taken a long time to try the case and had been expensive, and that it was their duty to get together was not error. *Fleck v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 191 S. W. 386.

Direction of verdict.—Where the court submitted the case to the jury, it may, in its discretion, upon the inability of that body to agree, direct a verdict. *Citizens' Nat. Bank of Waco v. Abeel* (Civ. App.) 160 S. W. 609.

## DECISIONS RELATING TO SUBJECT IN GENERAL

3. **Remarks and conduct of judge in general.**—In action for damages to a farm, trial judge's remark in the presence of the jury that the testimony of witnesses as to the damage was not worth anything and that the jurors would decide the case according to their own knowledge held prejudicial error. *Gorman v. Brazelton* (Civ. App.) 168 S. W. 434.

Remarks by the court in admitting evidence to show a fraudulent conveyance held not improper. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

It is error to reprimand a witness without a proper basis therefor. *Gulf, C. & S. F. Ry. Co. v. Lloyd* (Civ. App.) 175 S. W. 721.

A remark by the court urging the jury to agree, intended as a pleasantry, that the jury had the whole world to agree upon and the whole week before you, held not error. *Western Union Telegraph Co. v. Oakley* (Civ. App.) 181 S. W. 507.

Action of the court in deciding that certain of the grounds of negligence charged are so supported by evidence as to authorize their submission held not objectionable as an intimation of opinion on the weight to be given to the grounds submitted. *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412.

It was error for the trial judge, in making a ruling in the presence of the jury, to say or do anything calculated to influence the jury in reaching its verdict. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 183 S. W. 829.

Remarks of trial judge explanatory of his action in excluding immaterial deeds were not improper. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

The court, in rejecting testimony of statements made by a third person, which could not bind plaintiff, was justified in asking defendant, "How in the world could any statement made to Black by other people bind this plaintiff in this case?" *Id.*

Remarks of court in an action for damages for the flooding of lands held improper, tending to discredit the testimony offered by defendant. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

13. **Misconduct of others affecting jurors.**—An assignment in a motion for new trial that jury was caused to increase amount of award because of seeing plaintiff in a swoon or faint after retiring to deliberate, in the absence of a showing that the verdict was excessive, is insufficient to warrant reversal. *Houston Electric Co. v. Pearce* (Civ. App.) 192 S. W. 558.

14½. **View.**—In an action for death of plaintiff's decedent at a railroad crossing, refusal of court to allow jury to view premises was not error. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

22. **Arguments and conduct of counsel—Proceedings for impaneling jury.**—It was error for the attorney of an injured servant, on the voir dire examination of a juror connected with an indemnity insurance policy, after ascertaining that the master had no policy with the juror's company, to ask further questions, endeavoring to insinuate that the master was protected by such a policy. *Houston Car Wheel & Mach. Co. v. Smith* (Civ. App.) 160 S. W. 435.

25. — **Limiting scope or time of argument.**—The scope of the argument of counsel rests largely in the discretion of the trial court. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445.

Where the issue was simple and there were no questions of law to be argued to the jury, it was not an abuse of discretion to limit the argument of counsel on each side to 30 minutes. *Mitchell v. Robinson* (Civ. App.) 162 S. W. 443, rehearing denied *Childress v. Robinson*, 162 S. W. 1172.

Press of court business will not authorize refusal of reasonable time to counsel for full presentation of issues of fact to the jury. *Id.*

The argument to be pursued by counsel in any stage of a trial is largely in the discretion of the trial court. *Glover v. Pfeuffer (Civ. App.) 163 S. W. 984.*

In a servant's action for personal injuries, the court's action in limiting plaintiff's counsel to 1 hour and 15 minutes for argument, in the absence of any showing of prejudice was not error. *Glover v. Houston Belt & Terminal Ry. Co. (Civ. App.) 163 S. W. 1063.*

26. — **Statements as to facts, comments, and arguments in general.**—It was legitimate argument for counsel for plaintiff to state in his argument that he believed that \$35,000 damages would be fair and reasonable. *Trinity & B. V. Ry. Co. v. Dodd (Civ. App.) 167 S. W. 238.*

It is improper for counsel for a party to state that, if the jury find any sum for the adverse party, the party will have to pay the costs. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co. (Civ. App.) 167 S. W. 256.*

Counsel in the presentation of his case to the jury is allowed great freedom of speech, and may discuss all facts in evidence or admitted by the pleadings, and may draw conclusions from the evidence and give his opinion thereon. *Winnsboro Cotton Oil Co. v. Carson (Civ. App.) 185 S. W. 1002.*

Where jury must have known effect of answers to issues, held not error for counsel to inform jury of effect of their answers. *Southwestern Telegraph & Telephone Co. v. Sheppard (Civ. App.) 189 S. W. 799.*

27. — **Stating or reading and commenting on proceedings in cause.**—In trial of a libel suit, it was improper for plaintiff's attorney to state in his argument to the jury that the case had been tried before and a verdict returned for the plaintiff. *Houston Chronicle Pub. Co. v. McDavid (Civ. App.) 173 S. W. 467.*

In an action against defendant on the ground that he had assumed payment of his son's debt, held not error to read to the jury allegations of verbal promises to pay the notes sued on, after they had been eliminated by exceptions, where such allegations were interwoven with the remainder of the pleading. *Bell v. Swim (Civ. App.) 178 S. W. 850.*

It was error for counsel for the plaintiff to comment to the jury on the court's refusal to direct a verdict for the defendant. *St. Louis, B. & M. Ry. Co. v. Green (Civ. App.) 183 S. W. 829.*

It was error for counsel for the plaintiff to tell the jury that the court thought a verdict should be rendered for the plaintiff. *Id.*

In action against railroad for injuries, defendant's counsel was properly allowed to argue that the court's failure to submit question of contributory negligence showed that he had withdrawn the question from the jury and limited plaintiff's right of recovery to issue of discovered peril. *La Grone v. Chicago, R. I. & G. Ry. Co. (Civ. App.) 189 S. W. 99.*

The statements of counsel, in argument, that the first four special issues represented plaintiff's theory and the last four defendant's, was not prejudicial where the effect of the answers to the questions was apparent and obvious. *Galveston, H. & S. A. Ry. Co. v. Miller (Civ. App.) 192 S. W. 593.*

Counsel in his argument to the jury may read only a portion of a deposition. *Houston Chronicle Pub. Co. v. Lemmon (Civ. App.) 193 S. W. 347.*

29. — **Arguing or reading law to jury.**—Action of trial court in allowing counsel for plaintiff to read part of a case to the court in the hearing of the jury after the charge had been given held, in view of the cases read to the jury by defendant to have been within its discretion. *Ft. Worth & D. C. Ry. Co. v. Stalcup (Civ. App.) 167 S. W. 279.*

So far as argument of counsel, in a case submitted to the jury on special issues, explains to the jury the legal effect of their answers, it is improper. *Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 182 S. W. 7.*

In an action against a railroad for injuries, when plaintiff drove his automobile into a freight car placed upon defendant's team track in a street for unloading, the remark of counsel in argument that plaintiff had a greater right on the street than any corporation in the world was improper. *Galveston, H. & S. A. Ry. Co. v. Marti (Civ. App.) 183 S. W. 846.*

30. — **Matters not within issues.**—In an action for the death of a servant, argument of counsel held not improper as urging a ground of negligence not alleged. *Selden-Breck Const. Co. v. Kelley (Civ. App.) 168 S. W. 985.*

In a suit against a railroad for personal injuries, argument of plaintiff's counsel that defendant had neglected to ring the bell or blow whistle on other occasions held improper. *Gulf, C. & S. F. Ry. Co. v. Sullivan (Civ. App.) 178 S. W. 615.*

In an action against a railroad for personal injuries, the closing argument of plaintiff's counsel that jury should award such sum as would provide for plaintiff, and furnish interest to take care of him, held prejudicial error, as appeal for damages unwarranted by pleading, proof, or charge. *Id.*

In a personal injury action, where the only issue was actual damages, argument that the defendant railroad company was guilty of gross negligence held improper. *Texas & P. Ry. Co. v. Rasmussen (Civ. App.) 181 S. W. 212.*

31. — **Matters not sustained by evidence.**—A statement in argument by proponent's counsel, unsupported by any evidence, that the principal witness for contestants on the principal issue, who had testified by deposition, did not dare to come into court, and a further statement of counsel that his statement was true, when contestants' counsel objected, held to require that the verdict be set aside. *Tompkins v. Pendleton (Civ. App.) 160 S. W. 290.*

Counsel cannot charge in his argument that the adverse party has induced witnesses to give perjured testimony, where there is nothing to show it in the record beyond the mere fact that the party endeavored to secure the attendance of witnesses necessary to maintain his case. *Gulf, T. & W. Ry. Co. v. Culver (Civ. App.) 168 S. W. 514.*

It is improper for counsel to claim that a witness made statements which he did not, in fact, make. *Hambleton v. Southwest Texas Baptist Hospital (Civ. App.) 172 S. W. 574.*

Where a witness testified that a turf fire had killed the roots of grass, a statement by counsel that the witness testified that it would take three or four years for the grass to reset is not error requiring reversal. *Ft. Worth & D. C. Ry. Co. v. Firestone* (Civ. App.) 173 S. W. 919.

Statement of counsel in argument, without evidence to support, in effect, that witness had testified contrary to his prior statement to counsel, was improper. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 182 S. W. 7.

Argument of plaintiff's counsel, claimed to have intimated that attorney requesting plaintiff to submit to physical examination represented an insurance company, held not improper in view of the testimony as to whom he represented. *Decatur Cotton Seed Oil Co. v. Taylor* (Civ. App.) 182 S. W. 401.

The practice of counsel going outside of the record in argument and using language which could only be used to prejudice the jury is condemned. *Stark v. Brown* (Civ. App.) 193 S. W. 716.

**32. — Comments on evidence or witnesses.**—Where, in an action for negligent death, the case for plaintiffs depended on the testimony of two witnesses who had made contradictory statements to defendant, the argument of counsel that the practice of taking statements was reprehensible, and inquiring whether the jury would deprive plaintiffs of a recovery on statements obtained *ex parte*, held reversible error. *American Express Co. v. Parcarello* (Civ. App.) 162 S. W. 926.

In a civil action, the argument of the district attorney that a witness for defendant had committed perjury, and that he could convict him of that offense, was improper. *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514.

In an action against a landlord on a promise to pay for groceries furnished his tenant, the deduction of counsel from the fact that the landlord stood for the tenant in 1910 that it was likely he again stood for him in 1911 was permissible. *Chilson v. Oheim* (Civ. App.) 171 S. W. 1074.

In an action for personal injuries, it was not improper for plaintiff's counsel in his argument to tell the jury what amount he thought they should give plaintiff. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

Argument of plaintiff's attorney, in a suit for depreciation in value of real estate, that such real estate had remained stationary while other property had advanced in value, held not improper. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 176 S. W. 907.

In an action by a railroad brakeman for loss of his eye, argument by plaintiff's attorney that he would not treat the case as superficially as defendant's doctors treated plaintiff's eye held, under the evidence, not to require a reversal. *Atchison, T. & S. F. Ry. Co. v. Hargrave* (Civ. App.) 177 S. W. 509.

Where personal injuries resulted in paralysis argument of counsel that plaintiff would suffer mental anguish because unable to have children is warranted. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

In action for general damages for slander, remarks of counsel that: "Slander goes upon wings and is scattered; slander gets wings and never stops"—were proper; proof of consequences of an act not being necessary to warrant them. *Southwestern Telegraph & Telephone Co. v. Wilkins* (Civ. App.) 183 S. W. 429.

Where the carrier had agreed with certain witnesses to reimburse them for the time they were in attendance upon court as witnesses, statement to the jury by counsel for plaintiff that these witnesses were "bought and paid for" and that the carrier's claim agent admitted that fact, etc., was error. *Northern Texas Traction Co. v. Nicholson* (Civ. App.) 188 S. W. 1028.

Argument of plaintiff's counsel that defendant transferred the note to his wife to beat his debt to the plaintiff, held permissible as an inference from the evidence. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

In an action for the killing of cattle, argument of counsel that, inasmuch as a witness could see a train a given distance, those in charge of the train might have seen cattle, though possibly illogical, is not objectionable. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 193 S. W. 392.

In an action for killing of cattle, argument of counsel that terminal of switches marked terminal of switching yard, and that beyond it a railroad company could not escape liability to fence its right of way as required by *Vernon's Sayles' Ann. Civ. St. 1914, art. 6603*, held warranted under the evidence. *Id.*

In an action against a carrier for injuries alleged to have resulted from contracting a severe cold in defendant's station, remarks of counsel for plaintiff in his argument to jury "that a few thousand dollars won't compensate this good woman for the injuries she has sustained" held not an abuse of right of counsel to comment on weight of evidence. *Chicago, R. I. & G. Ry. Co. v. Faulkner* (Civ. App.) 194 S. W. 651.

In action against railroad company, remarks of counsel in comments on witness' testimony that he knew from past experience that you could not get anything favorable to plaintiff out of an employé of railroad company was improper. *Ft. Worth & D. C. Ry. Co. v. Anderson* (Civ. App.) 194 S. W. 847.

It was improper for attorney to refer in argument to excluded testimony. *Id.*

**33. — Comments on failure to produce evidence or call witness.**—Argument of counsel for plaintiff held not ground for reversal. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639.

Argument of plaintiff's counsel, in suit against a railroad for personal injuries, that the constable who had served subpoenas for defendant was its "employé," "in its power," justifying inferences from defendant's failure to call him as a witness, was objectionable. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 178 S. W. 615.

**35. — Appeals to sympathy or prejudice.**—In an action for injuries, argument of plaintiff's counsel that the jury should give plaintiff every cent it possibly could under the pleadings and evidence, because, if they gave too much, the court would cut it down, but could not raise it, held prejudicial error. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

Remark of plaintiff's counsel that he had heard of the plea of contributory negligence during his experience of 21 years as an attorney for and against railway companies was improper. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 168 S. W. 403.

The argument of counsel for plaintiff, suing a railroad company for a personal injury received while employed as a section hand, that plaintiff was poor, and that the railroad company had access, not only to its own books, but to the books of other railroads, to ascertain the location of other men who were working with plaintiff at the time of the injury, and that such men had the privilege of transportation over the other roads, was improper. *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514.

The remark of plaintiff's counsel, in argument in an action for failure to transmit a telephone call, whereby plaintiff was prevented from attending the funeral of his half-sister, that the jury should allow such damages as would compensate them for the injury that they would have suffered under the same circumstances, is improper. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

Argument of counsel for a passenger, claiming to have contracted tuberculosis because of exposure on defendant's train, that he would not have tuberculosis but for the railroad is not improper as tending to cause the jury to award excessive damages. *Missouri, K. & T. Ry. Co. of Texas v. Dellmon* (Civ. App.) 171 S. W. 799.

In actions for personal injuries to a minor, remarks of plaintiff's counsel, held calculated to arouse the sympathies of the jury, and, in view of defendant's complaint of the insufficiency of the evidence, reversible error. *Texarkana & Ft. S. Ry. Co. v. Terrell* (Civ. App.) 172 S. W. 742.

Argument, in a personal injury action against a railroad company, that in many cases recovery by servants was defeated on the ground of assumption of risk, coupled with a plea for a large verdict, held inflammatory. *Texas & P. Ry. Co. v. Rasmussen* (Civ. App.) 181 S. W. 212.

Remark in argument of plaintiff's counsel concerning defendant's request for physical examination that this was a scheme resorted to by "corporations" or by "this corporation" held not reversible error. *Decatur Cotton Seed Oil Co. v. Taylor* (Civ. App.) 182 S. W. 401.

Remark of plaintiff's counsel that defendant should apply money it was paying stenographer for taking down argument on plaintiff's doctor bill held not improper. *Id.*

Argument that defendant transferred note garnished to his wife to beat his debt to plaintiff, held not inflammatory or intended to prejudice the jury. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

Counsel's argument that "rich landowners want to buy up all the land \* \* \* and let it rot and keep the common people from getting any of it and let them rot" was cause for reversal. *Stark v. Brown* (Civ. App.) 193 S. W. 716.

35½. — **Statements as to mode of arriving at verdict.**—Argument in a personal injury action to the effect that each of the jurors might determine what damages they considered proper and a quotient be taken, but warning them that a previous agreement to that effect would render the verdict objectionable, is improper. *Texas & P. Ry. Co. v. Rasmussen* (Civ. App.) 181 S. W. 212.

37. — **Reference to protection of defendant by insurance or other indemnity.**—Circumstances surrounding the making of a statement by plaintiff, while testifying in an action for negligence on the part of the driver of an automobile, that defendant said he had insurance, held to show that it was made deliberately with an appreciation of the effect it would have; and hence a judgment for plaintiff would be reversed. *Carter v. Walker* (Civ. App.) 165 S. W. 483.

In a personal injury action by a servant, it was not error to ask the jurors on their voir dire examination whether they had any stock in an employers' liability insurance company or were in any way connected with any such company which was insuring employers. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

It is error for plaintiff's attorney, in examining jurors on their voir dire, to ask questions which intimate that an insurance company is defending the case. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

In servant's action for injuries, held, that verdict will not be regarded as rendered through passion and prejudice as result of argument of counsel that defendant would not have to pay judgment against it, but an insurance company would pay it, where policy was in evidence and the jury was instructed not to consider the statement. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

38. — **Retaliatory statements and remarks.**—Where, in an action to recover the balance due on a building contract, defendant's counsel argued that plaintiffs should have sued on the contractor's bond, argument in reply that plaintiffs did not know of the bond, and that defendants should not be permitted to conceal it and then defame plaintiffs because they did not sue on it, was not error. *Funk v. House* (Civ. App.) 168 S. W. 481.

Where, in an action on a building contract, defendant's counsel argued that all controversies and doubts as to the specifications should have been referred to the architect for instructions, argument in reply that it was the duty of the owner or the architect to supervise the work and call the contractor's attention to deviations was not error. *Id.*

In a city's proceeding to condemn land for a public use, the argument of counsel for the owners in answer to argument of counsel for plaintiff, tending only to enlarge the amount of damages, held not reversible error, where the city did not complain that the judgment was excessive. *City of Ft. Worth v. Morgan* (Civ. App.) 168 S. W. 976.

Where no ruling of the court on the question of objectionable argument was asked until motion for new trial, the matter cannot be considered on appeal. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

Argument of plaintiff's counsel provoked by that of defendant's attorney, held no ground for objection, though based on inference upon facts not appearing in the evidence. *San Antonio, U. & G. R. Co. v. Hagen* (Civ. App.) 188 S. W. 954.

Argument outside of the record, made to meet argument by defendant's counsel outside of the record, cannot be complained of by defendant on appeal. *Id.*



39. — **Objections and exceptions in general.**—An objection to remarks of counsel as a whole cannot be sustained, where some of the remarks objected to were proper. *Ferguson v. Fain* (Civ. App.) 164 S. W. 1040.

Where part of counsel's argument was plainly within the scope of the evidence and the objections went to the whole, the argument will not be considered reversible error, particularly where the matter was treated with levity by counsel and the court. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

Error cannot be predicated upon remarks of counsel not excepted to when made. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

Where objection goes to whole argument of counsel, and a portion is not subject to the objection, the rule applicable to the admission or exclusion of testimony applies, and the assignment will be overruled. *La Grone v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 189 S. W. 99.

41. — **Request for instruction to disregard improper argument.**—Remarks of counsel held not to be considered on appeal in absence of request for instructions thereon. *Missouri, K. & T. Ry. Co. of Texas v. Long* (Civ. App.) 174 S. W. 329.

In absence of request to lower court to instruct jury that counsel's argument was improper, Court of Appeals cannot reverse on account of argument. *Padgett v. Hines* (Civ. App.) 192 S. W. 1122.

It is enough that the court sustains objections to remarks of counsel in argument, and stops him; it not appearing request was made to instruct the jury to disregard them. *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 194 S. W. 462.

Defendant held, in view of other contentions and failure to move to exclude the same, not entitled to attack the verdict on appeal as resulting from passion on account of improper argument. *San Antonio & Aransas Pass Ry. Co. v. Schaeffer* (Civ. App.) 194 S. W. 684.

42. — **Withdrawal or correction of objectionable matter.**—Error cannot be predicated upon remarks of counsel which were withdrawn. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

Even if arguments of plaintiff's counsel to jury were improper, case will not be reversed where remarks were withdrawn, the jury instructed not to consider them, and three arguments for appellant followed. *Andrews v. Wilding* (Civ. App.) 193 S. W. 192.

43. — **Action of court.**—Where the plaintiff's attorney argues to the jury upon mental suffering which is too remote to be an element of damages, and the court refuses to give a requested charge that such suffering is not an element of damage, judgment for plaintiff will be reversed. *Western Union Telegraph Co. v. Vickery* (Civ. App.) 158 S. W. 792.

In an action for personal injuries, where a fellow servant, who was injured in the same accident, testified, and an objection to a question asked him whether he had compromised his claim against the company was sustained, and the jury were instructed to disregard it, the asking of the question could not be assigned as error. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

The argument to be pursued by counsel in any stage of a trial is largely in the discretion of the trial court, and, unless an abuse of such discretion clearly appears, the court on appeal will not reverse a judgment simply because it believes a different course should have been pursued. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

Where the court excluded all of the objectionable part of the argument for defendant and instructed the jury to disregard it, such argument was not prejudicial. *Id.*

In an action for negligence, testimony of plaintiff, given deliberately, that defendant said he had insurance, held not cured by admonition to the jury not to consider it. *Carter v. Walker* (Civ. App.) 165 S. W. 483.

If remarks of counsel in argument to the jury were inflammatory, they were not prejudicial, where the court withdrew them from the jury and instructed them not to consider them. *Trinity & B. V. Ry. Co. v. Dodd* (Civ. App.) 167 S. W. 238.

Where objectionable argument is withdrawn by counsel making it, and the jury is instructed to disregard it, the error is cured. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

Argument of counsel, which the jury were charged to disregard, held not so inflammatory as to invalidate a verdict in a personal injury action. *San Antonio, U. & G. R. Co. v. Moya* (Civ. App.) 173 S. W. 608.

Instructions to disregard improper argument do not in every case cure the error. *Texas & P. Ry. Co. v. Rasmussen* (Civ. App.) 181 S. W. 212.

If evidence or size of verdict indicates the jury were influenced by improper remarks of counsel, judgment should be reversed, notwithstanding objection was sustained and counsel reprimanded. *Stockey & White v. Mears* (Civ. App.) 181 S. W. 774.

In a personal injury case against a railroad improper, but not inflammatory, remarks of plaintiff's counsel to the jury, withdrawn upon objection, and as to which the court instructed they should be disregarded, held not prejudicially erroneous, in absence of anything in verdict or record indicating they affected the jury. *Texas City Terminal Co. v. Petitfils* (Civ. App.) 182 S. W. 19.

Statements of counsel that a general charge given would be a safer guide than a special charge held not to require a reversal, where part of such statements were withdrawn and the court instructed that the jury was bound by the special charge, the same as by the general charge, and no further instructions were requested by defendant. *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412.

Where improper remarks of counsel, when defendant objected to his offer of proof of the contents of books by the bookkeeper's memoranda, as to the time it would take to secure original evidence, were withdrawn, and the jury instructed not to be influenced, there was no error. *E. Alkemeyer Co. v. McCardell* (Civ. App.) 183 S. W. 416.

In a brakeman's action for injuries, remark of plaintiff's counsel, interrupting the road's counsel that an annuity equal to plaintiff's earning power could be purchased for \$10,000, that he would like to know who would buy one for him, counsel later withdrawing remark and the court instructing not to consider it, was not prejudicial. *St. Louis, B. & M. Ry. Co. v. Bell* (Civ. App.) 183 S. W. 823.

In a personal injury case, where remarks of plaintiff's counsel were not such as to inflame the jury's passions or arouse their prejudice against defendant, and where, upon objection, the remarks were withdrawn, while the court instructed the jury to disregard them, their making was harmless. *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846.

Although plaintiff's counsel made improper remarks, the error in admitting them was cured where on request the court instructed the jury not to consider them. *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867.

Statement in opening argument that plaintiff could not scour country for witnesses as had defendant corporation to bolster up unjust claim held not error, where withdrawn from jury with instruction not to consider. *Houston Oil Co. of Texas v. Jones* (Civ. App.) 184 S. W. 611.

It is within the discretion of the trial court to require the jury to disregard statements or inferences as to why plaintiff did not bring the suit in another county. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

In personal injury action, where counsel for plaintiff was each time stopped before he made any improper argument and nothing actually improper was brought before jury, attempted improprieties are no ground for reversal. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

Any error in permitting counsel to argue, in an action for injuries by explosion of fireworks in process of manufacture, that in another place there had been such an explosion and the master had been held liable, is cured by a specific instruction to disregard it. *Texas Fireworks Co. v. Gunn* (Civ. App.) 189 S. W. 528.

In servant's action for injuries, argument of counsel held reversible error, despite court's admonition. *Kirby Lumber Co. v. Youngblood* (Civ. App.) 192 S. W. 1106.

Remark of plaintiff's counsel as to attempt of defendant's counsel to impeach plaintiff, though censurable, held not reversible error in view of reprimand and instructions to disregard. *City of Henderson v. Fields* (Civ. App.) 194 S. W. 1003.

44. — Harmless error.—See notes under art. 1628.

## CHAPTER THIRTEEN

### CHARGES AND INSTRUCTIONS TO THE JURY

Art.	Art.
1970. Court shall charge the jury, unless waived, etc.	1974. Endorsement by judge on special instructions refused; as bill of exceptions; presumption on appeal; endorsement when instruction given or modified.
1971. Requisites of the charge; submission to parties; objections, etc.	1975. Jury may carry charge, etc., with them.
1972. Charge need not be excepted to.	
1973. Parties may ask instructions.	

#### Article 1970. [1316] [1316] Unless waived court shall charge jury or submit issues of fact; failure to give time for examination, etc.

Cited, *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397; *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729; *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504; *Thornton v. Daniel* (Civ. App.) 185 S. W. 585; *Gulf, T. & W. R. Co. v. Dickey* (Sup.) 187 S. W. 184; *Terrell v. Middleton* (Sup.) 191 S. W. 1138; *Terrell v. Middleton* (Sup.) (in dissenting opinion) 193 S. W. 139.

1. **Necessity and propriety of instructions in general.**—It was not error to furnish the jury with a form of verdict for plaintiff, where they were also furnished with a form of verdict in case of a finding for defendant. *Missouri, K. & T. Ry. Co. of Texas v. Burnett* (Civ. App.) 162 S. W. 458.

Rev. St. 1911, art. 2061, embodied in chapter 19, tit. 37, and amended by Acts 33d Leg. c. 59, refers to the articles of the chapter relating to bills of exceptions, and not to the foregoing articles of the amendatory law, amending articles 1970, 1971, 1973, 1974, of chapter 13, relating to instructions and objections; and the articles as amended govern the exceptions to instructions and refusal of instructions. *Heath v. Huffhines* (Civ. App.) 168 S. W. 974.

This article and art. 1971, which require the court to prepare and read its charges to the jury before argument, are mandatory. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

This article requires the court to give a written charge which may be either general or special, unless expressly waived by the parties. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

Where a peremptory instruction is given for defendant, the court not indicating on what issue the instruction was based, plaintiff, to obtain a reversal, must show that there was evidence to take all the issues to the jury. *Hanks v. Houston Oil Co. of Texas* (Civ. App.) 173 S. W. 635.

This article and article 1971, requiring charge to be presented to counsel before being read to jury, do not relieve trial judge of common-law duty to give charge on law of case, unless expressly waived. *Whaley v. McDonald* (Civ. App.) 194 S. W. 409.

It was not erroneous to refuse to submit an issue which, under the facts, did not assist in determination of the case. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

2. **Issues and theories of case in general.**—Where the evidence raises an issue a requested charge thereon, if in proper form, should be granted. *Caldwell v. Auto Sales & Supply Co.* (Civ. App.) 153 S. W. 1030.

Defendant is entitled to have affirmatively presented to the jury any specified group of facts developed upon the trial, which, if true, would in law be a defense to the action. *St. Louis, S. F. & T. Ry. Co. v. Overturf* (Civ. App.) 163 S. W. 639.

Ordinarily, where plaintiff presents two causes of action, the withdrawal of one of the causes from the jury eliminates that ground of recovery and the defense set up against it, and defendant may not complain that the defense was not presented in the charge. *Missouri, O. & G. Ry. Co. v. Boring* (Civ. App.) 166 S. W. 76.

There was no error in refusing defendant's requests instructing the jury to find for it as to certain acts of negligence set forth in the petition, where the court did not make those allegations grounds of recovery in the instructions which he gave. *Stone & Webster Engineering Corporation v. Goodman* (Civ. App.) 167 S. W. 10.

**3. Duty to submit all the issues.**—Where two or more grounds of negligence are alleged as the basis of the plaintiff's action, and the court submits the case only upon one of them, the other ground of negligence is thereby withdrawn from the jury's consideration, and the defendant is not entitled to have any special charge thereon. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

Where the parties to a personal injury action agreed what issue should be submitted, the court should have confined his charge to that issue. *Missouri, K. & T. Ry. Co. of Texas v. Barber* (Civ. App.) 163 S. W. 116.

The refusal of a special charge, applicable to the facts and not covered by the general charge, is error. *Pecos & N. T. Ry. Co. v. Chatten* (Civ. App.) 185 S. W. 911.

If judge does not give charge on law of case on controverted issues of fact, error requires reversal. *Whaley v. McDonald* (Civ. App.) 194 S. W. 409.

**4. Affirmative and negative of issue.**—The giving of an instruction authorizing the allowance of damages for permanent injuries, coupled with the denial of an instruction that, if the injuries were not permanent, no award could be made therefor, held improper. *Texas Traction Co. v. Fearis* (Civ. App.) 163 S. W. 1060.

When requested the court must give an affirmative charge on any defense as applied to the particular facts in the case. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 178 S. W. 574.

Party held entitled to affirmative presentation of issue on which he relies. *Wichita Falls Traction Co. v. Adams* (Sup.) 183 S. W. 155.

Refusal of instruction presenting an affirmative defense, especially if pleaded, and not presented in the main charge, constitutes error, provided the facts raised the issue. *Bean v. Hall* (Civ. App.) 185 S. W. 1054.

In action for injury to car inspector from explosion of tank car, defendant held entitled to instruction affirmatively presenting the group of facts upon which it relied to refute negligence on which suit was predicated. *Magnolia Petroleum Co. v. Ray* (Civ. App.) 187 S. W. 1085.

In an action for commissions for selling cattle, where owner contended that contract did not contemplate commissions where the sale was to one of his old customers, the owner is entitled to have such issue affirmatively submitted. *Shaller v. Johnson-McQuiddy Cattle Co.* (Civ. App.) 189 S. W. 553.

Defendant has the right on request to have an affirmative presentation of facts well pleaded, and relied on by him in support of plea of contributory negligence if the evidence fairly supports an inference of negligence. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

**5. Improper issues.**—The refusal of a request presenting an immaterial issue was not error. *First Nat. Bank v. Mangum* (Civ. App.) 194 S. W. 647.

**10. Purpose and effect of evidence.**—Where a part of the deposition was relevant to the material issues in the case, a requested instruction that it should be considered only in determining the credibility of witness was properly refused. *McFarland v. Lynch* (Civ. App.) 159 S. W. 303.

In an action on an accident policy, an instruction that a physician's certificate as to the cause of death, showing compliance with a provision of the policy requiring notice of the accident, with full particulars, could not be considered as establishing the cause of the death, should have been given. *Commonwealth Bonding & Casualty Co. v. Hendricks* (Civ. App.) 163 S. W. 1007.

In an action against a carrier for misdelivery, refusal to instruct that plaintiff's evidence that no partnership existed between consignee and him to whom goods were delivered could be considered only as impeaching consignee testifying to the partnership held erroneous. *Texas & P. Ry. Co. v. Missouri Iron & Metal Co.* (Civ. App.) 178 S. W. 597.

An instruction that statements of witness in conflict with his testimony were admissible only on the issue of his credibility held proper. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

**11. Exclusion of evidence from consideration.**—It was error to refuse to instruct the jury to disregard evidence erroneously admitted. *W. P. Carmichael Co. v. Miller* (Civ. App.) 178 S. W. 976; *Occident Fire Ins. Co. v. Linn* (Civ. App.) 179 S. W. 523.

**16. Law applicable to particular issues or theories.**—On the facts held that it was reversible error to refuse to submit a special issue in open court pursuant to this article. *Wood v. J. M. Radford Grocery Co.* (Civ. App.) 164 S. W. 1070.

Where the pleadings in an action for the title and possession of goods showed that the parties were adverse claimants, and the jury found that plaintiff was the sole owner subject to the payment of a part of the price, refusal to charge that the parties were tenants in common was not erroneous. *Trimble v. Tucker* (Civ. App.) 168 S. W. 1021.

In trespass to try title, refusal of instruction as to lease from plaintiff by son and effect as against mother claiming that she and not the son was in possession held not error. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

In an action on an option contract, evidence held to justify the submission of an instruction on the character of the tenancy of the option holder as a special tenancy. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

In action by seller of embalming fluid for purchase price, defended on the ground

of breach of warranty refusal to submit issue as to manner of use of fluid was not error, the manner of use being only evidentiary on the issue of breach of the warranty. *Frigid Fluid Co. v. Sid Westheimer Co.* (Civ. App.) 189 S. W. 334.

A defendant may have presented to the jury any specified group of facts developed at trial, which, if true, would in law establish a given defense, provided the evidence represented is not substantially covered by the main charge. *Scott v. Northern Texas Traction Co.* (Civ. App.) 190 S. W. 209.

Where, in proceeding for appointment of administrator, evidence showed common-law marriage, but that deceased lived apart from his wife for long period, instruction should have been given that to constitute valid common-law marriage it is not necessary that parties live together for any specified time. *Walton v. Walton* (Civ. App.) 191 S. W. 188.

17. — **Negligence.**—It was error to refuse a charge to find for defendant if plaintiff's wife and automobile were injured as the result of a cause which defendant, by use of ordinary diligence, could not have foreseen and guarded against. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

In action for injuries from falling of tank on walk in amusement grounds, instruction that if defendant did not place the tank there, and could not, by ordinary care, have known that it was placed there, it was not liable, should be given. *Wichita Falls Traction Co. v. Adams* (Sup.) 183 S. W. 155.

In action for injury when defendant's car struck and overturned plaintiff's wagon, where the allegations were denied by the defendant, a requested charge on a defense supported by defendant's evidence should have been given. *Corpus Christi St. & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 185 S. W. 430.

In an action against a sleeping car company for loss of wearing apparel stolen from a car and for consequent embarrassment, defendant held entitled to an instruction applying the law to its theory of the facts as to its exercise of reasonable care to guard the property against theft. *Pullman Co. v. Moise* (Civ. App.) 187 S. W. 249.

In lineman's action for personal injuries, defendant's requested charges on certain phases of negligence held properly refused. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

18. — **Agency and respondeat superior.**—Where employes of defendant on its depot platform saw the danger in time to have prevented the collision had they warned plaintiff in time, and the jury may have concluded from the charge that their failure to do so was imputable to defendant, it was error to refuse a charge which precluded consideration of evidence of such omission as showing negligence attributable to defendant. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

Requested instruction as to agency of one who had received message from sender over telephone held properly refused. *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925.

In a telephone lineman's action for personal injury joining an electric light company, its requested charge on its liability was properly refused, where it could not, in any event, be liable for the negligence of plaintiff's employer, a telephone company. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

In an action for damages caused by an automobile operated by defendant's servant, requested instruction, making defendant liable for accident if machine was defective, although not used in his business, held properly refused. *Gordon v. Texas & Pacific Mercantile & Mfg. Co.* (Civ. App.) 190 S. W. 748.

Evidence, in an action for commission on an exchange of lands, held not to warrant an instruction on adoption or ratification by defendant of plaintiff's act in finding a purchaser. *Anderson v. Walters* (Civ. App.) 194 S. W. 1153.

19. — **Contributory negligence and assumption of risk.**—Where, in an action for injuries to an automobile, struck by a street car, there was evidence that the operator of the automobile was guilty of contributory negligence, the street railway company, relying on the defense of contributory negligence, was entitled to a specific charge that contributory negligence was a complete defense. *Austin St. Ry. Co. v. Heflin* (Civ. App.) 158 S. W. 1040.

Where there was testimony in a negligence case which, if believed, would entitle the defendant to a verdict, on account of contributory negligence, failure of the court to give an instruction requiring the jury to find as to a specified group of facts was error. *Kirby Lumber Co. v. Hardy* (Civ. App.) 183 S. W. 80.

In an action under the federal Employers' Liability Act, held not error to refuse a requested charge that it was plaintiff's duty to exercise ordinary care to avoid the accident. *Kansas City, M. & O. Ry. of Texas v. Finke* (Civ. App.) 190 S. W. 1143.

In a section hand's action for injuries due to fall while hurriedly removing hand car from track to avoid approaching train, where a strongly controverted issue was distance of train when first discovered, refusal to instruct on such issue held error. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 194 S. W. 622.

In action for death of railway conductor from a derailment of a train due to defective coach trucks where it was not alleged or proved that condition of trucks was such that deceased, if ordinarily prudent, would not have operated train with knowledge of that condition, court properly ignored issue of contributory negligence. *Marshall & E. T. Ry. Co. v. Riden* (Civ. App.) 194 S. W. 1163.

21. — **Negligence of fellow servant.**—In action for injuries received when machine at which he worked with fellow servant was started by latter, court should have given defendant's special request directing jury to find for defendant if injuries were inflicted by reason of fellow servant's negligence. *Armour & Co. v. Morgan* (Sup.) 194 S. W. 942.

22. — **Proximate cause.**—Evidence held to call for a charge on accident, and it was error to refuse a charge to find for defendant if it was shown that plaintiff's injury was due to misfortune and misadventure. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

In an action against a carrier of live stock for damages caused by delay in transportation, defendant held entitled to have its defense that delay was caused by unusual rains and floods on its road presented clearly, without being confused and mixed with other issues. *Ft. Worth & D. C. Ry. Co. v. Atterberry* (Civ. App.) 190 S. W. 1133.

25. **Determination of amount of recovery.**—Under Acts 33d Leg. c. 59, art. 1984—a, amending Rev. St. 1911, c. 14, tit. 37, where a case is submitted to the jury on special issues, it is not necessary for the court to charge on the measure of damages. *St. Louis, S. F. & T. Ry. Co. v. Wall* (Civ. App.) 165 S. W. 527.

In suit by the grantee of land to restrain sale on execution against the grantor, where there was abundant evidence on issue of market value of property, court should have given requested instruction limiting jury's finding to such value. *Citizens' Nat. Bank of Plainview v. Slaton* (Civ. App.) 189 S. W. 742.

In an action for price of silo, refusal of a requested instruction, stating amount to be allowed for a breach of warranty alleged as defense, held error. *Ames Portable Silo & Lumber Co. v. Gill* (Civ. App.) 190 S. W. 1130.

In action for death of horse on railroad track, court should have submitted charge on measure of damages requiring verdict to assess amount. *Quanah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

26. **Instructions as to duties of jury.**—It will not be presumed that jury would be inclined to go contrary to their statutory oath to find upon issues submitted without reference to their opinions as to legal rights of parties, and refusal of an instruction as to the jury's duty in that respect is not ground for reversal. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

28. **Definition or explanation of terms.**—The court need not define to the jury the meaning of the words "would hold water" in a contract for construction of a dam; they being of common use and easily understood. *Lattimore v. Puckett & Wear* (Civ. App.) 161 S. W. 951.

Where the court instructs that the carrier is not liable for injuries to a shipment of cattle due to "inherent vice," he should state the meaning of such term. *Ft. Worth & D. C. Ry. Co. v. Berry* (Civ. App.) 170 S. W. 125.

Terms "burden of proof" and "preponderance of the testimony" being of common use, it will not be presumed that jury did not understand them, though instructions defining such terms were refused. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

On broker's suit for commissions it was not error to refuse to instruct as to meaning of "efficient and procuring cause," as the words are not technical, but are in common use. *Ramsey v. Gibson* (Civ. App.) 185 S. W. 1025.

29. **General or special charge.**—A party to a suit has right to special instruction on any group of facts supported by pleadings and evidence, and which, if true, would be of controlling effect in his favor, although a charge in general terms is given which is to same effect. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 194 S. W. 622.

31. **Requisites and sufficiency of charge.**—See notes under next article.

32. **Weight of evidence.**—See notes under next article.

33. **Requests for instructions.**—See notes under art. 1793.

34. **Questions of law or fact.**—See notes under next article.

35. **Objections and exceptions.**—See notes under next article and art. 2061.

36. **Waiver.**—Defendant employer does not waive its right to have refusal of a requested peremptory instruction reviewed by subsequently requesting specific instructions upon plaintiff's assumption of risk. *Patton v. Dallas Gas Co.* (Sup.) 192 S. W. 1060.

Party objecting to direction of verdict cannot be held to have expressly waived charge upon law of case. *Whaley v. McDonald* (Civ. App.) 194 S. W. 409.

**Art. 1971. [1317] [1317] Requisites of charge; submission to parties; objections, etc.**

## I. PROVINCE OF COURT AND JURY

### (A) Questions of Law or Fact

2. **Mixed questions of law and fact.**—Where parol evidence is admitted to remove the ambiguity in a deed, the identity of the land is a mixed question of law and fact. *Young v. Gharis* (Civ. App.) 170 S. W. 796.

3. **Preliminary or introductory questions of fact.**—Unless specially requested, the court need not charge the jury to look to the evidence of plaintiffs, as well as defendant, in determining whether the contributory negligence of a deceased servant, for whose death the action is brought, has been established. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

4. **Sufficiency of evidence to take case to jury.**—Where the evidence is such that reasonable men may differ, the question of fact is for the jury, and, when such that all reasonable men must draw the same conclusion, for the court. *Cartwright v. Canode*, 171 S. W. 696, 106 Tex. 502, affirming judgment (Civ. App.) 138 S. W. 792; *Zimmerman v. Baugh* (Civ. App.) 161 S. W. 943; *American Machinery Co. v. Haley* (Civ. App.) 165 S. W. 83; *Keevil v. Ponsford* (Civ. App.) 173 S. W. 518; *International & G. N. R. Co. v. Walters* (Sup.) 179 S. W. 854; *Mann v. Bell* (Civ. App.) 184 S. W. 320.

It is error to direct a verdict against a party where there is evidence in his favor. *Harris v. Parr* (Civ. App.) 165 S. W. 42; *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639; *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426; *Holtzclaw v. Moore* (Civ. App.) 192 S. W. 582.

Evidence, which goes no further than to create a surmise or suspicion, does not raise a fact issue. *Bock v. Fellman Dry Goods Co.* (Civ. App.) 173 S. W. 582; *De Shazo v. Eubank* (Civ. App.) 191 S. W. 369.

Where there is more than a scintilla of evidence for each party on the issue, the case must go to the jury. *Jones v. First Nat. Bank* (Civ. App.) 160 S. W. 126.

Where there was evidence sufficient to support a verdict for defendant, the court did not err in refusing a peremptory instruction for plaintiff. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

A case cannot be taken from the jury, unless the evidence, viewed most favorably to plaintiff, conclusively shows defendant's nonliability. *Houston Belt & Terminal Ry. Co. v. Winerich* (Civ. App.) 162 S. W. 903.

Where the evidence is such that under the most favorable view of it from plaintiff's standpoint it would not sustain a verdict, the court should instruct a verdict for defendant. *Eagle Pass Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 402.

Where there was evidence to establish one ground of recovery alleged in the petition, a peremptory instruction requested by defendant was properly refused, though plaintiff could not recover on another ground alleged. *Missouri, O. & G. Ry. Co. v. Boring* (Civ. App.) 166 S. W. 76.

Where plaintiff under all the evidence was entitled to a recovery of at least a part of the sum demanded, a peremptory instruction for defendant was properly denied. *Menefee v. Bering Mfg. Co.* (Civ. App.) 166 S. W. 365.

A peremptory instruction for plaintiff is properly refused, where the evidence is sufficient to warrant a finding for defendant. *Murray Gin Co. v. Putman* (Civ. App.) 170 S. W. 806.

Where there was positive and negative testimony on the issue whether an engine bell was rung, the question is for the jury. *Paris & G. N. R. Co. v. Lackey* (Civ. App.) 171 S. W. 540.

Greater insufficiency of evidence sustaining plaintiff's case is necessary to justify direction of a verdict against him than to warrant setting a verdict for him aside. *Keevil v. Ponsford* (Civ. App.) 173 S. W. 518.

The question whether there is sufficient testimony to go to the jury is for the court. *Ft. Worth & R. G. Ry. Co. v. McMurray* (Civ. App.) 173 S. W. 929.

Where there was sufficient evidence to require submission to the jury upon all the issues raised by the pleadings, it was error to direct a verdict. *Hodge v. Toyah Valley Irr. Co.* (Civ. App.) 174 S. W. 334.

In an action for the death of plaintiff's son at a crossing, testimony by plaintiff's witness as to the situation some time after the accident held too remote to raise a jury question as to the situation at the time. *Beaumont, S. L. & W. Ry. Co. v. Moy* (Civ. App.) 174 S. W. 697.

Where neither the evidence admitted nor that offered and excluded was sufficient to authorize a finding of fraud, it was not error to refuse to submit that issue to the jury. *McCullough v. Hurt* (Civ. App.) 175 S. W. 781.

To authorize directing verdict, the evidence must be undisputed and so conclusive as not to authorize the drawing of different conclusions. *Texas & P. Ry. Co. v. Frazer* (Civ. App.) 182 S. W. 1161.

In an action for injuries caused by defendant's street car striking plaintiff's automobile, where there was no evidence tending to prove the issue to be submitted, court did not err in instructing a verdict for defendant. *Jacobe v. Houston Electric Co.* (Civ. App.) 187 S. W. 247.

**6. Weight and probative force of evidence.**—The jury are the judges of the weight and value of evidence. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465; *Gulf, C. & S. F. Ry. Co. v. Green* (Civ. App.) 176 S. W. 63; *Houston Belt & Terminal Ry. Co. v. Vogel* (Civ. App.) 179 S. W. 268; *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404; *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846; *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

Where there is slight testimony, court should instruct a verdict if its probative force is so weak that it merely raises a suspicion of existence of fact sought to be established, and there is no room for ordinary minds to differ as to the conclusion to be drawn from it. *Sovereign Camp of Woodmen of the World v. McCulloch* (Civ. App.) 192 S. W. 1154.

**7. Credibility of witnesses.**—The jury are the judges of the credibility of witnesses. *San Antonio Traction Co. v. Badgett* (Civ. App.) 158 S. W. 803; *Wofford v. Strickland* (Civ. App.) 160 S. W. 623; *Texas Midland R. R. v. Ray* (Civ. App.) 168 S. W. 1013; *Denton v. English* (Civ. App.) 171 S. W. 248; *Houston Belt & Terminal Ry. Co. v. Vogel* (Civ. App.) 179 S. W. 268; *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404; *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846; *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

It cannot be said, as a matter of law, that the testimony of a witness who has been impeached should be entirely disregarded, even though it be shown that he is utterly unworthy of belief. *St. Louis Southwestern Ry. Co. of Texas v. Cole* (Civ. App.) 159 S. W. 146.

The jury alone could pass upon the credibility of witnesses, and though the trial judge doubted the testimony he had no authority to discard it. *Zeigel v. Magee* (Civ. App.) 176 S. W. 631.

**8. — Parties and persons interested.**—Plaintiff's credibility as a witness and the credibility of witnesses tending to impeach him was for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Morgan* (Civ. App.) 163 S. W. 992.

Where plaintiff, testified at a former trial that, when he passed the engine of a work train which later struck him, the fireman was in the gangway, from which place he could not have seen plaintiff when he stepped upon the track, and at the second trial testified that the fireman was at his window, from which place the plaintiff could have been seen, and his later testimony was corroborated by other witnesses, it was for the jury to say which testimony was true. *Angelina & N. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

A peremptory instruction for defendant may not be given on his uncorroborated testimony, proving facts material to his defense. *Iowa City State Bank v. Friar* (Civ. App.) 167 S. W. 261.

Where an injured servant testified that he did not sign a release, it was sufficient to take that question to the jury. *San Antonio, U. & G. R. Co. v. Moya* (Civ. App.) 173 S. W. 608.

Though plaintiff, in an action for personal injuries while a passenger, admitted that he had misrepresented the extent of a former injury while making a settlement with the party liable, his credibility was still for the jury, and a verdict for him could not be held unsupported by his testimony as matter of law. *St. Louis Southwestern Ry. Co. of Texas v. Hassell* (Civ. App.) 177 S. W. 518.

In an action for goods sold and delivered, buyer's letter to seller, omitting the terms of the contract, held for the jury on the question of his credibility as to making a contract upon a precedent condition of delivery. *National Novelty Import Co. v. Duncan* (Civ. App.) 182 S. W. 888.

Defendant's testimony that the work had not been properly done, though meager, was enough to raise an issue on the vital question, requiring submission to the jury, and making the giving of a peremptory instruction error. *Appelbaum v. Spinner-Hay Lumber Co.* (Civ. App.) 186 S. W. 810.

Where the commission agent testified that the president of the corporation principally authorized departure from terms of a written contract, that question was for the jury. *Channell Chemical Co. v. Hall* (Civ. App.) 187 S. W. 704.

In trespass to try title, it was error for the court to direct a verdict for plaintiffs based on the testimony of one of them that her ancestors had a deed to the land from the original patentee, which deed had been lost. *Morris v. Parsons* (Civ. App.) 190 S. W. 241.

**9. Uncontroverted facts or evidence.**—Where the evidence on an issue was undisputed, the court should decide it as a matter of law. *Hackler v. International Travelers' Ass'n* (Civ. App.) 165 S. W. 44; *Robinson Seed & Plant Co. v. Hexter & Kramer* (Civ. App.) 167 S. W. 749; *Commonwealth Bonding & Casualty Ins. Co. v. Harper* (Civ. App.) 180 S. W. 1156; *Cattlemen's Trust Co. of Ft. Worth v. Pruett* (Civ. App.) 184 S. W. 716; *Continental & Commercial Nat. Bank of Chicago v. Meister* (Civ. App.) 186 S. W. 377; *Ross v. Moore* (Civ. App.) 191 S. W. 853.

Where there was uncontroverted evidence that as the train approached the station plaintiff's wife prepared to leave the train and was ready with her children to leave it when it reached the station, the issue as to care on her part in preparing to leave the train as it approached the station was not in the case, so as to require a charge thereon. *Missouri, K. & T. Ry. Co. of Texas v. McCormick* (Civ. App.) 160 S. W. 429.

In an action on a policy indemnifying against the loss of rents for such period as was reasonably necessary to restore the premises, the evidence being undisputed that from the date of the fire to the restoration of the building the rents were \$175, the insurance company contesting alone the amount of recovery, the court properly charged that if the time actually spent was no more than was reasonably necessary, they should find for the insured for the sum of \$175. *Hartford Fire Ins. Co. v. Pires* (Civ. App.) 165 S. W. 565.

Where the ownership was not actually involved, a deed from defendant to plaintiff, and defendant's acknowledgment that he leased from plaintiff, held to justify an instruction to find for plaintiff as to the title. *Wolf v. Lane* (Civ. App.) 166 S. W. 72.

Where, on a contest between a creditor and the wife of the debtor claiming property levied on, the uncontroverted evidence showed a gift by the wife prior to the debt, the question as to when the gift was made was immaterial, within Rev. St. 1911, art. 1971, as amended by Acts 33d Leg. c. 59, and the submission of the question and an insufficient answer thereto were immaterial. *Wofford v. Lane* (Civ. App.) 167 S. W. 180.

If the undisputed facts showed that contracts signed by a buyer were accepted by the seller and acted on as a binding contract, the court should have so held as a matter of law instead of submitting the question to the jury. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

Where the undisputed evidence in an action for trespass showed that defendants occupied only a portion of plaintiff's land, held error to refuse to instruct that plaintiff could not recover more than the reasonable rental value of that portion of the land occupied by defendants. *Fairchild v. Wilson* (Civ. App.) 168 S. W. 409.

In an action for damages to a farm from pasturing cattle thereon, where the evidence was undisputed that the pasturing in one of the years was without plaintiff's authority, this should not have been submitted as a disputed issue. *Gorman v. Brazelton* (Civ. App.) 168 S. W. 434.

For error in the submission of an uncontroverted issue contrary to *Vernon's Sayles'* Ann. Civ. St. 1914, art. 1971, judgment will under some circumstances be reversed. *St. Louis, S. F. & T. Ry. Co. v. West* (Civ. App.) 174 S. W. 287.

Where the evidence sustained all the allegations in the petition, and there was no evidence to the contrary, there was nothing on which to direct verdict for defendant. *Hodge v. Toyah Valley Irr. Co.* (Civ. App.) 174 S. W. 334.

Where a carrier, when sued for injuries to live stock, proved by uncontradicted evidence that the injuries occurred while its railroad was operated by a receiver, the court must direct a verdict for it. *Ft. Worth & R. G. Ry. Co. v. Ballou* (Civ. App.) 174 S. W. 337.

Failure to submit to the jury the issue of the true location of a boundary line held not error, where the evidence conclusively showed such location. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

A case wholly dependent upon the uncorroborated testimony of a party interested in the litigation, though not contradicted, is for the jury. *First Nat. Bank of Plainview v. McWhorter* (Civ. App.) 179 S. W. 1147.

Where the evidence conclusively showed that the grantee in a defectively acknowledged deed, and those claiming under him, claimed under such deed, held, that the court properly refused to submit to the jury whether a curative deed had been given. *Ayers v. Snowball* (Civ. App.) 181 S. W. 827.

It is unnecessary to submit to the jury matters admitted. *Avery Co. of Texas v. Staples Mercantile Co.* (Civ. App.) 183 S. W. 43.

In trespass to try title, the burden being upon the plaintiffs, if their evidence was insufficient, clearly to establish title, the jury might disregard it altogether, and therefore submission of the sufficiency of evidence was proper whether defendants introduced any evidence or not. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

To submit undisputed facts as independent grounds of recovery is to submit a ques-

tion of law, which is always for the court's determination. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

Where several material issues are involved, some of which are sustained by undisputed evidence and are within themselves sufficient upon which to predicate a judgment, the court may direct a verdict, notwithstanding the evidence on the other issues is conflicting. *Peerless Fire Ins. Co. v. Reveire* (Civ. App.) 188 S. W. 254.

Though plaintiff makes out a prima facie case on undisputed evidence, some rebutting evidence alone carries the case to the jury. *Yeaman v. Galveston City Co.* (Civ. App.) 190 S. W. 212.

In an action for commissions upon sale of land listed with plaintiff by defendant, but sold by the latter, where the uncontradicted evidence showed the agency to have been terminated in good faith long prior to the sale, the defendant should have had an instructed verdict. *Witcher v. Adams* (Civ. App.) 191 S. W. 399.

Submission of issue whether employé turned his mule team out of proper road, thus dragging log he was snaking against end of log on skidway, to plaintiff's injury, held not erroneous on theory that undisputed evidence showed no causal connection between turning from passageway and contact between logs. *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

In action for injury to shipment of stock, where evidence was uncontradicted as to carrier's negligence during part of carriage, it was error to submit question to the jury. *Panhandle & S. F. Ry. Co. v. Harp* (Civ. App.) 193 S. W. 438.

**10. Inferences from evidence.**—To authorize the court to take a case from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the inferences to be drawn therefrom. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474; *Southern Pac. Co. v. Vaughn* (Civ. App.) 165 S. W. 885; *Luten v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 798; *Berryhill v. Berryhill* (Civ. App.) 193 S. W. 218.

Whenever the evidence reasonably authorizes an inference supporting a material issue necessary for a recovery, it is the duty of the court to submit the issue to the jury. *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132; *Ebersole v. Sapp* (Civ. App.) 160 S. W. 1137.

Where there is evidence from which a conclusion for either party might be drawn, it is the province of the jury to weigh the evidence and reach the conclusion they deem proper. *Manning v. Beaumont, S. L. & W. Ry. Co.* (Sup.) 181 S. W. 687.

It is proper to refuse to submit to the jury issues as to which on the evidence only one conclusion is possible. *St. Paul Fire & Marine Ins. Co. v. Laster* (Civ. App.) 187 S. W. 969.

**11. Conflicting evidence.**—Where the evidence is conflicting the question is for the jury. *Foix v. Moeller* (Civ. App.) 159 S. W. 1048; *A. J. Birdsong & Son v. Allen* (Civ. App.) 166 S. W. 1177; *Rich v. Park* (Civ. App.) 177 S. W. 184; *Murray Gin Co. v. Putman* (Civ. App.) 170 S. W. 806; *Shipp v. Cartwright* (Civ. App.) 182 S. W. 70; *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846.

Testimony being conflicting, the question of whether false representations were made was for the jury in the trial court. *Maddox v. Clark* (Civ. App.) 163 S. W. 309.

It was proper for the trial court to direct a verdict, though the evidence was conflicting, where the conflicts were immaterial or could not affect the result. *Jewett State Bank v. Corsicana Nat. Bank* (Civ. App.) 167 S. W. 747.

Where plaintiff's evidence, though contradicted, materially supported his allegations of damages, the court properly refused defendant's request for a peremptory instruction. *Western Union Telegraph Co. v. Goodwin* (Civ. App.) 173 S. W. 1164.

Where there is a disputed question of fact, the refusal of a peremptory charge is proper. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

It is a question for the jury, under conflicting evidence, whether a statement, purporting to be that of plaintiff made shortly after his injury, was accurately taken down. *Trinity & B. V. Ry. Co. v. Lunsford* (Civ. App.) 183 S. W. 112.

A peremptory charge should not be given where there is in the evidence such conflicts or matters of fact that reasonable minds might reach different conclusions therefrom. *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979.

Peremptory instruction on accord and satisfaction is properly refused in face of conflicting evidence. *Myers v. Grantham* (Civ. App.) 187 S. W. 532.

Where the evidence is conflicting, and reasonable minds might differ as to the inference therefrom, the issue is for the jury. *Peerless Fire Ins. Co. v. Reveire* (Civ. App.) 188 S. W. 254.

In an action on a note, where evidence was conflicting, it was error to instruct a verdict for plaintiff. *Ater v. Rotan Grocery Co.* (Civ. App.) 189 S. W. 1106.

In action for rescission by party who purchased realty, fact that defendants denied fraud charged to them, and denied making representations, merely presented conflict in testimony which it was jury's province to determine. *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

In an action for breach of contract, it was proper to refuse to instruct for defendant, where there was conflicting evidence on plaintiff's part as to the terms of the contract. *Wolfe City Milling Co. v. Ward* (Civ. App.) 194 S. W. 957.

**12. Withdrawal of particular counts or issues.**—The failure of the court to submit an issue to the jury withdraws the issue from their consideration. *Missouri, O. & G. Ry. Co. v. Boring* (Civ. App.) 166 S. W. 76; *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 680.

Where statute of frauds was not pleaded, and court charged that if sale of lumber was to contractor, and defendant did not promise to pay before delivery to find for him, failure to charge directly as to the statute held not error in the absence of a request. *Schramm v. P. J. Owens Lumber Co.* (Civ. App.) 163 S. W. 1016.

In an action on a note given for money advanced to defendant for drilling a well, in which defendant counterclaimed for damages from plaintiff's delay in pointing out a place for drilling the well, plaintiff should have requested a charge as to estoppel from



claiming such damages and as to an uncertain claim being sought to be offset against a certain claim, if she desired to submit those questions. *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

It was not error to refuse to withdraw from the jury an issue on which there was no evidence. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 172 S. W. 1129.

Where plaintiff charged two distinct grounds of negligence, and abandoned the first at the trial, but supported the second by sufficient evidence, defendant was not entitled to a directed verdict, in that its plea of contributory negligence as to the first ground was confessed by failure to traverse. *International & G. N. Ry. Co. v. Woldert Grocer Co.* (Civ. App.) 176 S. W. 613.

**13. Effect of failure to question sufficiency of evidence.**—Where record disclosed no motion on part of defendant to direct verdict at close of plaintiff's case, question whether it would have been proper to direct such verdict cannot be reviewed. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

**14. Demurrer to evidence.**—Defendants' motion for judgment at the close of plaintiff's case held not technically a demurrer to the evidence and was waived by the introduction of testimony without objection by either party. *Ward v. Walker* (Civ. App.) 159 S. W. 320.

In determining whether there is sufficient evidence to carry an issue to the jury, only plaintiff's evidence should be considered. *Charles B. Smith & Co. v. Duncan* (Civ. App.) 167 S. W. 233.

**15. — Operation and effect.**—The effect of a technical demurrer to the evidence by defendants is to withdraw the case from the jury and call for the judgment of the court, except where a question of unliquidated damages is to be passed on. *Ward v. Walker* (Civ. App.) 159 S. W. 320.

The effect of a technical demurrer to the evidence by defendants is to admit the truth of plaintiff's evidence and every legitimate inference to be drawn therefrom. *Id.*

Demurrer to evidence admits every fact and conclusion that the evidence tends to prove; that is, which a jury could legally infer from the evidence. *Combination Fountain Co. v. Rogers* (Civ. App.) 186 S. W. 407.

**16. Direction of verdict.**—A request to direct a verdict for plaintiff in certain contingencies was properly refused, where the case is submitted on special issues. *Beebe v. Sweeney* (Civ. App.) 158 S. W. 235.

It was error to give a peremptory instruction for defendant, when no evidence had been submitted. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

In an action for deceit, and to cancel a note, a peremptory instruction to find for defendant "as to all matters set up in plaintiffs' petition" held improper. *Martin v. Daniel* (Civ. App.) 164 S. W. 17.

Where a motion for an instructed verdict is overruled and the moving party thereafter introduced evidence in his own behalf, he waives his right to assign error on denial of the motion. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

On appeal from a judgment on a directed verdict, the question is whether the evidence may not support a contrary finding. *Adams v. A. A. Paton & Co.* (Civ. App.) 173 S. W. 546.

Where defendant introduced no evidence and by admission in open court conceded plaintiff's cause of action, it is proper for the court to direct a verdict for plaintiff. *Workman v. Ray* (Civ. App.) 180 S. W. 291.

The evidence failing to raise any issue of fact requiring submission to the jury, a peremptory instruction was proper. *Childress v. Crow* (Civ. App.) 185 S. W. 414.

Where plaintiffs had no cause of action against two of the defendants, and one of the plaintiffs had no cause of action, court may dispose of such parties by directed verdict without submitting matter to jury. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

A requested charge that plaintiff is not entitled to the weekly indemnity for total disability is a peremptory one, though not preventing recovery for partial disability. *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979.

Where evidence upon issues in lineman's action against his employer for personal injury was such that the jury could find a different verdict, the defendant's requests for peremptory instruction upon issues were properly refused. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

In a landlord's suit against her tenant, charge held a peremptory instruction not only to find for plaintiff for possession of the premises, but their fair rental value from a date until defendant surrendered. *Land v. Johnson* (Civ. App.) 189 S. W. 337.

In action by subscriber for stock of insurance company to recover price paid, verdict held properly directed for defendant in view of want of evidence as to authority of agent to contract for return of price. *Overton v. First Texas State Ins. Co.* (Civ. App.) 189 S. W. 514.

In an action against a carrier of live stock for damages caused by delay in transportation, held that an instruction that if defendant received shipment after it was in possession of facts to put it upon inquiry regarding conditions of bridges and tracks, plaintiff could recover, should not be given. *Ft. Worth & D. C. Ry. Co. v. Atterberry* (Civ. App.) 190 S. W. 1133.

That counsel for plaintiffs indulged in improper argument beyond the issues did not entitle defendant to a directed verdict. *Padgett v. Hines* (Civ. App.) 192 S. W. 1122.

In action under lease reserving share of crop as rent, landlord held entitled to directed verdict under provisions of lease, notwithstanding tenant's testimony. *McDowell v. Rathbun* (Civ. App.) 193 S. W. 428.

### *(B) Particular Questions or Issues*

**18. In general.**—Where circumstances were shown which would raise a vendor's lien to secure payment of the purchase price of land sold, it was not necessary to submit to the jury the question of its existence; the lien being established by law. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

Where there was evidence that a letter was mailed, whether it was received by the addressee, since deceased, was a question for the jury, though it could not be found among the addressee's papers. *Northern Assur. Co., Limited, of London v. Morrison* (Civ. App.) 162 S. W. 411.

Where no controversy existed between parties as to salary due plaintiff except as to \$3 which was then paid, the acceptance of a check "in full of salary" was not, as a matter of law, an accord and satisfaction, but was a question for the jury. *Graham v. Kes-seler* (Civ. App.) 192 S. W. 299.

**19. Account and accounting.**—Evidence, in an action for an accounting, an adjustment of expenses, and a partition, held sufficient to go to the jury on the material issues, so that there was no error in refusing to direct a verdict for defendant. *Phœnix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

In an action for damages for breach of contract, where defendant counterclaimed, evidence held to warrant the submission of plaintiff's claim to the jury, it not conclusively establishing an accounting by which plaintiff agreed to his liability. *Arminger v. City Nat. Bank of Paris* (Civ. App.) 180 S. W. 906.

**20. Acknowledgment.**—The sufficiency of certificates of acknowledgment is ordinarily a question for the court and not for the jury. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

**21. Adverse possession.**—It was a question for the jury in the light of the facts of the case whether the acceptance by a party, after his title to land by limitations had been perfected, of a payment from another for repairing a fence on the land showed that his possession was not adverse. *Dryden v. Makey* (Civ. App.) 160 S. W. 302.

It was not for the jury to determine whether title or color of title had been shown by one claiming by adverse possession in trespass to try title. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

Evidence held sufficient to go to the jury on the issue of plaintiff's claim to the specific land described in his petition and in the field notes of the surveyor, and of such claim for the period of limitations. *Houston Oil Co. of Texas v. Lambert* (Civ. App.) 161 S. W. 6.

In trespass to try title, where plaintiff claimed under a prescriptive title, evidence held to raise a question for the jury and not to warrant a directed verdict in plaintiff's favor. *Zimmerman v. Baugh* (Civ. App.) 161 S. W. 943.

In trespass to try title, where defendant had gone into possession under a contract of purchase, the question of defendant's repudiation of the contract and adverse holding held, under the evidence, for the jury. *McCulloch v. Nicholson* (Civ. App.) 162 S. W. 432.

Where there was evidence that would have justified a finding for defendants on the issue of limitations as to a portion of the land in controversy the court erred in refusing to submit such issue at defendant's request. *Wilmot v. Fore* (Civ. App.) 163 S. W. 1014.

In trespass to try title in which defendant claimed by adverse possession, evidence held at most to raise the issue of a conditional parcel gift to such defendant from his father, and not to raise the issue of adverse possession by defendant. *Harlie v. Harlie* (Civ. App.) 166 S. W. 674.

Whether the inclosure and cultivation of 1 acre on a tract of 160 was notice to the owner that the possessor was claiming the 160-acre tract, or any larger portion than that actually inclosed, was for the jury. *Houston Oil Co. of Texas v. Griffin* (Civ. App.) 166 S. W. 902.

Where the evidence was conflicting on whether defendant had prescriptive title to the part of the land under fence, held that the court properly refused to instruct a verdict for plaintiff for all of the land. *South Texas Development Co. v. Manning* (Civ. App.) 177 S. W. 998.

Where the evidence failed to show any use made by defendants of a portion of land to which they claimed title by limitation or to show that such portion was inclosed for ten years prior to commencement of the suit, held, that the court properly directed a verdict for plaintiff as to such land. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

Facts held to raise issue as to son's possession and as to mixed or joint possession or occupancy by mother and son, and not to entitle mother to peremptory instruction under the ten-year statute. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

Evidence, in an action of trespass to try title, held insufficient to show, as a matter of law, that the land in question was part of a public street, so as to prevent plaintiff's acquisition of title by limitation as claimed. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

When cotenants of one claiming title under exclusive possession and doing acts of ownership fail to exert rights or meet obligations as to the land, presumption of their ouster arises, raising an issue for the jury, of title by adverse possession. *Houston Oil Co. of Texas v. Davis*, 181 S. W. 851.

Occupant of land under claim of record title, who purchased claims of others claiming to be his cotenants, held not thereby as a matter of law to recognize such claims in derogation of his adverse possession. *Id.*

In trespass to try title, evidence of plaintiff's title by adverse possession held to be such as to require submission thereof to jury. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

On the issue of adverse possession, evidence of occupation by defendants and their predecessors, and conflicting evidence as to interruption thereof, held not to warrant peremptory instruction for plaintiff. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

Where title to land is claimed by adverse possession, nature of possessor's claim as an adverse holder is a question of fact. *Nerio v. Christen* (Civ. App.) 189 S. W. 1038.

In trespass to try title, evidence held sufficient to require the question of defendant's right to the property under the five-year statute of limitations to be submitted to the jury. *Morris v. Parsons* (Civ. App.) 190 S. W. 241.

Where the wife of the record owner's lessee lived on the land after her husband's death, but did not claim title by adverse possession in a former suit to eject her, and

certain of her children testified that she did not dispute her lessor's title, her hostile holding was a jury question. *W. T. Carter & Bro. v. Collins* (Civ. App.) 192 S. W. 316.

**22. Agency and respondeat superior.**—Evidence of the employment by K., an employé of defendant, of plaintiff physicians to render services to an injured employé of defendant, being within the apparent authority of K., so as to render defendant liable for the services rendered, held sufficient to go to the jury. *Gray v. Lumpkin & Thomas* (Civ. App.) 159 S. W. 880.

Evidence held to raise the issue of good faith in canceling the agency after plaintiff had interested another in defendant's property. *T. A. Hill & Son v. Patton & Schwartz* (Civ. App.) 160 S. W. 1155.

Evidence, in an action for commissions for effecting an exchange of land, held sufficient to go to the jury on the issue of plaintiffs' authority from defendant to make the exchange. *McKinney v. Thedford* (Civ. App.) 166 S. W. 443.

There being testimony of a revocation of an agency, which revocation, if made, would make defendant liable to plaintiff, it was error to instruct peremptorily for defendant. *Mason v. Ward* (Civ. App.) 166 S. W. 456.

Evidence in an action for injury to an employé held to make a question for the jury whether the person who employed plaintiff was an independent contractor, or merely a servant or agent. *Corrigan, Lee & Halpin v. Heubler* (Civ. App.) 167 S. W. 159.

In a personal injury action by one who had been sent by one defendant to install a cotton gin on the premises of the other defendant, evidence held sufficient to take to the jury the question whether the plaintiff was the servant of both or either of the defendants. *Dawson v. King* (Civ. App.) 171 S. W. 257.

One who was authorized by the owner of horses to accompany them during a shipment to see that none of them got down is not authorized, as a matter of law, to execute a contract of shipment limiting the carrier's liability. *Southern Pac. Co. v. W. T. Meadors & Co.* (Civ. App.) 176 S. W. 882.

Evidence held to make question for jury, as to agency for defendant of person employing plaintiff to repair a building. *Texas Mfg. Co. v. Fitzgerald* (Civ. App.) 176 S. W. 891.

Evidence, in an action for damages for deterioration of goods shipped, held to warrant submission of the issue whether defendant's agent, who assumed to compromise a claim, had been held out to shippers and consignees as having authority to do so. *Missouri, K. & T. Ry. Co. of Texas v. A. E. Want & Co.* (Civ. App.) 179 S. W. 903.

Where the evidence was not conclusive that the servants of the defendant stockyards company were under the exclusive control of plaintiff's agent, held, that whether defendant was liable for injuries to stock from the negligence of such servants was for the jury. *Hovencamp v. Union Stockyards Co.* (Sup.) 180 S. W. 225.

Evidence held sufficient to carry a case to the jury on the question of the liability of a master for the act of his servant in the alleged wrongful arrest and detention of the plaintiff. *Gulf, C. & S. F. Ry. Co. v. Besser* (Civ. App.) 181 S. W. 253.

Whether servant sent by employer to repair defendants' boiler was subject to direction and control of his master or of defendants held for the jury. *Fink v. Brown* (Civ. App.) 183 S. W. 46.

In an action by plaintiff whose leg was broken in putting a heavy bolt of cloth into a machine, question whether a servant, who assisted plaintiff and was negligent, was acting within scope of his authority held for the jury. *Postex Cotton Mill Co. v. McCamy* (Civ. App.) 184 S. W. 569.

In suit by the assignee of a bank against the bank and cotton dealers whose agent converted from the bank cotton tickets pledged by the dealers, whether the agent, in securing the tickets, was acting within the authority conferred upon him, held for the jury. *Carver Bros. v. Merrett* (Civ. App.) 184 S. W. 741.

Evidence held sufficient to go to the jury on the question of a husband being his wife's agent to rent her separate property. *Jackson v. Walls* (Civ. App.) 187 S. W. 676.

An action on fire insurance policy, where defendant claimed that the original policy had been canceled and a smaller policy substituted, held on the evidence that the authority of insured's attorney to accept notice of cancellation and substitution was for jury. *Glasscock v. Liverpool, London & Globe Ins. Co.* (Civ. App.) 188 S. W. 281.

In action against fruit company to recover agreed price for tomatoes, which plaintiff claimed fruit company had bought through its manager whether manager was acting within scope of authority, and whether plaintiff failed to use reasonable prudence in dealing with manager, as agent of company, held for jury; for court may take case from jury only if there is not sufficient evidence tending to prove agency. *Sanders v. Elberta Fruit Co.* (Civ. App.) 190 S. W. 817.

Under evidence in action for damages to an automobile from collision, held, that whether driver of defendant company's car was acting as company's agent at time of collision was for jury. *Auto Sales Co. v. Bland* (Civ. App.) 194 S. W. 1021.

**24. Assignment and transfer.**—Whether an assignment was in bad faith to enable the assignee to sue the assignor and the debtor in the county of the residence of the assignor held for the jury. *Eaton v. Klein* (Civ. App.) 174 S. W. 331.

Evidence held insufficient to require submission of question as to plaintiffs' assignment of contract sued on. *Plummer v. Simms* (Civ. App.) 177 S. W. 1037.

In action by assignee, refusal to submit to jury question whether assignee was the owner of the claim sued on held proper. *Day v. Van Horn Trading Co.* (Civ. App.) 183 S. W. 85.

**25. Assumption of risk.**—The question of assumption of risk by a section hand, who was injured from the foreman's negligence while attempting to move a switch tie, held to be for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Scott* (Civ. App.) 160 S. W. 432.

Whether, in view of the injured servant's youthfulness and want of discretion, and of the failure to warn him of the danger, plaintiff assumed the risk therefrom held, under the evidence, an issue requiring instruction. *T. B. Allen & Co. v. Shook* (Civ. App.) 160 S. W. 1091.

Whether an employé in a coal mine, injured by the breaking of the cable drawing loaded cars, assumed the risk, held for the jury. *Burnet Fuel Co. v. Ellis* (Civ. App.) 162 S. W. 911.

Where the evidence is such that reasonable minds could not differ as to the fact that a minor servant knew and appreciated the danger, the issue of assumed risk may be ignored, but otherwise it is a fact for the jury. *Lawson v. Hamilton Compress Co.* (Civ. App.) 162 S. W. 1023.

In an action against a municipality for injuries received upon a defective sidewalk, evidence held sufficient to carry the questions of assumption of risk and contributory negligence to the jury. *City of Austin v. Valdez* (Civ. App.) 164 S. W. 1098.

In an action for death of a servant, assumption of risk held, under the evidence, for the jury. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

In an action for an injury to a servant caused when the supports of a dummy elevator which he was dismantling fell, the question of assumed risk held for the jury. *American Machinery Co. v. Haley* (Civ. App.) 165 S. W. 83.

In an action for an injury to a station agent caused by falling as he was ascending the platform after the steps had been removed to construct a ditch, held, under the evidence, that the question of assumption of risk was properly submitted to the jury. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

In a personal injury action by a servant, the question of the servant's assumption of the risk from an insufficient scaffold which fell with him held, under the evidence, for the jury. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

Where a servant was injured by a ginhouse door falling upon him and there was no evidence that he knew of the defect which caused the fall, or that it was so obvious as to give him implied knowledge thereof, he did not assume the risk as a matter of law. *Dawson v. King* (Civ. App.) 171 S. W. 257.

Whether an employé, injured by the falling of a stack of sacks of meal, assumed the risk held for the jury. *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082.

Where plaintiff, while taking down a wall, stepped on a plaster of paris cornice, which gave way and precipitated him to the ground, he did not assume the risk, as a matter of law. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

Whether plaintiff assumed the risk of injury by the explosion of a locomotive held for the jury. *National Ry. of Mexico v. Ligarde* (Civ. App.) 172 S. W. 1140.

A peremptory charge that a brakeman had assumed no risk from negligence of the engineer in applying the air brake held proper. *Texas & P. Ry. Co. v. Matkin* (Sup.) 174 S. W. 1098, affirming judgment (Civ. App.) 142 S. W. 604.

Foreman, killed by gas in oil tank car while attempting to rescue one of his men, held not as a matter of law to have assumed the risk. *Stalworth v. Gulf Refining Co.* (Civ. App.) 175 S. W. 767.

Whether plaintiff, who was injured while using a ladder leading to the top of a fuel oil tank, assumed the risk of injury because the ladder was not fastened, held for the jury. *Smith v. Webb* (Civ. App.) 181 S. W. 814.

In a servant's action for injury when operating the lever of a hull conveyer, held, that the question of assumption of risk was properly referred to the jury. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

In an action by a servant, who was hurt when a board from a cotton conveyer turned, the question whether he assumed the risk held for the jury. *Winnsboro Cotton Oil Mill Co. v. Azbell* (Civ. App.) 185 S. W. 1031.

In action for death of servant, ordinarily the question of assumed risk is for the jury. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

In an action by a servant for personal injuries, whether servant had such knowledge of the danger as to charge him with assumption of the risk held a question of fact for the jury. *Southern Pac. Co. v. Gordon* (Civ. App.) 193 S. W. 471.

**26. Attorney and client.**—In an action by plaintiff to recover attorney fees from corporation in which he was stockholder, evidence held not to require directed verdict for defendant. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

In an action by attorney upon quantum meruit, on contract for additional compensation made after services had been commenced, the evidence being conflicting as to good faith of the attorneys, such issue was for the jury, and where defendant alleged a contract that the attorney would not be employed by the opposing party during the litigation and there was evidence to support the allegation and to show breach thereof, the issue raised thereby should have been submitted to the jury. *Laybourne v. Bray & Shifflett* (Civ. App.) 190 S. W. 1159.

**27. Bills and notes.**—Where, in an action on notes given for the price of stock, defendant admitted giving the notes, and there was no issue of fact presented, the court properly directed a verdict for plaintiff. *Hughes v. Four States Life Ins. Co.* (Civ. App.) 164 S. W. 898.

Evidence in an action against A. as principal and P. and others as sureties on a note held to present an issue for submission to the jury as to whether P. was a principal debtor on the note. *Solomon v. Merchants' & Planters' Nat. Bank* (Civ. App.) 168 S. W. 1029.

In a suit by transferee of a note, where there was no sworn pleading attacking the validity of the assignment, and the evidence clearly showed that the note was in force, it was proper to direct a verdict for plaintiff. *Gaines v. Brown* (Civ. App.) 177 S. W. 220.

In an action by the indorsee of two of a series of notes, evidence held sufficient to take to the jury the question whether the notes were indorsed after the first of the series became overdue. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 177 S. W. 528.

Whether either of two renewal notes constituted a novation was a question for the jury. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

In suit on a note which was in evidence and its execution admitted by defendant, a claimed accommodation surety, peremptory instruction for plaintiff held proper. *Banks v. Mixon* (Civ. App.) 179 S. W. 690.

In suit on note executed by defendant to own order and indorsed in blank, whether

defendant ever intended to put it into circulation at all was issue of fact for trial court.—*Kanamán v. Gahagan* (Civ. App.) 185 S. W. 619.

**28. Bona fide purchase.**—Where plaintiff states the note sued on was indorsed to it before maturity, and produces proof to sustain it, and defendant introduces testimony that another was in possession and the owner of it a few weeks after its maturity, when plaintiff claims to have been its owner, the evidence for defendant requires submission of the issue of ownership to the jury. *Jones v. First Nat. Bank* (Civ. App.) 160 S. W. 126.

Evidence held to make it a jury question whether the alleged purchaser of the land from a corporation was a bona fide purchaser. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Where there was nothing in any way to impeach the testimony of the cashier of a bank which held the note in suit that it was purchased before maturity for value and without notice of the payee's fraud, it was proper to direct a verdict in favor of the bank. *First Nat. Bank of Iowa City, Iowa, v. Humphreys* (Civ. App.) 166 S. W. 53.

In an assignee's action on a negotiable instrument, the question whether he purchased in good faith held for the jury. *Douglass v. Lockhart* (Civ. App.) 168 S. W. 382.

Whether a purchaser of a negotiable note acquired it in good faith is a question of fact. *Forster v. Enid, O. & W. R. Co.* (Civ. App.) 176 S. W. 788.

In an action on a note, the question whether plaintiff acquired it before maturity for value without notice held for the jury. *First Nat. Bank of Garner, Iowa, v. Smith* (Civ. App.) 183 S. W. 862.

Whether a grantee who knew that the consideration mentioned in his grantor's deed was not paid, and that the deed was not recorded, was chargeable with notice that the deed was intended as a mortgage, held for the jury under the evidence. *Harris v. Hamilton* (Civ. App.) 185 S. W. 409.

Where one who had bought a note and vendor's lien therefor from one who had brought suit on the note, in which suit defendant had filed answer setting up defenses, thereafter intervened in such suit as plaintiff, the question of his notice of defenses to the note was for the jury, even if he were not chargeable with such notice under the lis pendens statute (Article 6837. *Vernon's Sayles' Ann. Civ. St.* 1914). *Miller v. Poulter* (Civ. App.) 189 S. W. 105.

Evidence held to require peremptory instruction for plaintiff in action by holder of notes against the maker and indorsers. *Landon v. Wm. E. Huston Drug Co.* (Civ. App.) 190 S. W. 534.

**28½. Boundaries.**—Evidence held to make location of boundary line a question for the jury. *Petty v. Wilkins* (Civ. App.) 190 S. W. 531; *Bivins v. Lanier* (Civ. App.) 186 S. W. 779; *Cross v. Wilkinson* (Civ. App.) 187 S. W. 345; *Dunn v. Land* (Civ. App.) 193 S. W. 698.

Acquiescence in a boundary line established by an adjoining owner affords a strong presumption that it is the true line, but the weight of such acquiescence is for the jury. *Beebe v. Sweeney* (Civ. App.) 158 S. W. 235.

Where a latent ambiguity in a call for a boundary arises because the proof shows that a line run in accordance with the call will not reach the corner called for, the manner of ascertaining the true corner is for the jury. *Kirby Lumber Co. v. Stewart* (Civ. App.) 161 S. W. 372.

In an action involving a disputed boundary to land, the question whether the line should be governed by courses and distances or by artificial monuments claimed to have been laid out by earlier surveyors, and whether a corner as located by the surveyors was the true corner held, under the evidence, for the jury. *McSpadden v. Vannerson* (Civ. App.) 169 S. W. 1079.

Acquiescence under circumstances, not amounting to an estoppel, is a mere fact to be considered by the jury in determining the true location of a boundary line. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

On evidence in trespass to try title, held, that the proper location of a block on the ground and the contention of the surveyor with reference thereto, was a question of fact for the jury. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

In trespass to try title, maps constituting necessary part of grant showing conflict with calls in field notes should have been submitted to the jury. *Id.*

**29. Breach of marriage promise.**—That plaintiff in action for breach of promise, in answer to defendant's statements that he did not know that he would ever marry and that he did not have the same affection for her as formerly, said that they had better quit, was not, as a matter of law, a waiver or surrender of her rights under the contract. *Kaker v. Parrish* (Civ. App.) 187 S. W. 517.

**30. Brokers' commissions.**—In an action for commissions for procuring the sale of realty, evidence held to make it a jury question whether the broker procured the purchaser. *Shaw v. Faires* (Civ. App.) 165 S. W. 501.

In an action by a broker for commissions, an instruction authorizing a recovery, and refusal of a requested charge on the subject, held reversible error. *Arlington v. Layden* (Civ. App.) 175 S. W. 475.

In an action by broker for commission on a purchase of land, evidence of revocation held sufficient to require submission to jury. *West v. Kirby Lumber Co.* (Civ. App.) 193 S. W. 172.

**31. Cancellation, rescission, and abandonment of contracts.**—Whether an attorney had lost his interest in land secured by a contract for an interest therein contingent on his success in recovering the same, by abandonment of the fee contract, and by litigation in relation to the land after its acquisition, held, on the evidence, for the jury. *Phœnix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

Where defendant leased part of a farm to plaintiff on shares, agreeing to pay him for supervising the tenants of the remainder, and subsequently leased to him other parts of the farm abandoned by the tenants, the question whether they intended to abrogate the provision for payment to plaintiff for supervising the other tenants was a question for the jury. *Looney v. Evans* (Civ. App.) 160 S. W. 150.

Where insured directed the cancellation of a policy containing cancellation clause, and the agents wrote that the policy would be canceled if he would send certain increas-

ed premium but not otherwise, it cannot be held, as a matter of law, that insured's letter operated as a cancellation. *National Union Fire Ins. Co. v. Akin* (Civ. App.) 160 S. W. 669.

Whether an insurance policy was canceled by mutual consent without the return of the unearned premium held to be a question for the jury, though insured did not ask for the return of the premium and may have thought the policy was fully canceled without such return. *Polemanakos v. Austin Fire Ins. Co.* (Civ. App.) 160 S. W. 1134.

In action for refusal to permit plaintiff to perform contract, evidence held to make question for jury as to plaintiff's abandonment of the contract before defendant's cancellation thereof. *Waterman Lumber & Supply Co. v. Holmes* (Civ. App.) 161 S. W. 70.

Whether a contract of sale had been mutually rescinded, held, under the evidence, for the jury. *Stinson v. Sneed* (Civ. App.) 163 S. W. 989.

In an action to forfeit a lease for breach of a covenant against selling of intoxicating liquors on the premises, held on the evidence that it was a question for the jury whether the lessee in good faith did all that was required by the exercise of reasonable care to prevent such sales. *Johnson v. Ft. Worth Driving Club* (Civ. App.) 164 S. W. 875.

The defenses of abandonment and repudiation of a contract by the party suing for its specific performance are for the jury. *Groves v. Whittenberg* (Civ. App.) 165 S. W. 889.

Whether one complaining of fraud inducing a contract repudiated the contract within a reasonable time after discovery of the fraud, so as to justify rescission, is frequently for the jury. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

Evidence held to authorize submitting issue whether broker abandoned his contract before any sales were made. *Elser v. Putnam Land & Development Co.* (Civ. App.) 171 S. W. 1052, rehearing denied 171 S. W. 1200.

Evidence held sufficient to require the submission to the jury of the issue whether there was a mutual cancellation of a fire insurance policy before the fire. *Westchester Fire Ins. Co. v. McMinn* (Civ. App.) 188 S. W. 25.

**32. Carriage of goods and live stock.**—In an action for damages to shipment of cattle, the question of the carrier's negligence in failing to water the cattle held for the jury, despite the owner's direction not to water them. *Gulf, C. & S. F. Ry. Co. v. Marshall* (Civ. App.) 164 S. W. 446.

In an action for delay in transportation of live stock, length of time occupied held to justify submission of the carrier's negligence to the jury. *Chicago, R. I. & G. Ry. Co. v. Kerr* (Civ. App.) 164 S. W. 447.

In a shipper's action to recover an overcharge on an interstate shipment, evidence held to raise an issue as to the correct rate. *Texas & P. Ry. Co. v. Dickson Bros.* (Civ. App.) 167 S. W. 33.

In an action against two connecting carriers for injuries to cattle, evidence held sufficient to take to the jury the question whether the cattle had been roughly handled while being transported over the line of the first carrier. *Houston & T. C. R. Co. v. Hawkins & Nance* (Civ. App.) 167 S. W. 190.

It is a question for the jury whether oral negotiations between a shipper and a carrier's agent amount to a contract for liability for damages on connecting lines. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

In an action against a carrier for loss through fire of baled cotton, where evidence was insufficient to show delivery to the carrier, or any negligence, it was error to direct verdict for plaintiff. *Texarkana & Ft. S. Ry. Co. v. Brass* (Civ. App.) 175 S. W. 778.

Evidence, in an action for damages to household goods and wearing apparel, held to make defendant's negligence in not delivering the goods to plaintiff after their arrival at destination a question for the jury. *Galveston, H. & S. A. Ry. Co. v. Wallraven* (Civ. App.) 182 S. W. 21.

In action against carrier for conversion of shipment, refusal to submit issue as to offer of carrier's agent to rebill held proper. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

In action by buyer of plate glass to recover of the seller and carrier amount paid for glass after part of first shipment was damaged, with plea over by seller against carrier, held on pleadings and proof that verdict for carrier was properly directed. *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965.

**33. — Limitation of liability.**—In an action against a railroad company for injuries to an interstate shipment of live stock, the question whether a stipulation requiring notice of claim for injury was reasonable is for the court. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

Whether limitation in a contract of live stock shipment of time to 91 days for notice of claim for damages is reasonable, and so valid, under *Vernon's Sayles' Ann. Civ. St. 1914, art. 5714*, is a question for the jury, unless only one inference can be drawn from the testimony. *St. Louis, B. & M. Ry. Co. v. Marcofich* (Civ. App.) 185 S. W. 51.

Where the shipper had a contract for transportation of cattle at a reduced rate which required notice and action within 40 days of discovery of damage, and a federal statute declared the rights of the parties, it was not a question for the jury whether the contract entered into was reasonable, especially where the shipper could on arrival of the cattle have determined the extent of their injuries. *Betka v. Houston & T. C. R. Co.* (Civ. App.) 189 S. W. 532.

**34. — Connecting carriers.**—Where there was substantial evidence that the delay did not occur on the line of the final carrier, the question was for the jury, and an instruction that, if the shipment was negligently and unnecessarily delayed, the terminal carrier would be liable was erroneous. *Gulf, C. & S. F. Ry. Co. v. Brackett-Fielder Mill & Grain Co.* (Civ. App.) 162 S. W. 1191.

Whether the failure of the initial carrier of live stock to properly bed the car, was concurrent negligence causing injury to the shipper accompanying the shipment, held for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Ryon* (Civ. App.) 177 S. W. 525.

In action against two defendants for delay in shipment of cattle, question whether road was liable as partially responsible for delay, held for jury. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

**39. Community property.**—In a suit by a wife to partition land claimed as community property, evidence held to make it a jury question whether the husband intended that certain lands should remain his separate property or become community property. *Gameason v. Gameson* (Civ. App.) 162 S. W. 1169.

Evidence held insufficient to go to the jury on the question whether certain community property had become the husband's exclusive property prior to a levy thereon by his wife's judgment creditor. *Dunlap v. Squires* (Civ. App.) 186 S. W. 843.

**40. Consideration and want or failure thereof.**—Evidence held to require submission to the jury as to whether a note sued on had been executed to prevent a criminal prosecution against one of the parties. *Sanford v. John Finnigan Co.* (Civ. App.) 169 S. W. 624.

Where the pleadings and evidence raised the question of failure of consideration for a note, such issue should be submitted to the jury. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

In action on note payable to order of investment company engaged in promoting trust company and indorsed to plaintiff, held, on evidence, that whether it was given upon a subscription contract, and in consideration for delivery of shares of capital stock of trust company, was for jury. *Crawford v. Davis* (Civ. App.) 188 S. W. 436.

In action for injuries by a railroad's employé, whether plaintiff's written release of liability, executed in consideration of further employment, was without consideration, and whether plaintiff worked at least one day after he signed a release of all liabilities in consideration of the road's promise to employ him further for that period held for the jury. *Panhandle & S. F. Ry. Co. v. Pitts* (Civ. App.) 188 S. W. 528.

**42. Construction and effect of writings.**—Whether deed was given as a mortgage held on the evidence to be a jury question. *Alexander v. Conley* (Civ. App.) 187 S. W. 254; *Kellner v. Randle* (Civ. App.) 165 S. W. 509.

The construction of a deed is a matter of law for the court. *Young v. Gharis* (Civ. App.) 170 S. W. 796; *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

The question whether an absolute deed was a deed or mortgage, the evidence being conflicting was one of fact for the trial judge. *Cochrane v. Wilson*, 106 Tex. 180, 160 S. W. 593.

If parol evidence is necessary to explain any ambiguities in a contract, the question of construction is one of mixed law and fact for the jury under proper instructions. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Where there is no ambiguity in a written contract, it is the duty of the court to construe it and to instruct the jury what its legal effect is. *Conn v. Rosamond* (Civ. App.) 161 S. W. 73.

Where there was in evidence a rule requiring the engineer to have his train "under full control" in approaching the switch, what "under full control" meant was properly submitted to the jury. *Trinity & B. V. Ry. Co. v. Dodd* (Civ. App.) 167 S. W. 238.

Whether it was the intention by a deed to convey only 810 acres of a survey, or all that the grantor's father had owned therein, held, under the evidence, a question for the jury. *Holman v. Houston Oil Co.* (Civ. App.) 174 S. W. 886.

Whether two bills of sale, one absolute, the other subject to defeasance, constituted a conditional sale or a mortgage of race horses held for the jury. *Walker v. Wilmore* (Civ. App.) 174 S. W. 921.

Where the authority of an agent has been conferred in writing, the scope of agency is for the court. *White Sewing Mach. Co. v. Sneed* (Civ. App.) 174 S. W. 950.

Though the construction and effect of an agent's promise in writing to be personally responsible are ordinarily questions of law for the court, where the testimony conflicts as to the nature and extent of the words used or the conduct involved, the question is of fact for the jury. *Dublin Fruit Co. v. Neely* (Civ. App.) 182 S. W. 406.

In suit by superintendent of agents against insurance company for breach of contract of employment, it was the province of the court to determine whether contract was ambiguous as to right of discharge. *American Nat. Ins. Co. v. Van Dusen* (Civ. App.) 185 S. W. 634.

If a contract for broker's commission is not ambiguous, it is proper to ask court to construe it, and if it is ambiguous, but the evidence makes its intention clear, it would be proper for the court to construe it and require the jury to accept such construction in estimating the value of services. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

The construction of a written provision as to the extent of the insurer's liability was a question for the court and not for the jury. *Fireman's Ins. Co. v. Jesse French Piano & Organ Co.* (Civ. App.) 187 S. W. 691.

In landlord's suit against tenant, question whether lease giving landlord right to terminate it on fire had reference to fire that should destroy all buildings on premises held not a jury question in absence of pleading that clause was ambiguous, or evidence as to what was in minds of parties. *Land v. Johnson* (Civ. App.) 189 S. W. 337.

It is the court's duty to construe a written instrument, and a special charge, requiring the jury to determine the legal effect of such instrument, is error. *United Brotherhood of Carpenters and Joiners of America v. Luck* (Civ. App.) 189 S. W. 1036.

Where from its terms a deed was ambiguous and evidence was necessary to determine whether it was a quitclaim, or warranty deed, the court should submit that question to the jury. *Barksdale v. Benskin* (Civ. App.) 194 S. W. 402.

**43. Contracts—Legality.**—Whether an agreement, between two prospective purchasers of school land at a public sale, that one of them should bid in the land and hold the title for the benefit of both was invalid as a contract to prevent competition held for the jury. *Ellerd v. Ellison* (Civ. App.) 165 S. W. 876.

Under conflicting evidence, held, that whether plaintiffs had secretly employed defendant's agent, thereby rendering void a contract for the sale of timber, was for the jury. *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 177 S. W. 226.

**44. — Making and terms of contract.**—In an action for materials furnished to one of the incorporators to be used by the corporation, the question whether the corporation assumed the payment of the debt held, under the evidence, for the jury. *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

In an action for the purchase price of a large quantity of cotton, which the seller

claimed was to be fixed by the market price in a certain locality, evidence held sufficient to carry the issue whether that was the agreement between the parties to the jury. *Charles B. Smith & Co. v. Duncan* (Civ. App.) 167 S. W. 233.

In an action for the price of oil, in which defendant counterclaimed for breach of a contract to furnish all the oil required by it for six months, evidence held insufficient to make a question for the jury as to whether the seller accepted and acted upon a written agreement between the buyer and its agent to the effect alleged by defendant. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

Evidence held to make question for jury as to whether plaintiff's agent, before shipment of oil sued for, communicated with plaintiff and advised it that he had closed a contract to furnish a car load of oil every third day for six months; defendant having counterclaimed for breach of such contract. *Id.*

In action for amount due on labor contract, held that it was a question for the jury whether there had been a binding settlement between the parties. *Aycock v. Ross* (Civ. App.) 169 S. W. 1037.

Where conflicting testimony made an issue as to whether one of the defendants was the purchaser of certain shingles or not, it was error to peremptorily instruct the jury that plaintiff, suing as assignee for the price, could not recover as against such defendant. *Continental Bank & Trust Co. v. Dealey Bros.* (Civ. App.) 171 S. W. 552.

In an action for the balance due on a bill of lumber furnished for a house which defendant had agreed to convey, evidence held to make defendant's agreement to pay therefor a question for the jury. *Scruggs v. E. L. Woodley Lumber Co.* (Civ. App.) 179 S. W. 897.

In salesman's action for compensation under oral contract, where defendant pleaded an employment under a written contract, held, that whether plaintiff accepted the alleged written contract and acted thereunder was for the jury. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

Evidence held insufficient to go to the jury on the question whether certain cotton had been pledged before being levied upon. *Dunlap v. Squires* (Civ. App.) 186 S. W. 843.

In an action for breach of contract for the sale of oil to the plaintiff, evidence held to make defendant's acceptance of the contract a question for the jury. *Farmers' & Ginners' Cotton Oil Co. v. Cleburne Oil Mill Co.* (Civ. App.) 187 S. W. 350.

In suit for rescission by buyer of realty who gave notes and conveyance of his land, whether certain defendants were jointly interested in and participated with another defendant in the acquisition of plaintiff's property held for jury. *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

Where a plaintiff alleged an option to take additional salary or an interest in the business "within a reasonable time," the question of whether he exercised his option within such time should have been submitted to the jury. *Graham v. Kesseler* (Civ. App.) 192 S. W. 299.

45. — **Construction and effect.**—Contract being ambiguous as to adjustment of expenses upon cancellation of contract, court held to have properly submitted intention of the parties to the jury. *Plummer v. Simms* (Civ. App.) 177 S. W. 1037.

In suit for the price of Maine potatoes sold Texas buyers, question as to place of delivery to the buyers held for the jury. *J. & G. Lippman v. Jeffords-Schoenmann Produce Co.* (Civ. App.) 184 S. W. 534.

46. — **Performance or breach.**—In an action to rescind the sale of a traction engine for breach of guaranty, held, on the evidence, that whether the buyer had used due diligence to protect himself against loss after the discovery of its defects was for the jury. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

Under conflicting evidence in an action for breach of a contract to sell timber providing the seller gave a certain notice within time specified, held, that whether the time for giving the notice was extended by mutual agreement and notice given, and whether there had been a waiver of the provision regarding the notice and a continuation of the contract in force with such provision eliminated, was for the jury. *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 177 S. W. 226.

Where a contract failed to make a reservation covering impossibility of performance through act of God, no question was presented for the jury on the issue of impossibility of performance. *Northern Irr. Co. v. Watkins* (Civ. App.) 183 S. W. 431.

Evidence in purchaser's action for damages for breach of contract to sell certain realty, held to make purchaser's failure to perform within reasonable time question for jury. *Longinotti v. McShane* (Civ. App.) 184 S. W. 598.

On pleading and evidence in buyer's action against seller of glass predicated on seller's contract for safe delivery to buyer's place of business, instructed verdict for plaintiff held proper. *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965.

In an action for wrongful discharge, held, that whether defendant was in good faith satisfied with plaintiff's performance of his duties was for the jury. *Noa Spears Co. v. Inbau* (Civ. App.) 186 S. W. 357.

Evidence held to warrant submission to jury of issue whether an architect completed plans in accordance with his employment and whether the employer accepted them. *Vaky v. Phelps* (Civ. App.) 194 S. W. 601.

47. **Contributory negligence.**—Contributory negligence is for the jury, unless the act done is in violation of law, or the facts admit of only one inference. *Adams v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 853; *Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co.* (Civ. App.) 180 S. W. 1170; *St. Louis Southwestern Ry. Co. of Texas v. Harrell* (Civ. App.) 194 S. W. 971.

To justify the submission of contributory negligence to the jury, there must be sufficient evidence to support a verdict finding that plaintiff was guilty of contributory negligence as charged. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

On the evidence in an action for negligence proximately causing an explosion, held, that whether plaintiff was guilty of contributory negligence in the manner in which he held his torch to be filled with oil was for the jury. *Texas & P. Ry. Co. v. Brown* (Civ. App.) 168 S. W. 866.

In an action for personal injuries received in deliberately touching a wire negligently allowed to become charged with electricity, it was unnecessary to submit to the jury



whether contributory negligence was a proximate cause of his injury. *Dowlen v. Texas Power & Light Co.* (Civ. App.) 174 S. W. 674.

Whether a pedestrian was guilty of contributory negligence in crossing a gas company's ditch in a street upon its foreman's invitation held a jury question. *North Texas Gas Co. v. Meador* (Civ. App.) 182 S. W. 708.

Contributory negligence is generally a mixed question of law and fact, and must be submitted to the jury if the evidence is such that reasonable minds may differ. *Ft. Worth & D. C. Ry. Co. v. Houston* (Civ. App.) 185 S. W. 919.

In suit for damages to shipment of live stock, held, that whether the shipper in the exercise of ordinary care should have been present to receive and unload it was for the jury. *Chicago, R. I. & G. Ry. Co. v. Pavillard* (Civ. App.) 187 S. W. 998.

49. — **Children.**—In an action for the wrongful death of a 14 year old boy, who had placed himself beneath a turntable revolved by his companion, which turntable was unusually attractive to children, the question whether deceased was guilty of contributory negligence in playing beneath the turntable was for the jury. *Stephenville, N. & S. T. Ry. Co. v. Voss* (Civ. App.) 159 S. W. 64.

In an action for the death of a minor child, killed while on a railroad company's right of way, the question whether he was guilty of contributory negligence held for the jury. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

The question of discretion in children is for the jury; there being no fixed age limit at which they are presumed to have discretion, but where the burden of proving want of contributory negligence was on a 14 year old boy suing for injuries received in exploding powder stolen from defendant's quarry, a peremptory charge should be given for defendant, where there is no proof of want of contributory negligence. *Dudley & Orr v. Hawkins* (Civ. App.) 183 S. W. 776.

51. — **Persons under physical disability.**—Defendant carrier held entitled to an instruction to find for it, if the passenger would not have fallen from the coach had he not been under the influence of liquor. *St. Louis Southwestern Ry. Co. of Texas v. Christian* (Civ. App.) 169 S. W. 1102.

52. — **Employés.**—The question of a servant's contributory negligence held for the jury. *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729; *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

In an action by a railway engineer for injuries by stumbling on a pole beside the track while inspecting his slowly moving engine, resulting in his being thrown upon the track, evidence held to make it a jury question whether plaintiff was guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied 106 Tex. 160, 160 S. W. 471.

Evidence in an action by a railroad engineer for injuries in a collision of his train with train on the main track at a station held not to show plaintiff's contributory negligence as a matter of law in assuming the track was clear because the switch target was white. *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

In an action for an elevator operator's death, whether decedent negligently violated the employer's rules resulting in his injury held a jury question. *Modern Order of Prætorians v. Nelson* (Civ. App.) 162 S. W. 17.

Whether an employé in a coal mine, injured by the breaking of the cable drawing loaded cars, was guilty of contributory negligence in entering on the track, held for the jury. *Burnet Fuel Co. v. Ellis* (Civ. App.) 162 S. W. 911.

Evidence, in an action for injuries to a railroad engineer by being struck by a train while going through the yards to work, held to make the question of contributory negligence one for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Rentz* (Civ. App.) 162 S. W. 959.

In an action for an injury to a servant by a dummy elevator falling, evidence held to take to the jury the question of contributory negligence. *American Machinery Co. v. Haley* (Civ. App.) 165 S. W. 83.

Where an employé, acting under orders of the vice principal who directed the work, neither did nor omitted to do anything which could contribute to an accident causing injury to him, the issue of contributory negligence was not in the case. *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 680.

A railroad construction employé was not negligent, as a matter of law, in stepping upon the track in front of a work train which was standing still at the time, and in proceeding down the track toward the water barrel without looking back. *Angelina & N. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

Evidence, in an action for a brakeman's death from his falling from a freight car under the wheels of another car while switching, held not sufficient to go to the jury on the issue of his contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

In an action for an injury to a station agent caused by falling as he was ascending the platform after the steps had been removed to construct a ditch, held, under the evidence, that the question of contributory negligence was properly submitted to the jury. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

Whether a servant whose clothing caught on a projecting set screw on a revolving shaft was negligent held for the jury. *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

In an action for injuries to a servant who fell from the upper to the lower floor of a ginhouse, evidence held not to show that the servant was negligent as a matter of law. *Dawson v. King* (Civ. App.) 171 S. W. 257.

The contributory negligence of a servant is a question for the jury, unless the act is a violation of some law or the facts are undisputed. *Id.*

Whether a servant knew or ought to have known that a pinch bar, furnished him by defendant with directions to use it, was defective, and appreciated the danger of using it as directed, held for the jury. *Houston & T. C. R. Co. v. Smallwood* (Civ. App.) 171 S. W. 292.

In an action for injuries to an employé thrown from an unguarded elevated platform in the course of his employment, whether he was guilty of contributory negligence held for the jury. *Kirby Lumber Co. v. Hamilton* (Civ. App.) 171 S. W. 646.

Whether an employé, injured by the falling of a stack of sacks of meal, was guilty of contributory negligence held for the jury. *Memphis Cotton Oil Co. v. Gardner* (Civ. App.) 171 S. W. 1082.

Use by railway brakeman of end ladder instead of side ladder held not contributory negligence, as a matter of law, where such ladders were used indiscriminately. *Galveston, H. & S. A. Ry. Co. v. Roemer* (Civ. App.) 173 S. W. 229.

Where an engineer set the brakes, but did not have time to alight before his locomotive, which had left the tracks, overturned, there was no issue of contributory negligence in his voluntarily leaving the train. *Kansas City Southern Ry. Co. v. Coomber* (Civ. App.) 173 S. W. 544.

In section hand's action for injury from rear approaching train, held that his failure to look for approaching train was not as a matter of law negligence. *Mitchum v. Chicago, R. I. & G. Ry. Co.* (Sup.) 173 S. W. 878, reversing judgment *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 140 S. W. 811.

Whether a foreman of laborers engaged in cleaning oil tank cars was guilty of dereliction of duty in ordering a workman to enter a car, knowing it might contain gas, so that the foreman's widow could not recover for his death in endeavoring to rescue the workman, held for the jury. *Stalworth v. Gulf Refining Co.* (Civ. App.) 175 S. W. 767.

A telegraph lineman held not negligent as a matter of law in going on a pole without first securing it, where the pole had been inspected by the foreman. *Tweed v. Western Union Telegraph Co.* (Sup.) 177 S. W. 957, denying rehearing (Sup.) 166 S. W. 696.

Question whether a coupler could have been operated from the side of the car so as to make plaintiff switchman guilty of contributory negligence in going between the cars is for the jury. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

Whether a servant injured while oiling a shive wheel of a mine railroad was guilty of contributory negligence, held under the evidence for the jury. *Texas & Pacific Coal Co. v. Gibson* (Civ. App.) 180 S. W. 1134.

In an action by a servant injured while climbing a ladder to a fuel oil tank, the question whether he was charged with constructive notice that it was not fastened held properly submitted to the jury. *Smith v. Webb* (Civ. App.) 181 S. W. 814.

The violation of a rule by a servant is not negligence per se. *San Antonio, U. & G. R. Co. v. Green* (Civ. App.) 182 S. W. 392.

In an action for death of brakeman killed while between cars to make a coupling, question of brakeman's freedom from contributory negligence held for jury. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

In a servant's action for injury to his hand when pulling the lever which directed the hulls from a conveyer without the use of a lantern, contributory negligence held a question for the jury. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

In an action by a servant, who was hurt when a board from a cotton conveyer turned, the question whether he was negligent held for the jury. *Winnsboro Cotton Oil Mill Co. v. Azbell* (Civ. App.) 185 S. W. 1031.

In action by lineman of telephone company against that company and an electric light company for injury from live wire caused by negligence of both companies, evidence as to his warnings by appearance of wire and shouts of others before picking up the wire held to make question of his contributory negligence for the jury. *Brazos Valley Telegraph & Telephone Co. v. Wilson* (Civ. App.) 187 S. W. 234.

Evidence held to warrant submission to jury of question of servant's contributory negligence in working in heated furnace. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

In action for death of servant, ordinarily the question of contributory negligence is for the jury. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

Evidence held to warrant submission to jury of issue whether freight conductor injured by stumbling over a stake in the path was guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

53. — **Passengers.**—It is not negligence per se for one to alight from a moving street car, but the question is for the jury. *San Antonio Traction Co. v. Badgett* (Civ. App.) 158 S. W. 803.

A prospective passenger is not negligent as a matter of law for failing to inquire whether the train upon which he expected to take passage would arrive and depart on the main line or on a switch. *Trinity & B. V. Ry. Co. v. Voss* (Civ. App.) 160 S. W. 663.

Evidence that plaintiff and her brother started to the front of the train to alight and were told by other passengers that there were no doors open when they went back and again returned, and plaintiff attempted to alight while the train was in motion, and that there were in fact two doors open, held to raise the issue of contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

In a personal injury action by a passenger, who fell from a train when he stumbled over a box left on a dimly lighted platform, the question of his contributory negligence held, under the evidence, for the jury. *Gulf, C. & S. F. Ry. Co. v. Battle* (Civ. App.) 169 S. W. 1048.

The jury may find that a passenger stepping from a moving street car before it has reached the stopping place is guilty of contributory negligence. *Darden v. Southern Traction Co.* (Civ. App.) 172 S. W. 200.

A drover in charge of stock, injured by being caught between the drawheads of the train, held not, as a matter of law, guilty of contributory negligence in crossing it over the bumpers according to a custom of drovers. *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822.

Stepping from the platform of a railroad train in the daytime, where the distance to the ground was about three feet without a footstool, held not contributory negligence as a matter of law. *Aransas Harbor Terminal Ry. v. Sims* (Civ. App.) 179 S. W. 895.

Under the evidence, held that it was for the jury whether an intended passenger, who rushed past a station platform with the intention of taking a train and struck an iron rod, 5 feet 7 inches from the ground, with his head, was guilty of contributory negligence in failing to see the rod. *Texas Midland R. Co. v. Truss* (Civ. App.) 186 S. W. 249.

54. — **Persons on railroad property in general.**—Whether plaintiff was guilty of contributory negligence in being in the car when another car was being coupled to it held for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Sconce* (Civ. App.) 176 S. W. 833.

The fact that the driver of a service automobile stopped his car at the depot platform in such a position that it was struck by a train on the house track, does not show contributory negligence as a matter of law. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

In an action for injuries to plaintiff when he drove his automobile into a freight car standing on a street track for unloading, questions whether he was guilty of contributory negligence by failing to use proper lights, and by failing to keep a lookout, held for the jury. *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846.

55. — **Person injured at railroad crossing.**—Failure to stop, look, and listen before crossing railway track held not negligence as a matter of law. *Galveston, H. & S. A. Ry. Co. v. Linney* (Civ. App.) 163 S. W. 1035; *International & G. N. Ry. Co. v. Walker* (Civ. App.) 161 S. W. 961, rehearing denied 162 S. W. 921.

Plaintiff, in attempting to cross a railroad track at the suggestion of defendant's foreman, while the crossing was torn up during construction by the railroad company, held not negligent as a matter of law because by traveling a mile further he could have crossed at another point in safety. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 153 S. W. 1179.

It is not contributory negligence, as a matter of law, to cross railroad tracks at a place not a crossing, though there be other ways of crossing which are both safe and convenient, where people are accustomed to so cross with the knowledge and consent of the company. *Ft. Worth & D. C. Ry. Co. v. Wininger* (Civ. App.) 159 S. W. 881.

The question whether plaintiff looked and listened is one for the jury, whenever the evidence is conflicting. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445.

Evidence held to make question for jury as to negligence of traveler who passed through opening in freight train and was struck by train on another track, even if the burden was on him to disprove negligence. *Galveston, H. & S. A. Ry. Co. v. Linney* (Civ. App.) 163 S. W. 1035.

In an action for injuries in a collision between an automobile and a train at a highway crossing, evidence held sufficient to take the question of contributory negligence to the jury. *Adams v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 853.

In an action for injuries to plaintiff by an alleged defect in a railroad crossing, plaintiff's alleged negligence in loading his wagon with lumber so that it could slide when the wheels dropped from an elevation onto the crossing held properly submitted to the jury. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 164 S. W. 1125.

In an action for wrongful death of one run down at a railroad crossing, the question of his contributory negligence held, under the evidence, for the jury. *Galveston, H. & S. A. Ry. Co. v. Pennington* (Civ. App.) 166 S. W. 464.

Deceased's contributory negligence held for the jury. *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

In action for death at a railroad crossing, plaintiff's contributory negligence was a jury question. *Texas & P. Ry. Co. v. Moody* (Civ. App.) 169 S. W. 1057.

Evidence held insufficient to show, as matter of law, that plaintiff's decedent was guilty of contributory negligence in crossing a railroad track. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

Evidence in an action for collision at a crossing held to make the question of contributory negligence one for the jury. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

In an action for injuries to an automobile in a crossing accident, evidence held not to show, as a matter of law, contributory negligence in not discovering the train in time to avoid the accident. *Texarkana & Ft. S. Ry. Co. v. Rea* (Civ. App.) 180 S. W. 945.

Where one crossing a set of tracks was suddenly told by a brakeman that a train on another track was to be moved and was injured when he attempted to get out of the way, the question of his contributory negligence was for the jury, although if he had remained in the situation he was when warned he would not have been injured. *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 189 S. W. 284.

In action against railroad for damages to an automobile, evidence, authorizing court to take plaintiff's contributory negligence from jury, must have been such that there was no room for ordinary minds to differ as to conclusion to be drawn from it. *Houston Belt & Terminal Ry. Co. v. Hardin Lumber Co.* (Civ. App.) 189 S. W. 518.

Evidence held to present a question for the jury whether a pedestrian, injured by railway cars, was negligent. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

Evidence held such that the court could not say as matter of law that deceased was negligent when struck by defendant's locomotive. *Texas & P. Ry. Co. v. Miles* (Civ. App.) 192 S. W. 1138.

In action for injuries in collision between automobile and railway motorcar, plaintiff's negligence held for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Harrell* (Civ. App.) 194 S. W. 971.

56. — **Persons injured while walking on or near railroad track.**—Where a licensee using a path on the right of way of a railroad company was injured by the active negligence of the company, recovery cannot be defeated because there was another way over which she might have traveled; the question whether she was guilty of contributory negligence in selecting the path being for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Balthrop* (Civ. App.) 167 S. W. 246.

In an action for injuries received while walking along the street beside a railroad track, the plaintiff being safe, except for a projecting object on one of the cars, whether he was guilty of negligence held for the jury under the evidence. *Atchison, T. & S. F. Ry. Co. v. Shadden* (Civ. App.) 185 S. W. 629.

Evidence held not to show that plaintiff was, as a matter of law, guilty of contributory negligence in crossing a railroad track near standing cars, which were struck

by other cars and driven against him. *Broughton v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 186 S. W. 354.

57. — **Owner of animals killed on railroad track.**—In an action for injuries to horses being driven along a road, which were hurt in crossing a cattle guard, the question whether the owner was negligent in driving them loose held for the jury. *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

58. — **Owner of property destroyed by fire set out in operation of railroad.**—Whether owner of barn, who extinguished fire set by railroad engine on the same side of the track, was negligent in not also extinguishing the fire on the other side held for the jury. *Marshall & E. T. Ry. Co. v. Kollingsworth* (Civ. App.) 162 S. W. 1181.

Whether person suing for loss of barn by fire spreading from the right of way was negligent in having combustible material on his adjoining land held for the jury. *Id.*

60. — **Person sending or receiving telegrams.**—In an action against a telephone company for failure to deliver call to persons who would have notified plaintiff of her brother's death, whether failure of sender to employ messenger at a cost of \$3 was contributory negligence held a question for the jury. *Southwestern Telegraph & Telephone Co. v. Domy* (Civ. App.) 160 S. W. 315.

In an action for damages for improperly transmitting a telegram to brokers in England directing the sale of cotton futures, whether plaintiffs were guilty of contributory negligence in not telegraphing immediately after discovering the mistake to correct the error held a jury question. *Mackay Telegraph-Cable Co. v. Bain* (Civ. App.) 163 S. W. 98.

62. — **Last clear chance or discovered peril doctrine.**—Evidence in an action against a railway company for injuries by being struck by a train while at a place on the right of way habitually used by pedestrians held to make it a jury question whether the trainmen discovered plaintiff's peril in time to have stopped the train before striking him. *Galveston, H. & S. A. Ry. Co. v. Huegle* (Civ. App.) 158 S. W. 197.

Evidence, in an action for the death of deceased in a collision between his automobile and defendant's street car, held to authorize submission of the question of discovered peril to the jury. *El Paso Electric Ry. Co. v. Davidson* (Civ. App.) 162 S. W. 937.

Direct and positive evidence that railway engineer knew of peril of employé, who slipped and fell in front of a train, held not necessary to justify submission of discovered peril. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

In an action for a crossing collision between an automobile and a car backed by a switch engine, the questions of discovered peril and contributory negligence held for the jury. *Southern Pac. Co. v. Walker* (Civ. App.) 171 S. W. 264.

In an action by boy hurt when a passing train struck gate leading from a stock pen to the tracks, question whether engineer in charge realized boy's peril, but failed to take precautions, held for jury. *International & G. N. Ry. Co. v. Logan* (Civ. App.) 184 S. W. 301.

Evidence in a pedestrian's action for injuries by being struck by a locomotive near public crossing held to raise the issue of discovered peril. *Ft. Worth & D. C. Ry. Co. v. Houston* (Civ. App.) 185 S. W. 919.

In action against railroad for damages to automobile, held, on the evidence, that trial court did not err in submitting issue of plaintiff's discovered peril to the jury. *Houston Belt & Terminal Ry. Co. v. Hardin Lumber Co.* (Civ. App.) 189 S. W. 518.

Evidence held such that the court could not say as matter of law that issue of discovered peril of wagon driver approaching a railway crossing was not in the case for damages for his death. *Texas & P. Ry. Co. v. Miles* (Civ. App.) 192 S. W. 1138.

63. **Conversion.**—On the issue of conversion by the mortgagor, the question whether the property had been sold with the consent of the mortgagee held for the jury. *Stinson v. Sneed* (Civ. App.) 163 S. W. 989.

Whether a landlord who removed from the leased building chattels of the tenant was guilty of converting the same held for the jury. *Copeland v. Porter* (Civ. App.) 169 S. W. 915.

In an action by a stockholder against directors, the question whether defendants failed to account for certain funds received held for the jury. *Thomas v. Barthold* (Civ. App.) 171 S. W. 1071.

In suit by the assignee of a bank against the bank and cotton dealers whose agent converted from the bank cotton tickets pledged by the dealers, whether the bank was negligent in letting the agent have access to the tickets was a question for the jury. *Carver Bros. v. Merrett* (Civ. App.) 184 S. W. 741.

64. **Custody of children.**—In a suit involving the custody of infant children, the question whether it was better for them to be in the custody of their father or their maternal relatives held for the jury. *Kirkland v. Matkew* (Civ. App.) 174 S. W. 830.

65. **Customs and usages.**—Whether a custom exists, is a question of fact. *Missouri, K. & T. Ry. Co. of Texas v. Ryon* (Civ. App.) 177 S. W. 525.

66. **Damages and amount of recovery.**—In a suit to set aside her insane husband's conveyance of their homestead, held, that the question of the amount of the consideration expended for necessities should not be submitted to the jury. *Rowan v. Hodges* (Civ. App.) 175 S. W. 847.

In an action for deceit in the sale of corporate stock, the failure of plaintiff's evidence to show the value of the stock held to entitle defendant to a directed verdict. *Harris v. Shear* (Civ. App.) 177 S. W. 136.

Court held not in error in failing to submit amount allowable in retention of damages, or to peremptorily instruct for defendant. *Diamond v. Duncan* (Sup.) 177 S. W. 955, denying rehearing 172 S. W. 1100.

In action for attorney fees, value of services rendered is peculiarly within province of jury. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

Where petition alleged that reasonable value of services was certain sum, issue of reasonable value was for jury. *Myers v. Grantham* (Civ. App.) 187 S. W. 532.

67. — **Personal injuries in general.**—Evidence held sufficient to take to the jury the question whether an attorney was so disabled by an accident as to be entitled to total disability indemnity. *Hefner v. Fidelity & Casualty Co. of New York* (Civ. App.) 160 S. W. 330.

Whether plaintiff was rendered unable to sleep on his left side by reason of the injury so as to be entitled to damages on that ground held a jury question. *Trinity & B. V. R. Co. v. Blackshear* (Civ. App.) 161 S. W. 335.

Evidence held to authorize the submission to the jury of plaintiff's loss of future earning capacity, despite a failure to prove the life expectancy of plaintiff and to absolutely establish his age. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445.

Evidence of personal injury, from which it may be inferred from an opinion of a physician that plaintiff could not do active work, justified submission of the matter of future diminished capacity to earn money. *Prince v. Taylor* (Civ. App.) 171 S. W. 826.

In an action by a husband for injuries to the wife, evidence as to earning capacity of the wife held sufficient to go to the jury, though there was no direct evidence of value. *Galveston, H. & S. A. Ry. Co. v. Bibb* (Civ. App.) 172 S. W. 178.

In an action by a city fireman against a railway company for injuries due to an explosion, the issue of damages for lost time held properly submitted to the jury under conflicting evidence. *Houston Belt & Terminal Ry. Co. v. Johansen* (Sup.) 179 S. W. 853.

In a servant's action for personal injury by falling from a ladder attached to defendant's oil derrick, striking upon his back with his head on some iron tubing, evidence held to warrant a submission of his impaired ability to earn money in the future. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 182 S. W. 444.

In servant's action for personal injury, where there was evidence that he was earning \$14 per week when injured, and that for some time thereafter he was unable to perform any work, there was no error in submitting an issue as to the reasonable value of the time lost on account of his injury. *Eureka Ice Co. v. Buckloo* (Civ. App.) 188 S. W. 510.

68. — **Wrongful death.**—On evidence in an action by the parents of a young man of 23 killed in a wreck due to defendant's negligence, held, on evidence, that the question whether plaintiffs had any reasonable expectation of pecuniary benefit from him was for the jury. *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 166 S. W. 1190.

69. — **Mental suffering.**—Evidence, in a railroad employe's action for permanent injury to his collar bone and abdomen, held sufficient to justify a submission of the question of his future mental anguish and physical pain. *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

70. — **Injuries to property.**—Whether plaintiff's property was depreciated by reason of the construction of a railroad held, under the evidence, for the jury. *Houston Belt & Terminal Ry. Co. v. Vogel* (Civ. App.) 179 S. W. 268.

Charge directing a verdict for defendant carrier on the ground that no measure of damages to shipment of cattle had been shown was properly refused, as, notwithstanding there was no sufficient evidence on the measure of damages, plaintiff was entitled to recover nominal damages. *San Antonio & A. P. Ry. Co. v. Shankle & Lane* (Civ. App.) 183 S. W. 115.

73. — **Expenses incurred.**—In action against trustee of estate for the expenses of the last sickness of a devisee, the question of the duration of such last sickness was a question for the jury under all the facts and circumstances. *McLean v. Breen* (Civ. App.) 183 S. W. 394.

In suit to cancel deed on ground of fraudulent representations, etc., court did not err in submitting issue of plaintiff's reasonable and necessary expense in going to and returning from land, where there was evidence authorizing its submission. *Pitt v. Gilbert* (Civ. App.) 190 S. W. 1157.

74. — **Exemplary damages.**—In an action for compensation for medical services begun by attachment, where defendant claimed damages for malicious attachment, the evidence held to raise the issue of punitive damages. *Johnson v. Tindall* (Civ. App.) 161 S. W. 401.

In an action for damages for an attachment of cotton, alleged to have been sued out maliciously and without probable cause, the question of defendant's malice was for the jury with reference to the claim for exemplary damages. *Pruitt v. English* (Civ. App.) 173 S. W. 1172.

Whether punitive damages should be allowed in a slander case held a jury question. *Ellis v. Garrison* (Civ. App.) 174 S. W. 962.

75. — **Mitigation of damages and reduction of loss.**—Testimony that a passenger who contracted a cold from exposure on defendant's train was directed to consult a throat specialist does not alone raise an issue for the jury as to whether the passenger failed to procure competent medical treatment. *Missouri, K. & T. Ry. Co. of Texas v. Dellmon* (Civ. App.) 171 S. W. 799.

Whether plaintiff, whose horse was injured by defendant, was guilty of contributory negligence in not having it treated by a veterinary and in using it too soon, held, under the evidence, a question for the jury. *Andrews v. Viraldo* (Civ. App.) 176 S. W. 737.

In an action for injury to a mare in transit, whether the plaintiff's own agent had been guilty of contributory negligence in continuing shipment of the mare after she was kicked in the shipping pens, held for the jury under the evidence. *Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co.* (Civ. App.) 180 S. W. 1170.

In a servant's action for injuries defended on the ground of contributory negligence, the issue of the amount to which his compensation should be reduced by such contributory negligence must be submitted. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

Evidence merely that plaintiff disregarded the advice of her attending physician to call in a consulting physician, without a showing that the result would have been different had she done so, does not raise the issue of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Whitsett* (Civ. App.) 185 S. W. 406.

**78. Duress, undue influence and mental capacity.**—Question of undue influence held for jury. *Rounds v. Coleman* (Civ. App.) 139 S. W. 1086; *Baker v. McDonald* (Civ. App.) 159 S. W. 450; *Clark v. Briley* (Civ. App.) 193 S. W. 419.

On evidence in a will contest on the ground of contestee's undue influence upon the testator, her husband, whereby contestant, a daughter, was excluded from any material participation in the estate, held that the question of undue influence was for the jury. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed, 106 Tex. 322, 166 S. W. 1138.

In suit to set aside deed, evidence held to authorize submission to the jury of the question whether the grantor was mentally incompetent to make the conveyance at the time he executed it. *Brown v. Brenner* (Civ. App.) 161 S. W. 14.

In an action to establish a note as a claim against the estate of an indorser, evidence held to require a finding, as a matter of law, that the indorser had sufficient mental capacity when he indorsed the note to bind himself by his indorsement. *Central Bank & Trust Co. of Houston v. Wiess* (Civ. App.) 170 S. W. 820.

Evidence held sufficient to take to jury question of extent of mental disability of deceased at time of executing deeds to defendants. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

If there is evidence to support a verdict that the will was secured by undue influence, such issue is for the jury, although there may be weighty evidence to the contrary. *Clark v. Briley* (Civ. App.) 193 S. W. 419.

**80. Estoppel.**—The question of estoppel to claim a homestead is one of fact which is ordinarily for the jury. *Randleman v. Cargile* (Civ. App.) 163 S. W. 350.

Existence of estoppel precluding the person bound from contradicting a recital or admission is one of law for the court. *Amarillo Nat. Bank v. Sanborn* (Civ. App.) 169 S. W. 1075.

Evidence held to justify the submission to the jury of the issues of waiver and estoppel. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 668.

In action for necessities, in which plaintiff pleaded estoppel, held, that question whether the husband knew the goods were being charged to him should have been submitted to the jury. *Trammell v. Neiman-Marcus Co.* (Civ. App.) 179 S. W. 271.

Whether insured, giving his note for and accepting a policy covering a different period than that alleged to have been represented by the insurer's agent, was inexcusably negligent, was a question of fact for the jury. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

In an action by depositor to recover an alleged deposit, on evidence that depositor did not object to charging back the deposit when not collected, but executed notes for overdrafts made necessary thereby and the bank relied thereon to its injury, the question of his estoppel was for jury. *First State Bank of Holland v. Mills* (Civ. App.) 186 S. W. 870.

When estoppel is pleaded and supported by evidence, such issue should always be submitted to the jury. *Frigid Fluid Co. v. Sid Westheimer Co.* (Civ. App.) 189 S. W. 334.

**81. Execution and delivery of written instruments.**—Evidence that, though the note sued on was not signed by one defendant, it was signed under his authority by his son, was insufficient to present any issue as to whether such defendant executed the note. *Solomon v. Merchants' & Planters' Nat. Bank* (Civ. App.) 168 S. W. 1029.

In trespass to try title, evidence held to require submission to the jury of the question which of two deeds, executed one by W. to R. and the other by R. to W. on the same date, was last delivered. *Rayner v. Posey* (Civ. App.) 173 S. W. 246.

Whether a letter offered in evidence as an archive of the General Land Office was a forgery held for the jury. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

Whether a deed was delivered, held for the jury. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536.

In trespass to try title, evidence held to require submission to jury of question of forgery of deed through which plaintiff derived title. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

**82. Exemption.**—In trespass to try title, evidence as to the character of the unincorporated place in which plaintiff and her husband lived held to make a question for the jury as to whether the land was a part of their rural homestead. *Cotten v. Friedman* (Civ. App.) 158 S. W. 780.

In action to set aside trust deed securing debt, evidence held to require submission to the jury of issue as to whether land was a homestead. *Palmer v. Jaggaers* (Civ. App.) 180 S. W. 907.

In action raising issue of homestead abandonment, the intent to abandon is a question of fact for the jury or court trying the case. *Derry v. Harty* (Civ. App.) 187 S. W. 343.

**83. False imprisonment and malicious prosecution.**—In an action against store proprietor for false imprisonment, petition and evidence held to justify the submission of the question whether defendant's employé took hold of and examined plaintiff against his will and without his consent to ascertain if he had stolen a pin. *S. H. Kress & Co. v. Lawrence* (Civ. App.) 162 S. W. 448.

**84. Foreign laws.**—Where the evidence of the laws of a sister state consists of reports of judicial decisions of the state, the effect of the decisions is for the trial court, though, where the evidence consists of parol testimony of experts, the jury must determine what the foreign law is. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

Whether, under the Mexican law, a Mexican judge had power to order a bank to pay over a deposit as a payment on a judgment he had rendered against the owner held a question of fact. *Banco Minero v. Ross*, 172 S. W. 711, 106 Tex. 522.

Proof of foreign laws is made to the court, rather than to the jury. *El Paso & Southwestern Co. v. La Londe* (Civ. App.) 173 S. W. 890, writ of error denied (Civ. App.) 184 S. W. 498.

85. **Fraud.**—Whether the representation that notes of a third person given by defendant in payment of timber were made by defendant before or at the time the first contract was made, whether his later statements to plaintiff in regard thereto were intended to and did induce plaintiff to make a second contract, held under the evidence, for the jury, and whether plaintiff accepted the notes relying upon his own judgment as to their value, and whether he had opportunity to investigate their value before making the contract, were for the jury. *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438.

Evidence held to require submission of the issue whether a release including the company was procured by fraud. *Western Union Telegraph Co. v. Walck* (Civ. App.) 161 S. W. 902.

Where the damages alleged were \$96, and the purchase price deposited in a bank was \$144, and a plea in abatement alleged want of jurisdiction because the attempted recovery of the \$144 was fraudulently included, the question of fraud was for the jury, and it was not enough to instruct that, if defendant had not received the deposit of \$144, the verdict should be for defendant. *Johnson v. Miller* (Civ. App.) 163 S. W. 592.

Evidence held insufficient to take to the jury the question of fraudulent misrepresentations by the seller of a stock of jewelry as to the quality. *Bixler v. Rinn* (Civ. App.) 166 S. W. 96.

In an action on a note, defendants' evidence, which merely showed a loan from plaintiff bank on the faith of their own and other signatures to a note and default, presented no issue of fraud as to other makers and the bank's notice thereof for submission to the jury. *Solomon v. Merchants' & Planters' Nat. Bank* (Civ. App.) 168 S. W. 1029.

In an action to rescind a land trade for misrepresentations, evidence of reliance thereon held sufficient to justify the submission of the issue whether the trade was so made. *Boles v. Aldridge* (Sup.) 175 S. W. 1052, reversing judgment (Civ. App.) 153 S. W. 373.

Whether a representation was intended by the seller, and understood by the buyer, as an affirmation of a fact, or as a mere expression of opinion, in the latter case no ground for rescission, is a question of fact. *Fowler v. Carlisle* (Civ. App.) 179 S. W. 528.

In a suit for fraud and false representations, where there was ample evidence to sustain plaintiff's allegations thereof, and to show that he suffered damage, the issues were for the jury under proper instructions. *Vaden v. Buck* (Civ. App.) 184 S. W. 318.

In a suit by a subscriber to stock to cancel the note representing the purchase price, whether the party who negotiated the stock subscription contract with plaintiff represented that he was offering the stock at par value, and that such value was \$20 a share, held for the jury. *Cattlemen's Trust Co. of Ft. Worth v. Pruett* (Civ. App.) 184 S. W. 716.

Where the pleadings raised the issue of validity of a release for injuries given by the employé on representations of the employer's surgeon that he would soon be as well as ever, such issue was for the jury. *Alenkowsky v. Texas & N. O. Ry. Co.* (Civ. App.) 188 S. W. 956.

Mere statement of vendor that the property was worth more than the contract price is not sufficient for submission of the defense to action for commissions of fraud of the broker in inducing her to sell at less than its value. *Leonard v. Kendall* (Civ. App.) 190 S. W. 786.

In action for misrepresenting amount of timber on land traded to plaintiff, evidence held to make defendant's fraud a jury question, although plaintiff sent his own agent to inspect the land, where such agent was misled by defendant's representative regarding the boundaries and amount of timber on the tract. *Peck v. Robinson & Smith* (Civ. App.) 194 S. W. 456.

In action against directors to recover amount of loan made to the corporation upon misrepresentations as to its financial condition, evidence held to justify a refusal to direct verdict for defendants. *Cameron v. First Nat. Bank* (Civ. App.) 194 S. W. 469.

86. **Fraudulent conveyances.**—Whether a chattel mortgage was fraudulent as to creditors is a question for the jury, unless the fraudulent intent is apparent on the face of the instrument, or is admitted, or unless some interest, inconsistent with the conveyance, has been reserved. *Panell v. First Nat. Bank* (Civ. App.) 163 S. W. 340.

Whether the transfer of a note by a debtor was in fraud of creditors held, under the evidence, for the jury. *Citizens' State Bank v. McShan* (Civ. App.) 172 S. W. 565.

In garnishment proceedings against purchaser of debtor's stock of goods in bulk, question whether plaintiff was creditor of the seller at time of sale held for jury. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

87. **Insurance and beneficial associations.**—In an action on a life policy, where it was a question of fact whether the policy in the record was the one issued, the question was for the jury. *International Order of Twelve Knights & Daughters of Tabor v. Denman* (Civ. App.) 160 S. W. 980.

Where the evidence in an action on a benefit certificate was conflicting as to whether deceased was in arrears or had been legally suspended at the time of his death, the issue was properly left to the jury. *Grand Lodge, F. & A. M. of Texas, v. Dillard* (Civ. App.) 162 S. W. 1173.

In an action on a burglary insurance policy, question whether marks of visible entry on the premises, made a prerequisite to recovery by the policy, were inflicted by the insured as a blind, held for the jury. *National Surety Co. v. Silberberg Bros.* (Civ. App.) 176 S. W. 97.

In an action on an indemnity policy where plaintiff testified to telephone conversation with insurer's agent, which was denied by defendant, the question of the identity of the party with whom plaintiff conversed, was for the jury. *Liverpool & London & Globe Ins. Co. v. Lester* (Civ. App.) 176 S. W. 602.

Evidence held to warrant submission to jury of issue whether member of fraternal benefit association signed regular form for reinstatement and delivered it to the local lodge, so as to make his reinstatement binding. *Grand Lodge of Brotherhood of Railroad Trainmen v. Kennedy* (Civ. App.) 188 S. W. 447.

In an action on a fire policy issued to a husband in which it appeared that he had no insurable interest in property insured as it was separate property of his wife, court

should have instructed a verdict for defendant. *St. Paul Fire & Marine Ins. Co. v. McQuary* (Civ. App.) 194 S. W. 491.

88. — **Representations and warranties.**—A denial by an applicant for membership in a fraternal insurance order that he ever had inflammatory or acute rheumatism held not as a matter of law a misrepresentation under the laws of the order. *National Council of the Knights and Ladies of Security v. Sealey* (Civ. App.) 162 S. W. 455.

89. — **Compliance with conditions subsequent.**—In a suit on a policy on household goods, whether insured filed the proof of loss required by the policy held for the jury. *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

In action on insurance policy, where defendant pleaded unauthorized vacancy and the uncontradicted evidence showed permit from defendant, the court properly refused to submit to the jury the question whether the building was unoccupied for full 10 days before the fire. *German-American Ins. Co. v. Shaddix* (Civ. App.) 194 S. W. 1178.

90. — **Risks and causes of loss.**—In an action on an accident policy for death, evidence held to require submission to the jury of the question whether insured's death resulted from external, violent, or accidental means, or from prior disease. *Order of United Commercial Travelers of America v. Roth* (Civ. App.) 159 S. W. 176.

Where the evidence, in an action on a policy of life insurance excepting liability in case of suicide, indicated that the death of insured was caused by accident or suicide, it was for the jury to say whether defendant had sustained the burden of removing the presumption against suicide. *First Texas State Ins. Co. v. Jiminez* (Civ. App.) 163 S. W. 656.

In an action against a mutual benefit insurance association evidence on the question whether insured met his death while in violation of law held sufficient to go to the jury. *Sovereign Camp Woodmen of the World v. Bailey* (Civ. App.) 163 S. W. 683.

In an action upon an accident policy, evidence held to make it a question for the jury whether a loss to the insured was the result of sickness or of an accident within the policy. *First Texas State Ins. Co. v. Jones* (Civ. App.) 167 S. W. 9.

In an action on an accident policy, the question of cause of death is for the jury, where no one witnessed it. *Order of United Commercial Travelers v. Simpson* (Civ. App.) 177 S. W. 169.

In an action on an accident policy, defendant held entitled to have the issue as to whether insured's diseases caused him to be stricken with paralysis submitted to the jury. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 185 S. W. 615.

91. — **Waiver.**—Whether any default by insurer in filing proofs of loss was waived held a jury question. *Fidelity Phenix Fire Ins. Co. v. Sadan* (Civ. App.) 178 S. W. 559.

In an action on a fire insurance policy, void if other insurance is procured without consent, evidence held sufficient to justify the submission to the jury of the question of consent. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 668.

95. **Libel and slander.**—In an action for slander, where the defense was that the charge by defendant that plaintiff had stolen the hay from defendant's place was true, evidence held sufficient to take to the jury the issue of the truth of the words spoken by defendant. *Burkhiser v. Lyons* (Civ. App.) 167 S. W. 244.

Where defendant had stated that plaintiff had stolen every blade of grass upon defendant's place, proof that any part of the hay on the place had been stolen or fraudulently appropriated by the plaintiff is sufficient to take to the jury the question of justification. *Id.*

The question of malice in case of qualifiedly privileged statements is a question of fact for the jury. *Dickson v. Lights* (Civ. App.) 170 S. W. 834.

Violent statements made in a church convention against a minister who opposed state-wide prohibition held sufficient to take to the jury the question of actual malice necessary in qualifiedly privileged statements. *Id.*

Questions whether a charge was slanderous held, under the evidence, for the jury. *Ellis v. Garrison* (Civ. App.) 174 S. W. 962.

In an action for libel in charging on report that plaintiff, chief of police of another city, was to be investigated for carrying his son on the city pay roll as confidential clerk in violation of law, instruction that publication did not charge that the son was on the city pay roll held properly refused. *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45.

In case of a privileged communication, slight evidence of malice entitles plaintiff to have his case submitted to the jury, and evidence of a reckless disregard of whether the statement was true or false held sufficient to go to the jury on the question of express malice. *International & G. N. Ry. Co. v. Edmundson* (Civ. App.) 185 S. W. 402.

In a libel suit based on an alleged privileged communication, although plaintiff has burden of proof of malice, he has right to submit alleged libel itself to jury as evidence of malice on its face, and on question whether author or publisher has exceeded his privilege. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463.

96. **Limitation and laches.**—Where a plaintiff seeks to avoid the bar of limitations on the ground of defendant's fraud, and his petition shows a failure to avail himself of means of information, the question whether the statute was tolled is one of law for the court. *Powell v. March* (Civ. App.) 169 S. W. 936.

Evidence held to require submission to the jury of the issue whether the mistake in a deed was or could have been discovered prior to the time of limitations. *Seureau v. Frazer* (Civ. App.) 189 S. W. 1003.

Where a citation was not sent for service until two months after it was issued, and after the right of action was barred by limitations, plaintiff's intention to have it served and the reasonableness of his excuse present questions for the jury. *Panhandle & S. F. Ry. Co. v. Hubbard* (Civ. App.) 190 S. W. 793.

In a suit to set aside a judgment, whether defendant defectively served should have discovered the judgment in time to have moved for a new trial at the same term of court, held a jury question. *Kimmell v. Edwards* (Civ. App.) 193 S. W. 363.



96½. **Marriage.**—Where there is testimony tending to rebut the presumption of validity of a marriage, an instruction on the presumption is properly refused; the whole matter being for the jury. *Adams v. Wm. Cameron & Co.* (Civ. App.) 161 S. W. 417.

97. **Misconduct by physician.**—Whether other pressing professional and business engagements furnished a sufficient excuse for the defendant's failure to attend plaintiff's wife in person, and whether plaintiff was intoxicated and threatened defendant's substitute with a pistol, and thus contributed to his failure to exercise ordinary skill and care in the treatment, was for the jury. *Lee v. Moore* (Civ. App.) 162 S. W. 437.

In an action by a husband for injuries to the wife, evidence held insufficient to warrant an instruction on the question whether the wife had suffered a miscarriage at the hands of a doctor, rather than from the injury. *Galveston, H. & S. A. Ry. Co. v. Bibb* (Civ. App.) 172 S. W. 178.

98. **Mistake.**—In trespass to try title, the question whether a defendant had paid purchase money to another defendant to plaintiff's knowledge, and was entitled to a correction deed describing the land as against plaintiff and such other defendant, held, under the evidence, for the jury. *Hodges v. Moore* (Civ. App.) 186 S. W. 415.

99. **Negligence in general.**—Negligence, whether of plaintiff or defendant, is generally a question of fact, and becomes a question of law only when the act done is in violation of law or when the facts are undisputed and admit of but one inference. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073; *Luten v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 798.

The issues of a defendant's negligence, and the proximate cause of an injury on account of which a recovery is sought, are nearly always questions for the jury, and never become questions of law for the court, when there is evidence of probative force in support of the issue. *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132.

The issue of unavoidable accident held, under the evidence, for the jury. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

In an action against an express company for injuries by a box falling off of an express truck and striking the plaintiff, evidence held to make it a jury question whether the truck was negligently handled. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

Evidence held to make a question for the jury as to whether defendant's automobile was the one which caused the injury. *Carter v. Walker* (Civ. App.) 165 S. W. 483.

In an action for personal injury resulting from plaintiff's shoe catching on a projecting strip on a step of defendant's theater, the question whether the projection was known to be defective or should have been known to defendant by reasonable care a sufficient time before the accident to have repaired it held for the jury. *Dalton v. Hooper* (Civ. App.) 168 S. W. 84.

Where evidence was sufficient to raise the issue of defendant's negligence, it was not error to refuse peremptory charges. *Missouri, K. & T. Ry. Co. of Texas v. Washburn* (Civ. App.) 184 S. W. 580.

To authorize a directed verdict on the issue of negligence, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

In action for value of horse placed in livery stable to board, charge, submitting to jury question whether it was negligence for stable keepers to fail to employ veterinary to treat a wound received by the horse, and to treat it themselves, was proper. *Attaway v. Schmidt & Madigan Grocery Co.* (Civ. App.) 188 S. W. 1010.

The general rule is that negligence is a question of fact for the jury, but the courts may declare some acts to be so obviously dangerous and reckless as to constitute negligence per se. *St. Louis, B. & M. Ry. Co. v. Paine* (Civ. App.) 188 S. W. 1033.

Evidence that defendant newspaper's employé threw a tightly folded newspaper into a group, injuring plaintiff, made defendant's negligence a jury question. *Houston Chronicle Pub. Co. v. Lemmon* (Civ. App.) 193 S. W. 347.

100. **Violation of statute or ordinance.**—Whether defendant's freight car, with which plaintiff's automobile collided at night, was left standing in the street for temporary work, and not contrary to ordinance, held for the jury. *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846.

Whether water-closets are within a reasonable and convenient distance of a depot, as required by Rev. St. 1911, arts. 6592, 6594, is a question of fact for the jury. *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 194 S. W. 462.

101. **Injuries to passengers.**—In an action for injuries while traveling on a freight train with cattle, evidence held to justify the submission of the questions as to unnecessarily checking or jerking the car. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

In an action for injuries to plaintiff's wife, her testimony that she received serious and permanent internal injuries by being thrown against the arm of a seat of the coach in which she was riding was not physically impossible, so as to require a directed verdict for the defendant. *St. Louis Southwestern Ry. Co. of Texas v. McNatt* (Civ. App.) 166 S. W. 89.

Whether a street railway company was negligent in permitting the exit door of a car to remain open so as to permit a passenger to fall from the car running on a curve held for the jury. *Dallas Consol. Electric St. Ry. Co. v. Stone* (Civ. App.) 166 S. W. 708.

Where plaintiff, who claimed that his arm was hurt by the falling of a car window, testified that he found it defective, verdict cannot be directed for defendant, on the ground that such claim was contrary to the physical facts because defendant's inspectors and servants testified the window was in good order. *Weatherford, M. W. & N. W. Ry. Co. v. Smith* (Civ. App.) 170 S. W. 133.

Whether a carrier should have provided a step box for passengers alighting where there were no facilities therefor held a question for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Kemp* (Civ. App.) 173 S. W. 532.

Evidence held to raise a jury question whether a passenger suffered any physical injury from abusive language of train employes toward him. *Texas & P. Ry. Co. v. Keller* (Civ. App.) 176 S. W. 62.

Whether defendant carrier's brakeman, claimed to have assaulted a passenger in self-defense, used no more force than was reasonable, is a question for the jury on conflicting evidence. *St. Louis Southwestern Ry. Co. of Texas v. Huddleston* (Civ. App.) 178 S. W. 704.

Refusal of instruction to find for defendant, if plaintiff remained in the waiting room of the station for her own purposes after all business with the railroad company connected with her journey had been entirely finished, held not error, in view of art. 6591, where there was no evidence that more than 30 minutes elapsed between the time she alighted from the train and the accident. *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412.

In a passenger's action for injuries from a fellow passenger, held that, under the evidence, the conductor's negligence in not ejecting the offending passenger was for the jury. *Ft. Worth & R. G. Ry. Co. v. Stewart* (Sup.) 182 S. W. 893.

It is a question of fact for the jury in each case whether or not the highest degree of care was exercised in the premises by the defendant carrier. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 183 S. W. 1185.

Whether a carrier owed the duty of assisting a passenger from its train held for the jury. *Id.*

In action for injuries to passenger, where there is evidence to sustain allegation of one of the acts of negligence alleged, peremptory instruction was properly refused. *Houston, E. & W. T. Ry. Co. v. Hooper* (Civ. App.) 184 S. W. 347.

In an action for injuries to plaintiff's wife resulting from cold contracted in an insufficiently heated car, evidence held insufficient to raise the question whether the carrier's servants would have heated the car had they been informed of the wife's delicate condition. *St. Louis Southwestern Ry. Co. of Texas v. Rutherford* (Civ. App.) 184 S. W. 700.

Evidence, in a passenger's action for injuries received when he stepped upon a banana peel and fell to the ground, held to authorize submission of the issue of the carrier's negligence in permitting the banana peel to remain upon the doorsill. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

In action for injuries to passenger boarding a car, whether a duty arises for employes to assist passengers to board a car is for the jury upon consideration of all the circumstances. *Southern Traction Co. v. Reager* (Civ. App.) 186 S. W. 272.

Evidence in a newsboy's action for damages for personal injury by a passenger held to make the negligence of the conductor in failing to protect him a question for the jury, since the evidence favorable to plaintiff, discarding all evidence favorable to the defendant, was sufficient to support a verdict for the plaintiff. *Nevill v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 187 S. W. 388.

In passenger's action for personal injury while alighting from car held that whether a box, about which a witness testified, was the same box used to assist plaintiff to alight, and whether defendant's employes knew that the box on which plaintiff stepped was there when she alighted or by ordinary care could have known that it was not a safe step, was for the jury. *Wichita Falls Traction Co. v. Berry* (Civ. App.) 187 S. W. 415.

In an action against a railroad for injuries to a passenger who fell in stepping on a round piece of wood lying on car floor, the question of the negligence of the servants of the company in failing to remove the wood held for the jury. *Texas & Pac. Ry. Co. v. Hanson* (Civ. App.) 189 S. W. 289.

In action for injuries from being struck by a truck on an unlighted station platform, held not error to submit question of the failure of the railway to have the platform properly lighted. *St. Louis Southwestern Ry. Co. of Texas v. McMichael* (Civ. App.) 191 S. W. 186.

102. **Loss of passenger's baggage.**—In an action for damages for the loss of wearing apparel stolen from a sleeping car berth, and for consequent mental anguish and embarrassment, defendant's negligence held a question for the jury. *Pullman Co. v. Moise* (Civ. App.) 187 S. W. 249.

In action against sleeping car company for loss of passenger's money by theft of porter or failure to keep watch over it, evidence that the money was lost and that the porter had opportunity to take it, there being others in the car with equal opportunity, held not to raise an issue of theft by porter. *Pullman Co. v. Franks* (Civ. App.) 187 S. W. 501.

103. **Injuries from defects in streets.**—Whether the foreman of a gas company negligently invited a pedestrian to cross its ditch in a street held a question for the jury. *North Texas Gas Co. v. Meador* (Civ. App.) 182 S. W. 708.

Evidence that defendant maintained guy wire where it obstructed the most natural entrance to a residence held to present question for jury whether defendant power company was negligent in failing to cover guy wire with plank or otherwise and to paint it white. *Canyon Power Co. v. Gober* (Civ. App.) 192 S. W. 802.

104. **Injuries to employes.**—In action for death of employe caused by injuries sustained while fighting fire, evidence held to make a question for the jury as to the employer's negligence. *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132.

Where, in an action for injuries to a boy, employed when not quite 14, it appeared that he was able to read and write simple sentences in English, the court did not err in refusing to submit to the jury the issue of defendant's negligence in employing plaintiff in alleged violation of Act March 6, 1903 (Acts 28th Leg. c. 28). *Stirling v. Bettis Mfg. Co.* (Civ. App.) 159 S. W. 915.

The master's negligence held for the jury. *Ebersole v. Sapp* (Civ. App.) 160 S. W. 1137.

In an action for death of a servant, defendant's negligence held, under the evidence, for the jury. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

It is not question for jury whether employer is subscriber under Workmen's Compensation Act. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

106. — **Defective tools, appliances, and places for work.**—Evidence, in an action for the death of a railroad engineer by derailment after a washout, held to make it a jury question whether the company in the exercise of ordinary care should have inspect-

ed the tracks and notified decedent of the defect before the accident occurred. *Texas Cent. R. Co. v. Neill* (Civ. App.) 159 S. W. 1180.

In an action by a car inspector for injuries from falling into a ditch, held, that the questions whether the ground through which the ditch ran was a part of defendant's yard at that place, and under its control, at the time of the accident, were for the jury. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639.

Whether the outer step on a tender which was worn so as to slant downward, instead of presenting a square edge on top, made it more likely that one's foot would slip therefrom, and whether its maintenance in such condition was negligence, held questions for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

On injury to a brakeman, thrown from wild cars which had come uncoupled, the question of the master's negligence in furnishing insufficient couplers and in maintaining defective tracks held for the jury. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

In an action for decedent's death while descending from a platform suspended on a messenger wire by a line passing over a pulley attached to an open hook, by the hook slipping off, whether defendant employer was negligent in using an open hook held a jury question. *French v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 162 S. W. 406.

Evidence held to make a question for the jury as to whether obstruction over which brakeman stumbled as he was getting on moving car was a pile of clinkers, as claimed by him. *Texas Midland R. Co. v. Geron* (Civ. App.) 162 S. W. 471.

Evidence, in an action against a railroad for injury to an employé in its shops from the falling of a locomotive spring, held sufficient to raise the issue of negligence. *Texas & N. O. Ry. Co. v. Stewert* (Civ. App.) 163 S. W. 624.

There was no error in directing a verdict for the defendant in an action for the death of a servant by the explosion of an engine, alleged to have been old and unsafe, where there was no evidence that it was unsafe, or as to the cause of the explosion, though there was sufficient evidence to raise the issue as to its being old. *Graves v. San Antonio & A. P. Ry. Co.* (Civ. App.) 164 S. W. 1059.

In an action for an injury to a servant caused by a dummy elevator falling which the servant was dismantling preparatory to the installation of new elevators, held, under the evidence, a question for the jury whether the master exercised due care. *American Machinery Co. v. Haley* (Civ. App.) 165 S. W. 83.

It could not be said as a matter of law that if a railroad was not negligent in failing to inspect and repair a defective car door, which came open and struck a brakeman, it was negligent in failing to use due care to close and fasten the door when the train started on its trip. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

In railway engineer's action for injuries caused by slipping on running board, evidence held to make a question for the jury as to the company's negligence in permitting oil to be on the running board. *Gulf, C. & S. F. Ry. Co. v. Riordan* (Civ. App.) 166 S. W. 133.

In railway engineer's action for injuries caused by slipping on running board, evidence held to justify submission of issue as to a defect in the air pump permitting oil to escape. *Id.*

On evidence in an action for a switchman's death by falling from a car upon its sudden stop to avoid striking an iron pipe, on the issue whether the pipe was placed on the track by the employés of the impleaded defendant, held, that the trial court did not err in peremptorily instructing a verdict for such defendant. *Ft. Worth Belt Ry. Co. v. Jones*, 166 S. W. 1130, 106 Tex. 345.

In an action for an injury to a station agent caused by his falling from the platform into a ditch after the steps were removed to construct the ditch, the court properly submitted to the jury the negligence of defendant in removing the steps and in leaving the ditch uncovered. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

Evidence held to make a question for the jury as to whether the accident was due to a defect in the ladder, from which the employé fell. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 168 S. W. 439.

Whether handhold on railway car which gave way was sufficient and secure within art. 6713 held a question for the jury. *Galveston, H. & S. A. Ry. Co. v. Enderle* (Civ. App.) 170 S. W. 276.

Whether a master was negligent in selecting a place for a servant to work held a question for the jury. *Houston Lighting & Power Co., 1905, v. Conley* (Civ. App.) 171 S. W. 561.

Evidence of a defect in an elevator and an employer's failure to inspect held sufficient to take to the jury the question of the employer's negligence. *Canode v. Sewell* (Civ. App.) 172 S. W. 142.

In an action for injuries to a servant by the fall of a wall, defendant held entitled to have the issue of latent defects in the wall submitted to the jury. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

Where the facts are such that reasonable minds may differ whether a master exercised ordinary care to provide a safe place for work, it could not be said, as a matter of law, that there was no negligence. *Wells Fargo & Co. Express v. Wilson* (Civ. App.) 175 S. W. 495.

Where a minor employé was injured by having his hand caught in the rollers of a printing machine that had no foot brake nor fender, whether defendant had used reasonable care in furnishing such machine was for the jury. *Magnolia Paper Co. v. Duffy* (Civ. App.) 176 S. W. 89.

That a machine whereby an employé is injured is one customarily used in the same line of business does not as matter of law, exonerate the employer for liability for injuries. *Id.*

Evidence held sufficient to take to the jury the question of a railroad company's negligence in furnishing a defective hand car for plaintiff's use. *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Civ. App.) 180 S. W. 300.

Where a servant claimed that his injuries were caused by the master's negligent failure to fasten a ladder leading to a fuel oil tank, the question whether the master was

guilty of negligence in that respect held properly submitted to the jury. *Smith v. Webb* (Civ. App.) 181 S. W. 814.

It is the duty of the employer to furnish a reasonably safe implement for the work required, and whether it was the duty of a railroad company to furnish a tool car with a motor starting apparatus was a question for the jury in a servant's action for injuries in attempting to start the car by pushing it. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

Where a switchman was injured by jumping from a car derailed for the second time in a few minutes because of rigid trucks, it was a question for the jury whether the inspection of the car was properly made. *Galveston, H. & S. A. Ry. Co. v. Webb* (Civ. App.) 182 S. W. 424.

In a railroad employé's action for injuries when the sides of a narrow ditch on which he was working caved in, held, that there was no error in overruling defendant's motion for an instructed verdict. *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

In an action by a switchman injured between the running boards of two cars, evidence held to raise the issue of negligence with respect to defective drawheads or coupling appliances allowing the cars when switched to come too close together on striking. *Southern Pac. Co. v. Evans* (Civ. App.) 183 S. W. 117.

Under the common rule for establishing negligence, where there was evidence that the railroad car on which a switchman was injured by breaking of a handhold had been delivered to the employing company very recently, and that the defect could not have been discovered by a customary careful inspection, question of the road's negligence was for the jury. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

Evidence held sufficient to take to the jury the question of the employer's negligence in failing to furnish a safety belt to a derrick man. *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369.

In action for death of brakeman killed while between cars to make a coupling question of railroad's negligence held for jury. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

In an action by a servant, who was hurt when a board from a cotton conveyer turned, the question whether he was furnished a safe place of work held for the jury. *Winnboro Cotton Oil Mill Co. v. Azbell* (Civ. App.) 185 S. W. 1031.

Question, whether injury to car inspector from explosion of tank car ought to have been anticipated by defendant road as the probable result of allowing defective car to remain in its yard, held for the jury. *Magnolia Petroleum Co. v. Ray* (Civ. App.) 187 S. W. 1085.

It is for the jury whether a furnace was in safe condition in which to work, and whether it was the foreman's duty to inspect the furnace and determine whether it was safe. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

In a railroad lineman's action for injury while riding in an engine cab to inspect wires, his forehead being struck and skull crushed in as the engine passed the bridge, defendant's negligence held for the jury. *Detro v. Gulf, C. & S. F. R. Co.* (Civ. App.) 188 S. W. 517.

In action under federal Employers' Liability Act by railroad's employé, question whether there was negligence in furnishing hammer and nails which plaintiff's fellow servant was using, and which caused his injury, was of fact to be determined from facts found by jury. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

Where the evidence showed that if the employer had coupled coal cars together, they would not have collided with the car in which plaintiff worked, and injured him, the question of whether the employer was negligent in not doing so was for the jury. *Rule Cotton Oil Co. v. Russell* (Civ. App.) 191 S. W. 802.

The defective condition of the running boards on two cars between which brakeman was injured was not made a jury question by testimony that they came so close together as to indicate either defects in them or the car's body, where plaintiff's witness stated that in subsequent experiments the car shifted, thereby indicating its defective condition. *Southern Pac. Co. v. Evans* (Civ. App.) 192 S. W. 268.

In a servant's action for injuries caused by falling of lumber from a car which plaintiff was unloading, whether defendant was negligent in failing to have stays on side of car before it was unloaded held for the jury. *Santa Fé Tie & Lumber Preserving Co. v. Burns* (Civ. App.) 192 S. W. 348.

107. — Negligence in operation of railroads.—In a section hand's action for injuries, plaintiff's testimony that when he stepped on the cinders and sank down the men engaged with him in lifting a hand car "turned the hand car and pushed it on" him held to authorize submitting their negligence to the jury. *Texas & P. Ry. Co. v. Martinez* (Civ. App.) 162 S. W. 1167.

Where the rear end of a passenger train did not clear a switch, and so a very long freight which was on the switch could not pass the passenger train, and thus clear the main line, the failure of those in charge of the freight to protect the rear end by signals in accordance with the rules warranted a charge on their negligence. *Galveston, H. & S. A. Ry. Co. v. Boshier* (Civ. App.) 165 S. W. 93.

Under the evidence, held a question for the jury whether the trainmen could have foreseen that plaintiff would probably jump from the car. *International & G. N. R. Co. v. Walters* (Civ. App.) 165 S. W. 525, reversing judgment on rehearing 161 S. W. 916.

In an action for personal injuries received by a railroad construction employé, the question whether the engineer of the train which struck plaintiff did see him held, under the evidence, to be a question for the jury, notwithstanding the denial of the engineer that he saw the plaintiff. *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

Evidence held to make question for jury as to whether freight train employés were guilty of negligence proximately causing a passenger train fireman's injuries in failing to post and put out a flag at a sufficient distance to warn the passenger train. *Missouri, K. & T. Ry. Co. v. Wallace* (Civ. App.) 167 S. W. 168.

In an action for the death of an engineer caused by the failure of the switch tender to throw a switch, the court properly submitted the question whether the engineer had the right to rely upon a go-ahead signal received from the switch tender. *Trinity & B. V. Ry. Co. v. Dodd* (Civ. App.) 167 S. W. 238.

The affirmative evidence of a circumstantial nature, in an action for injury to an employé on a gravel train, from the instant stop of it, from sudden application of the air brake, through a breaking of the air hose, held sufficient for submission of the issue of negligence in improper operation of equipment of the train. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545.

Evidence held to make question for jury whether injured section hand got upon hand car to take it to point where the employés returned after work, and whether a coemployé started it for the same purpose. *St. Louis S. W. Ry. Co. of Texas v. Blevins* (Civ. App.) 173 S. W. 281.

The question of the cause of the derailment of the locomotive held, under the evidence, for the jury, in an action by the injured engineer. *Kansas City Southern Ry. Co. v. Coomber* (Civ. App.) 173 S. W. 544.

Evidence held to make question for jury as to negligence of engineer, or foreman of switching crew, as to violence with which cars were kicked upon a side track. *St. Louis Southwestern Ry. Co. of Texas v. Moore* (Civ. App.) 173 S. W. 904.

Evidence of the negligence of a station porter in throwing trunks about the platform, one of which fell on a switchman, held insufficient to carry the case to the jury. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 173 S. W. 1186.

In an action for injuries to a railroad brakeman, evidence held sufficient to take to the jury the negligence of the engineer in making an emergency stop when the signal for the ordinary stop was given. *Atchison, T. & S. F. Ry. Co. v. Hargrave* (Civ. App.) 177 S. W. 509.

Where an engine crew has information giving notice that a car inspector may leave the car on which he rides parallel with the engine's track and put himself in position to be struck by the engine, whether the crew should foresee he would do so was a question of fact for the jury. *International & G. N. R. Co. v. Walters* (Sup.) 179 S. W. 854.

In a car repairer's action for injuries by being struck by an engine, when he jumped from a car on a parallel track, held, on the evidence, that the question whether defendant's employés knew that plaintiff was ignorant of the approach of the engine was for the jury. *International & G. N. R. Co. v. Walters* (Civ. App.) 165 S. W. 525, reversing judgment on rehearing 161 S. W. 916.

In a car repairer's action for injuries by being struck by an engine, held, that the question whether the engineer saw plaintiff on the side of the car from which he jumped and ran in front of the engine, and whether defendant's employés on the engine exercised ordinary care to prevent the injury, and, if they did not, whether their exercise of such care could have averted the injury, was for the jury. *International & G. N. R. Co. v. Walters* (Civ. App.) 161 S. W. 916, judgment reversed on rehearing 165 S. W. 525.

In a servant's action for injuries in operating a tool car on an interstate railway, it is a question for the court whether the servant's injuries were received while employed in interstate or intrastate commerce, thereby determining whether state or federal statutes shall control. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

In an action by a switchman injured when a car was let down against the cars on which he was riding, the question of negligence in propelling the last car at an excessive speed, held not raised by the evidence and improperly submitted. *Southern Pac. Co. v. Evans* (Civ. App.) 183 S. W. 117.

It cannot be said that railroad, as matter of law, was not negligent, in crushing its brakeman between two cars attempted to be coupled, because conductor did not know where the brakeman was. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

Testimony that a car was kicked into the car on which plaintiff was standing, the force indicating it was moving 15 or 20 miles per hour, makes its speed a jury question. *Southern Pac. Co. v. Evans* (Civ. App.) 192 S. W. 268.

108. — **Promulgation and enforcement of rules.**—Where a brakeman was injured by the door of a dump car swinging out and knocking him from the car, the fact that there was no rule or custom requiring the fastening of the doors of such cars does not require the direction of a verdict for the defendant. *St. Louis Southwestern Ry. Co. of Texas v. Tune* (Civ. App.) 158 S. W. 238.

109. — **Orders, and warning and instructing employés.**—In an action for injuries to a conductor, evidence held to warrant the submission to the jury of the question whether the conductor was ordered by the train dispatcher to bring in certain "bad order" cars, either directly or under the instructions of the foreman of a wrecking crew. *St. Louis Southwestern Ry. Co. v. Wilkes* (Civ. App.) 159 S. W. 126.

Whether minor employé appreciates the dangers so as to relieve employer of liability for failure to instruct held a question of fact for the jury. *Reliable Steam Laundry v. Schuster* (Civ. App.) 159 S. W. 447.

In a servant's action for injuries to his foot from the wheels of a wagon driven by another servant, held, that the question whether the driver's use of the words, "get up here if you are going with me," was negligent, was for the jury. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

Evidence, in an action for death of an elevator operator, held to make it a jury question whether the person in charge of the operators was negligent in directing the work to be done in a negligent manner. *Modern Order of Prætorians v. Nelson* (Civ. App.) 162 S. W. 17.

Evidence, in a section hand's action for injuries from a hand car falling against him when his foot sank in a pile of cinders, held to authorize submitting to the jury whether the foreman was negligent in ordering the car to be moved. *Texas & P. Ry. Co. v. Martinez* (Civ. App.) 162 S. W. 1167.

In an action for injuries to an employé while assisting in carrying a tie, caused by the coemployés dropping it under orders of the foreman, evidence held that the question of the negligence of the foreman was for the jury. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 685.

As between a master and a minor servant, not instructed as to the dangers of his employment, it is a question for the jury whether he acquired sufficient knowledge of the danger to exempt the master from liability for his injury therefrom. *Cook v. Urban* (Civ. App.) 167 S. W. 251.

Whether there was an extraordinary risk, from nuts weakened by rust, of which an inexperienced servant, directed to tighten nuts on handholds on a box car, should have been warned, held a question for the jury. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 174 S. W. 617.

Evidence held sufficient to warrant submission to the jury of defendant's failure to warn of dangers, to furnish safe place and to properly direct the work. *Stockey & White v. Mears* (Civ. App.) 181 S. W. 774.

Where plaintiff, who was injured while on a ladder furnished by the master, claimed the master was negligent in failing to warn him, and the evidence on that issue was conflicting, the question whether the failure to warn was negligence was for the jury. *Smith v. Webb* (Civ. App.) 181 S. W. 814.

Evidence held to warrant submission to jury of question whether employer's foreman ordered servant to work in furnace while it was dangerous owing to extreme heat. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

Evidence held insufficient to warrant submission of issue whether foreman was negligent in failing to warn servant of the danger which caused his injuries. *Missouri, K. & T. Ry. Co. v. Masqueda* (Civ. App.) 189 S. W. 328.

110. — **Number and competency of fellow servants.**—Where, in an action for injuries to a section hand while attempting to remove a hand car from the track, the evidence showed that a car weighed about 300 pounds, and that one person could take a car off the track, and that three men were engaged in removing the car, the issue of the carrier's negligent failure to furnish a sufficient number of men to handle the car with safety was not raised. *Missouri, O. & G. Ry. Co. v. Boring* (Civ. App.) 166 S. W. 76.

Evidence held to make defendant's failure to furnish sufficient workmen a jury question. *Stockey & White v. Mears* (Civ. App.) 181 S. W. 774.

In a servant's action for injuries from a strain from carrying a heavy timber where it appeared that plaintiff had made a protest before carrying the timber but had no thought of sustaining an injury, evidence held to justify submission of question of defendant's negligence to the jury. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

111. — **Negligence of fellow servants.**—In an employé's suit for injuries against lumber company, question of negligence on part of defendant's other employé snaking logs with a four-mule team, held for jury. *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

In action for injuries to employé working at machine, whether operator of machine, plaintiff's fellow servant, was guilty of negligence was for the jury. *Armour & Co. v. Morgan* (Sup.) 194 S. W. 942.

114. **Injuries to persons on railroad tracks.**—In action for death of a person struck by a train while on the track, evidence held insufficient to justify submission of alleged negligent dangerous rate of speed of the train as a basis for recovery. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 168 S. W. 403.

Whether the speed of defendant's train was too great under the circumstances held for the jury. *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

In an action for personal injury to boy of nine, who, while on pathway crossing defendant's track, was injured by shunted car, held, on evidence, that whether pathway was one commonly used by public was for jury. *Texas & P. Ry. Co. v. Key* (Civ. App.) 175 S. W. 492.

In an action against a railroad for death of plaintiffs' minor son, while walking on the tracks, whether defendant negligently operated its engine at a high rate of speed held for the jury. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 179 S. W. 930.

In a widow's action against a railroad for death of her husband at a crossing, issues whether deceased was killed at the crossing, whether the train operatives in striking him were guilty of negligence which was the proximate cause of his death, and whether the train was being run without a headlight were for the jury. *Luten v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 798.

Evidence held to present a question for the jury as to whether a railroad company, operating its line on a street, was negligent in driving cars against standing cars with such force as to cause such standing cars to strike plaintiff, who was crossing the track. *Broughton v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 186 S. W. 354.

115. — **Defects in roadbed or tracks.**—Whether a railroad company was guilty of negligence proximately resulting in injuries to the driver of a horse, which ran away at a crossing which was torn up because of repairs, and whether the driver was guilty of contributory negligence or assumed the risk, held to be questions for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 166 S. W. 702.

Under Rev. St. 1911, art. 6485, requiring a railroad company to restore a crossing, it is a question for the jury whether a crossing was properly restored or kept in repair. *Horton v. Texas Midland R. R.* (Civ. App.) 171 S. W. 1023.

116. — **Frightening horses.**—In an action for injuries to plaintiff by frightening his horses while waiting to drive across the track, evidence held to justify submission of the question of the excessive speed of the train at the time of the accident as an independent act of negligence. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 160 S. W. 629.

117. — **Signboards and flagmen.**—The question of the railroad company's negligence in failing to keep a watchman at the crossing held for the jury. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445.

Whether defendant in the exercise of ordinary care was required to station a flagman at the crossing, especially when it was about to back trains over it in order to warn persons about to use the crossing, held for the jury. *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

The issue of negligence in not maintaining a flagman, on the theory of the crossing being unusually dangerous, held for the jury. *Southern Pac. Co. v. Walker* (Civ. App.) 171 S. W. 264.

118. — **Signals and lookouts from trains.**—In an action for damages at a crossing, evidence of negligence in failing to keep a lookout held insufficient to go to the jury. *Ft. Worth & D. C. Ry. Co. v. Harrison* (Civ. App.) 163 S. W. 332.

In an action for the death of a person killed on the track, evidence held insufficient to justify the submission of the train employes' failure to keep a proper lookout as a ground of recovery. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 168 S. W. 403.

Whether a warning was given by ringing of a bell and blowing a whistle in a way reasonably calculated to apprise a man of ordinary prudence of the approach of the train held for the jury. *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

In an action for death at a crossing, evidence held to make question for the jury as to whether the statutory signals were given. *Texas & P. Ry. Co. v. Moody* (Civ. App.) 169 S. W. 1057.

In a widow's action against a railroad for death of her husband at a crossing, whether the trainmen failed to keep a proper lookout, ring the bell or blow the whistle, or otherwise give warning was for the jury. *Luten v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 798.

Evidence held to present a jury question whether one injured by railway cars received due warning of their approach. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

Evidence held to warrant submission to jury of issue of negligence of railway employes in running at high speed without warning, proximately causing death of deceased. *Texas & P. Ry. Co. v. Miles* (Civ. App.) 192 S. W. 1138.

119. **Injuries to animals on or near railroad tracks.**—Where plaintiff's horse was killed on a track where there was no stock law in force, and where animals were in the habit of grazing at will on defendant's right of way, evidence of the operation of the train at a high rate of speed without signals held sufficient to carry the question of defendant's negligence to the jury. *Houston & T. C. R. Co. v. Garrett* (Civ. App.) 160 S. W. 111.

In an action against a railroad for injuries to stock driven on its right of way and run into by a freight train, where there was no evidence upon the issue of discovered peril, a verdict for the railroad held properly directed. *Irving v. Texas & P. Ry. Co.*, 164 S. W. 910 (Civ. App.) affirming judgment on rehearing 157 S. W. 752.

In an action for the value of a mule killed by one of defendant's trains, where there was evidence of defendant's negligence in the particulars charged, the question of negligence was properly submitted to the jury. *Missouri, K. & T. Ry. Co. of Texas v. Withers* (Civ. App.) 167 S. W. 5

Under conflicting evidence, in an action for the value of a mule killed by defendant's train, held, that the question whether defendant was guilty of negligence proximately causing the injury was for the jury. *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 171 S. W. 245.

In an action for killing horses on a right of way, evidence held sufficient to take defendant's negligence to the jury. *Kansas City Southern Ry. Co. v. Johnson* (Civ. App.) 180 S. W. 944.

In an action for injuries to plaintiff's horses, which were frightened and attempted to cross a railroad cattle guard, the question whether the railroad company's guard was sufficient held, in view of Rev. St. 1911, arts. 6596-6600, properly submitted to the jury. *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

Whether defendant railway company used all available means to avoid a collision between its train and plaintiff's horse and wagon, which were awaiting freight at a station, after discovering the danger of such a collision, held, on the facts, to be a question for the jury. *San Antonio & A. P. Ry. Co. v. Schwethelm* (Civ. App.) 186 S. W. 414.

120. **Injuries by fire set out in operation of railroad.**—Evidence held to make question for jury whether fire which destroyed plaintiff's pecan trees was set out by defendant's locomotive, and hence verdict for defendant was improperly directed. *Schattenberg v. Houston E. & W. T. Ry. Co.* (Civ. App.) 168 S. W. 8.

In an action for the firing of plaintiff's barn, evidence held sufficient to go to the jury where the petition alleged that all of defendant's engines were defective, and conflicting evidence on that point was introduced. *Texas Midland R. R. v. Ray* (Civ. App.) 168 S. W. 1013.

In a suit against a railroad company for the firing of adjacent property, evidence held insufficient to go to the jury on any theory; the cause of the fire being wholly conjectural. *Talley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 176 S. W. 65.

In an action against a railway company for the destruction of plaintiff's house by fire from the spark of a locomotive, evidence held to justify direction of verdict for defendant. *Moose v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 179 S. W. 75, writ of error granted (Sup.) 180 S. W. 225.

121. **Injuries to property from operation of railroad.**—In action against a railroad for damages caused by flooding of plaintiff's basement by surface water, diverted from natural course by defendant's elevated roadbed, evidence held sufficient to take to jury question of defendant's failure to provide proper culverts or sluices as required by Rev. St. 1911, art. 6495. *Pence v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 190 S. W. 538.

122. **Injuries to persons at stations.**—In an action by one who fell down an elevator shaft in a station, evidence of the company's negligence in maintaining in a dangerous condition what was an apparent exit held sufficient to go to the jury. *Houston Belt & Terminal Ry. Co. v. Winerich* (Civ. App.) 162 S. W. 903.

124. **Injuries to children on trains.**—In action for injuries to plaintiff, a small child, when he was scalded by defendant railroad's employe, turning on injector of his engine without examining the valve of the squirt hose, issue of negligence held for jury. *Gulf, T. & W. Ry. Co. v. Dickey* (Sup.) 187 S. W. 189.

126. **Injuries in operation of street railroads.**—In an action for an injury to a pedestrian stepping into a hole in a bridge, which had been torn up by defendant street railway company, held a question for the jury whether defendant's failure to restore the bridge to its original condition was negligence. *Cleburne St. Ry. Co. v. Dickey* (Civ. App.) 168 S. W. 475.

127. **Injuries from live electric wires.**—Where plaintiff's husband was electrocuted by a broken electric transmission line, a witness' testimony held to make defendant's

negligence in not having automatic circuit breakers attached to the line a jury question. *Ablene Gas & Electric Co. v. Thomas* (Civ. App.) 194 S. W. 1016.

130. **Notice.**—Ordinarily knowledge of an existing state of facts is a jury question. *Kimmell v. Edwards* (Civ. App.) 193 S. W. 363.

132. **Partnership and rights and liabilities incident thereto.**—Where the pleading and the evidence raised the issue of a consummated partnership, and there was slight evidence to establish such issue, it was for the jury. *Look v. Bailey* (Civ. App.) 164 S. W. 407.

Whether the person to whom delivery by a carrier was made was a partner of the consignee held for the jury under the evidence. *Texas & P. Ry. Co. v. Missouri Iron & Metal Co.* (Civ. App.) 178 S. W. 597.

135. **Proximate cause.**—In an action against a carrier for damages for delay in a shipment of live stock, evidence held to raise the issue whether the carrier's negligence proximately caused the holding of the cattle on board the cars beyond the required time. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

Ordinarily, the question whether an injury should have been foreseen and was the proximate result of the negligence complained of is for the jury. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

The question of remote or proximate cause of loss is one of law to be decided by the court. *Eagle Pass Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 402.

The question whether the consequences should have been anticipated is for the jury only when the evidence is such that they might find for the wrongdoer. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

Evidence that an overflow was caused by obstructions placed in a stream by defendant, held for the jury. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

In an action against a carrier of live stock for injuries to a jack, question whether foundering was caused by defendant, held for the jury. *Gulf, C. & S. F. Ry. Co. v. Green* (Civ. App.) 176 S. W. 63.

The proximate cause of an injury is ordinarily a jury question. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

In action against railroad for damages to land from flood caused by negligent construction or maintenance of its embankment and culverts, the question whether the damages were caused by such embankment and culverts or would have occurred from natural conditions is for the jury. *Scott v. Northern Texas Traction Co.* (Civ. App.) 190 S. W. 209.

In pedestrian's action for injuries by cars, plaintiff having died before trial, refusal of requested instruction on proximate cause of death, as being the injuries or a subsequent fall, held error. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

136. — **Injuries to passengers.**—In a passenger's action for the loss of an eye due to a particle of metal being blown through an opening of an open toilet and embedding itself in his eye, held, that the question whether the accident was one that ought to have been anticipated by defendant was for the jury. *Trinity & B. V. Ry. Co. v. McDonald* (Civ. App.) 160 S. W. 984.

Whether the act of defendant's porter in directing a passenger to alight and shoving him toward the door of a moving train and defendant's failure to stop the train was the proximate cause of the passenger's death, he having been killed by being run over when alighting, held for the jury. *Ft. Worth & R. G. Ry. Co. v. Keith* (Civ. App.) 163 S. W. 142.

In action for injuries in derailment, evidence held not to show, as a matter of law, that the breakage in the first rail struck by the train was the proximate cause of the derailment. *International & G. N. Ry. Co. v. Berthea* (Civ. App.) 179 S. W. 1087.

In suit against a railroad for death of a shipper, riding with his goods, the question of the proximate cause or causes of the death held for the jury under the evidence. *Missouri, K. & T. Ry. Co. of Texas v. Norris* (Civ. App.) 184 S. W. 261.

Evidence that a passenger's ailment was caused by being rained on through an open or broken car window held sufficient to go to the jury. *Texas Midland R. Co. v. Sikes* (Civ. App.) 185 S. W. 412.

In an action for injuries to a child boarding street car and being assisted by conductor, question whether conductor's negligent assistance was proximate cause of injury was for jury. *Southern Traction Co. v. Reagor* (Civ. App.) 186 S. W. 272.

137. — **Injuries to persons at railroad crossings.**—That plaintiff's mule on which he was riding was frightened and ran away, resulting in plaintiff's injury by striking his head on projecting bolts of a bridge negligently maintained over an underground passageway by defendant, did not relieve defendant of liability for its negligence; the proximate cause of the injury being for the determination of the jury. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

139. — **Delay in transmitting telegram or in affording telephone communication.**—That addressee of telegram informing him of his mother's death had received another shortly before advising him that she was paralyzed and speechless, but had not gone to see her, held merely to make a question for the jury whether he would have attended the funeral, and whether he suffered mental anguish from the delay in delivery of the second telegram. *Johnston v. Western Union Telegraph Co.* (Civ. App.) 167 S. W. 272.

Evidence held to make question for jury as to whether plaintiff would have reached child's bedside before it died, if telegram had been promptly delivered. *Western Union Telegraph Co. v. Forest* (Civ. App.) 177 S. W. 204.

140. — **Wrongful death.**—In action by pedestrian for injuries when struck by railway cars, evidence held to make jury question whether his injuries resulted in death or whether his death pending suit was from other causes, so as to permit revival under Art. 5686. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.



141. — **Injuries to employés.**—In an action for injuries to the conductor of a freight train in a collision between the separate sections of the train, which had pulled apart, evidence held to warrant the submission of the question whether a failure to comply with the safety appliance act, requiring 75 per cent. of the cars to be equipped with air brakes, was the proximate cause of the injury. *St. Louis Southwestern Ry. Co. v. Wilkes* (Civ. App.) 159 S. W. 126.

In an action for death of an employé caused by injuries sustained while fighting fire, whether defendant's negligence was the proximate cause of the injury held, under the evidence, for the jury. *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 159 S. W. 132.

In a personal injury action by a railroad brakeman, the question whether the employer's negligence was the proximate cause of the injury held under the evidence for the jury. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1033.

Evidence held insufficient to make jury question as to whether negligence in permitting engine to stand in railroad yards, with brilliant headlight burning, contributed in any way to railroad switchman's injuries from a collision of a car on which he was riding with another. *Paris & G. N. R. Co. v. Flanders* (Civ. App.) 165 S. W. 98.

Evidence held to warrant submission to jury of question whether impaired condition of servant's health resulted from extreme heat of furnace in which he worked. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

Whether another railroad employé pulled the stake that released timbers that fell, and whether the timbers fell as a result of the act, held for the jury. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

In laundry worker's action for injuries, held proper to refuse to submit issue whether her negligence was proximate cause of injury. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

142. **Public lands.**—In trespass to try title to school lands, evidence held to make a question for the jury as to whether defendant, at the time of his application to purchase the land, had settled thereon in good faith, desiring it as a home. *Patrick v. Barnes* (Civ. App.) 163 S. W. 408.

Mere absence by a purchaser of public free school lands for eight or nine months does not as a matter of law necessarily constitute an abandonment of the property as the purchaser's permanent place of abode. *Anthony v. Ball* (Sup.) 183 S. W. 1142.

143. **Ratification.**—Evidence held to make a question for the jury as to whether defendant ratified a contract after her husband's death. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

144. **Reasonableness of ordinance.**—Whether an ordinance, or a regulation of a quasi municipal corporation as a school board, is reasonable, is a question of law for the court, although it may depend largely upon surrounding circumstances. *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840.

When facts alleged to make ordinance unreasonable and void are controverted, they must be determined by jury; but whether they show ordinance to be unreasonable or not is for court. *Munger Oil & Cotton Co. v. City of Groesbeck* (Civ. App.) 194 S. W. 1121.

145. **Reasonable time.**—Whether a vendor delivered a deed within a reasonable time the contract fixing no time is a question for the jury. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 184 S. W. 523.

What is a reasonable time within which to express dissatisfaction with a chattel sold on trial is ordinarily a question of fact under the circumstances surrounding the parties. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

General rule is that it is a mixed question of law and fact as to what constitutes a reasonable time for the performance of a contract when no time is fixed by its terms. *Potter County v. Boesen* (Civ. App.) 191 S. W. 787.

Unless facts are undisputed, question of what is reasonable time for performance of contract is for jury, being a mixed question of law and fact. *J. W. Crowds Drug Co. v. Nichols* (Civ. App.) 194 S. W. 484.

148½. **Residence.**—In an election contest, the question whether a voter had resided in the county for a sufficient length of time to vote, held a question of fact. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

153. **Title and possession.**—In an action for wrongful attachment, evidence of attachment debtor's statements that he did not own the attached property held not to justify the submission of the ownership in view of his explanation thereof, showing that the statements were made under a misapprehension of his legal rights, and the other evidence showing ownership by him. *Carroll v. First State Bank of Denison* (Civ. App.) 160 S. W. 632.

Evidence in trespass to try title held not sufficient to raise the question of a presumed deed in defendant's claim of title to such degree of certainty as to require its submission to the jury. *Lafferty v. Wilson* (Civ. App.) 162 S. W. 379.

Evidence in an action on a vendor's lien note or, in the alternative, for recovery of the land held to warrant a directed verdict for defendants, where the note and land were not owned by plaintiffs, but had been allotted to another joint owner with plaintiffs in a parol partition. *Scott v. Watson* (Civ. App.) 167 S. W. 268.

The question as to whether the claimant had possession, or as to who had possession, held for jury. *First Nat. Bank of Ft. Wayne, Ind., v. Howard* (Civ. App.) 174 S. W. 719.

In a suit against a railroad for killing and injuring mules, evidence held to make the plaintiff's ownership when they were killed or injured a question for the jury. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 182 S. W. 357.

In trespass to try title, where there was evidence supporting plaintiff's claim that the renting to defendant was by the month, and defendant's that it was by the year, and that she paid rent after its expiration, the court properly declined to direct verdict for plaintiff, though defendant's plea in reconvention relied on a rental contract for a year which had expired before suit. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

Evidence held sufficient to carry to the jury the issue whether land claimed by the

wife to be exempt from husband's creditors was her separate property. *Amend v. Jahns* (Civ. App.) 184 S. W. 729.

In trespass to try title to land sold in tax proceeding against unknown owners, whether the county attorney had exercised such diligence as would have ascertained the ownership before the proceeding, held a question for jury. *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

In suit to establish ownership of certificate in corporation and for new certificate in lieu of an alleged lost trustee's certificate, evidence held to make plaintiff's ownership of the certificate a question for the jury and to support a verdict for defendants. *Converse v. Galveston City Co.* (Civ. App.) 189 S. W. 539.

In suit for commissions for selling corporate stock, where evidence showed that stock issued in lieu of stock owned by president was traded by him for a lot, it was error to refuse to submit issue of whether stock belonged to president or company. *Mooringsport Oil Co. v. Aldridge* (Civ. App.) 193 S. W. 400.

In action to recover a bank deposit, ownership of fund held a jury question. *Cozart v. Western Nat. Bank of Ft. Worth* (Civ. App.) 194 S. W. 644.

Evidence that money deposited with defendant bank was credited to order of proposed bank and that defendant's cashier so stated makes jury question whether money was deposited for proposed bank or for depositor's individual benefit. *Id.*

Where a third person claimed liquors levied on, the question of ownership being made one of fact by *Vernon's Sayles' Ann. Civ. St. 1914, art. 7785*, was for the jury. *Steed v. Wren & Berry* (Civ. App.) 194 S. W. 963.

156. **Trespass.**—In an action to recover damages caused by cattle which the owner had turned into plaintiff's field, evidence as to the inclosure of the field held to justify a refusal of defendant's request for a directed verdict, because the field was part of a common inclosure in which the defendant had a right to pasture cattle. *Tandy v. Astle* (Civ. App.) 159 S. W. 468.

157. **Trusts.**—Whether plaintiff contracted with O. to purchase certain school lands, agreeing to furnish half of the price, so that O. should take title to one-half the land as trustee, held for the jury. *Ellerd v. Ellison* (Civ. App.) 165 S. W. 876.

159. **Usury.**—Whether a contract apparently innocent upon its face is usurious is a question for the jury. *Cotton v. Cooper* (Civ. App.) 160 S. W. 597.

160. **Waiver.**—Issue of waiver held a jury question. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 668.

When waiver is pleaded and supported by evidence, such issue should always be submitted to the jury. *Frigid Fluid Co. v. Sid Westheimer Co.* (Civ. App.) 189 S. W. 334.

162. **Wrongful death.**—In action for death of servant, ordinarily the question of negligence is for the jury. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

163. **Wrongful levy.**—Issue as to excessive levy held properly submitted to the jury under the petition and evidence. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

Evidence held sufficient to warrant submission of the issue of malice in suing out a writ of sequestration. *Half Co. v. Waugh* (Civ. App.) 183 S. W. 839.

### (C) Instructions Invading Province of Jury

166. **Credibility of witnesses.**—Instruction that testimony of railroad company's employes could not be arbitrarily disregarded held properly refused; their credibility being for the jury. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

169. **Assumptions by judge as to facts.**—An instruction held not objectionable as assuming facts in dispute. *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426.

It is reversible error for the trial judge in his charge to assume the existence of any material disputed fact. *International & G. N. Ry. Co. v. Kruger* (Civ. App.) 163 S. W. 677.

Requested instructions assuming facts not in evidence are properly refused. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

An instruction assuming a fact which was not conclusively shown by the evidence was properly refused. *Anderson v. Jackson* (Civ. App.) 168 S. W. 54.

A charge directing the jury to return an answer to a special issue submitted is not erroneous as assuming facts in issue. *Richardson v. Wilson* (Civ. App.) 178 S. W. 566.

Material facts controverted by the evidence should not be assumed in the charge. *Snaman v. Lane* (Civ. App.) 184 S. W. 366.

A charge which assumed the existence of facts on which the evidence was conflicting was properly refused. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

A requested instruction, assuming a fact as to which the evidence raised an issue, is properly denied. *Fidelity & Deposit Co. of Maryland v. Anderson* (Civ. App.) 189 S. W. 346.

171. — **Contracts and actions relating thereto.**—A requested charge was properly refused, in an action against a railroad company for injury to live stock en route, which assumed that the written contract of shipment should be considered in determining the measure of liability, though there was evidence tending to show its invalidity. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943.

In an action for fraud in the sale of land, an instruction that, if defendant unreasonably delayed boring a well that would produce sufficient water for irrigation for the purpose for which plaintiff, within defendant's knowledge, purchased the land, etc., held erroneous as assuming that defendant had agreed to bore a well which would produce sufficient water for irrigation, which was a contested issue. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28.

In an action against the initial carrier for negligent handling and delay in transportation, a charge that the contract was for through shipment assumed a controverted fact. *San Antonio & A. P. Ry. Co. v. Grady* (Civ. App.) 171 S. W. 1019.

In an action for mental anguish for failure to deliver a telegram informing plaintiff of her father's death, an instruction held not bad as assuming facts. *Western Union Telegraph Co. v. Gest* (Civ. App.) 172 S. W. 133.

In action on note, instruction held not objectionable, as assuming that court thought that part of defendants were sureties. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

In action on fire policy, court did not err in refusing a peremptory instruction for defendant assuming, as a matter of law, that the evidence was not sufficient to raise the issues of waiver and estoppel. *Mechanics' & Traders' Ins. Co. v. Dalton* (Civ. App.) 189 S. W. 771.

In action on note for insurance premium, a requested instruction, assuming that a contract regarding the note was not abrogated by the company's refusal to issue the policy, was properly refused. *Texas Life Ins. Co. v. Huntsman* (Civ. App.) 193 S. W. 455.

**172. — Actions relating to property.**—In trespass to try title, a charge, assuming that plaintiffs were in actual possession of the land when it was entered by trespassers, but concluding with the admonition, "if you find from the evidence that she, or they, were in possession of the same," held not objectionable as assuming such possession. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

In a suit to remove a cloud, where the evidence raised the issue whether the land was a public alley, a charge assuming that it was not is properly refused. *Perrow v. San Antonio & A. P. Ry. Co.* (Civ. App.) 178 S. W. 973, rehearing denied 181 S. W. 496.

**173. — Actions for torts in general.**—In action for injuries to property in crossing accident, an instruction held properly refused, even if otherwise proper, because it made driver's failure to heed warning negligence per se, whether or not an ordinarily prudent person would have observed the warning. *Texas Midland R. R. v. Nelson* (Civ. App.) 161 S. W. 1088.

**174. — Negligence in general.**—A requested charge which assumed, as a matter of law, negligence from a contested fact was properly refused. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

In an action for delay in delivering a telegram, an instruction on defendant's liability for misrepresentations of the sending agent in informing plaintiff that the message had been delivered held not objectionable in assuming defendant's negligence under certain circumstances, etc. *Western Union Telegraph Co. v. Erwin* (Civ. App.) 164 S. W. 908.

An instruction in an action against a railroad company negligently failing to construct culverts in an embankment held not objectionable as assuming a fact. *Missouri, K. & T. Ry. Co. of Texas v. Evans* (Civ. App.) 183 S. W. 93.

An instruction specifying different features of negligence for which, if established, defendant might be liable, held not error as assuming negligence by defendant. *Rio Grande, E. P. & S. F. Ry. Co. v. Starnes* (Civ. App.) 185 S. W. 366.

An instruction that plaintiff was guilty of contributory negligence in the use of an underground passageway if he knew such use to be dangerous held properly refused as invading the province of the jury. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

Requested charge that jury should not consider damages to cattle by reason of the cows and calves being loaded in the same car was properly refused; as it assumed that it would be negligence to load them together, and excluded question of ordinary care in so loading them. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

Instructions should not assume that certain facts constitute contributory negligence, but leave such issue to the jury. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 194 S. W. 1016.

**175. — Personal injuries in general.**—In action to recover for death by electrocution an instruction that defendant's failure to turn off the current under certain circumstances constituted negligence is erroneous. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 194 S. W. 1016.

**176. — Personal injuries in operation of railroads in general.**—An instruction held not on the weight of evidence as assuming an engine struck cars with terrific force, but to submit that as an issue of fact. *Missouri, K. & T. Ry. Co. of Texas v. Perryman* (Civ. App.) 160 S. W. 406.

In an action for injury to a railway mail clerk from a falling letter box, continued after his death by his surviving children, instruction as to defendant's negligence and liability held objectionable as upon the weight of the evidence in assuming that defendant furnished a defective car and failed to inspect the car. *Houston & T. C. R. Co. v. Walker* (Civ. App.) 167 S. W. 199, judgment reversed (Sup.) 173 S. W. 208, motion to re-tax costs granted (Sup.) 177 S. W. 954.

In a pedestrian's action for injuries when struck by railway cars, instruction, assuming that, as a matter of law, if he attempted to cross the tracks without looking or listening and after warning he was negligent, was properly refused, when he testified that he did look. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

**177. — Injuries to passengers.**—In an action against a carrier for personal injuries, charge that "if you find from the evidence that after plaintiff's wife was so injured (if she was)" held not objectionable as assuming her injuries and hence a charge on the weight of the evidence. *Missouri, K. & T. Ry. Co. of Texas v. McCormick* (Civ. App.) 160 S. W. 429.

In an action for injuries to plaintiff's wife while boarding a train, a charge held not erroneous as assuming that the train started with a jerk which caused plaintiff's wife to lose her balance. *International & G. N. Ry. Co. v. Kruger* (Civ. App.) 163 S. W. 677.

In an action for injuries caused by the failure of a railroad company to keep its station warmed and lighted for one hour after the departure of a passenger train, as required by art. 6591, a charge held not erroneous as assuming that the plaintiff was a passenger. *Missouri, K. & T. Ry. Co. of Texas v. Cook* (Civ. App.) 166 S. W. 453.

In action for injuries to woman alighting from street car, instructions held not erroneous as assuming the conductor's failure to exercise due care. *Galveston Electric Co. v. Hanson* (Civ. App.) 187 S. W. 533.

In action for injuries to plaintiff's wife, an instruction that defendant was bound to use the highest degree of care for her safety held erroneous as not predicating such care upon determination whether she was a passenger and assuming such to be a fact in violation of this article. *Northern Texas Traction Co. v. Nicholson* (Civ. App.) 188 S. W. 1028.

An instruction, assuming defendant railway company's negligence, is proper where plaintiff passenger was injured in a derailment unexplained by defendant. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 191 S. W. 374.

**178. — Injuries to servants.**—In an action for injuries to a servant, an instruction which assumed that he knew of the danger in operating the machine, was misleading, where he knew of one danger but not of the particular danger which caused the injury. *Wichita Falls Motor Co. v. Bridge* (Civ. App.) 158 S. W. 1161.

In an action by a servant who was burned by steam when the hose conducting the steam to a drill blew off owing to the excessive pressure and the failure of the safety valve to work, the court could assume in its charge that the master was guilty of negligence. *Missouri, K. & T. Ry. Co. v. Burton* (Civ. App.) 162 S. W. 479.

Instruction that, if foreman directing work unduly hastened employés, or if plaintiff employé was injured as alleged, plaintiff would be entitled to recover, held erroneous, as whether such acts were negligence, and whether such negligence was the proximate cause of the injury, should have been submitted to the jury. *Houston Belt & Terminal Ry. Co. v. Montello* (Civ. App.) 165 S. W. 540.

In an action for injuries to a railroad construction employé, an instruction on the doctrine of last clear chance held not erroneous, as assuming that the engineer and fireman of the work train discovered plaintiff's peril in time to have avoided the injury. *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918.

There being evidence making issues for the jury, on which depended the question of a minor servant in a dangerous service having assumed the risks, unequivocally charging that he assumed all the hazards ordinarily incident to his employment was affirmative error. *Cook v. Urban* (Civ. App.) 167 S. W. 251.

In servant's action for injury from explosion in defendant's cement plant, instruction on assumption of risk held not objectionable as assuming the accumulation of coal dust as alleged in the petition. *Southwestern Portland Cement Co. v. Moreno* (Civ. App.) 181 S. W. 221.

Refusal of special charge on contributory negligence, which issue was submitted, held not error, where it assumed that brakeman placed himself in a more hazardous position than was necessary. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

**179. — Damages and amount of recovery.**—In contractor's action for damages from refusal to permit him to perform, instruction on measure of damages as to considering irregularity of the job, distance from the contractor's home, and other expenses, held properly refused as assuming that such matters were parts of the expense of performance. *Waterman Lumber & Supply Co. v. Holmes* (Civ. App.) 161 S. W. 70.

In suit for damages to a shipment of cattle, instruction on measure of damages held objectionable, as assuming a difference between the value when they arrived and their value had they arrived earlier, and as assuming that the cattle were damaged and failed to arrive in a reasonable time. *San Antonio & A. P. Ry. Co. v. Shankle & Lane* (Civ. App.) 183 S. W. 115.

**180. — Uncontroverted facts or evidence.**—The court in its instructions may assume a fact established by uncontradicted evidence. *Watson v. Rice* (Civ. App.) 166 S. W. 106; *Missouri, K. & T. Ry. Co. of Texas v. Burnett* (Civ. App.) 162 S. W. 458; *Hamilton v. Fireman's Fund Ins. Co.* (Civ. App.) 177 S. W. 173; *Richardson v. Wilson* (Civ. App.) 178 S. W. 566; *Thornburg v. Moon* (Civ. App.) 180 S. W. 959; *White v. Peters* (Civ. App.) 185 S. W. 659; *Townsend v. Pilgrim* (Civ. App.) 187 S. W. 1021.

In an action for injuries to a passenger by being thrown down in the aisle of a passenger coach and injured by an extraordinary and unusual bump as the engine was coupled to the coach, the severity of the movement not having been explained, the court properly assumed that the carrier was negligent. *Quanah, A. & P. Ry. Co. v. Johnson* (Civ. App.) 159 S. W. 406.

Where there was no dispute that the injuries to plaintiff continued up to the time of the trial, it would not be error in the charge to assume that his suffering continued to that time. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

Instruction which assumed a breach of a contract of sale held not erroneous where the undisputed fact showed such breach. *Standard Milling Co. v. Imperial Rice Co.* (Civ. App.) 160 S. W. 637.

In an action against a passenger carrier for damages caused by failure to furnish proper facilities for taking a train, it was not error for the court in its charge to assume that the train was one upon which the plaintiff had a right to ride; the carrier having made no attempt to sustain the burden on it of negating that fact. *Trinity & B. V. Ry. Co. v. Voss* (Civ. App.) 160 S. W. 663.

In an action on an insurance policy, where the actual issuance of a policy was not controverted, the court properly assumed it as a fact. *International Order of Twelve Knights & Daughters of Tabor v. Denman* (Civ. App.) 160 S. W. 980.

In an action for an amount due on a contract, where it was liquidated, it is not improper for the charge to assume that any recovery should be for the sum agreed upon. *Spires v. McElroy* (Civ. App.) 166 S. W. 457.

In proceedings to condemn land for a right of way of a ditch, an instruction assuming a fact held not erroneous under the evidence. *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

A party who admits in his pleading a fact is bound thereby, and the court may assume that fact in its instructions. *Richard Cocke & Co. v. New Era Gravel & Development Co.* (Civ. App.) 168 S. W. 988.

Where the execution of a deed by complainants to defendant was not a controverted issue, the court could charge the jury that they did so execute it. *Irvin v. Johnson* (Civ. App.) 170 S. W. 1059.

Where the evidence is conclusive that plaintiff was an invitee when injured, an instruction requiring the railroad company to exercise ordinary care to keep its premises

safe for him was not erroneous for assuming that he was an invitee. *Missouri, K. & T. Ry. Co. of Texas v. Kinslow* (Civ. App.) 172 S. W. 1124.

The court in his charge may assume, as established, facts alleged in the petition and not denied, and which are supported by uncontradicted evidence. *Melado Land Co. v. Field* (Civ. App.) 172 S. W. 1136.

In an action for injury to live stock in dipping, an instruction assuming that some dipping had taken place was not erroneous, where that fact was uncontested. *Missouri, K. & T. Ry. Co. of Texas v. Cauble* (Civ. App.) 174 S. W. 880.

Since the state treasurer's receipt for the money paid by a purchaser of school land, dated July 13th, did not controvert positive evidence afforded by an entry on the treasurer's account that the payment was made on June 28th, it was not error for the court to assume in an instruction that payment was made on June 28th. *Houston Oil Co. of Texas v. McGrew* (Sup.) 176 S. W. 45, affirming judgment (Civ. App.) 143 S. W. 191.

An instruction on acquisition of title by adverse possession held not objectionable, in view of the undisputed evidence, as invading the province of the jury. *Id.*

**181. Opinion or belief of judge as to facts.**—In an action for negligence in transporting a shipment of cattle, an instruction which might have conveyed the impression that the court did not believe the evidence justified a finding that defendants were negligent was properly refused. *Kansas City, M. & O. Ry. Co. of Texas v. Treadwell & Wilkison* (Civ. App.) 164 S. W. 1089.

Instruction, in action to quiet title, held not improper for indicating what the findings of the jury should be. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

In an action by real estate broker who claimed to have been the procuring cause of a sale, a charge informing the jury what fact in the opinion of the court would constitute the procuring cause is improper; that being a question for the jury. *Andrew v. Mace* (Civ. App.) 194 S. W. 598.

**182. Weight and sufficiency of evidence.**—Requested instructions on the weight of the evidence are properly refused. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807; *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063; *Burkhiser v. Lyons* (Civ. App.) 167 S. W. 244; *Magnolia Paper Co. v. Duffy* (Civ. App.) 176 S. W. 89; *W. P. Carmichael Co. v. Miller* (Civ. App.) 178 S. W. 976; *Turner v. McKinney* (Civ. App.) 182 S. W. 431; *Galveston, H. & S. A. Ry. Co. v. Moses* (Civ. App.) 184 S. W. 327; *Beaumont, S. L. & W. Ry. Co. v. Manning* (Civ. App.) 186 S. W. 387.

A requested charge, which is on the weight of the evidence, and which, so far as proper, is covered by the general charge, is properly refused. *Miller v. Campbell* (Civ. App.) 171 S. W. 251.

A charge held not on weight of evidence. *First Nat. Bank of Ft. Wayne, Ind., v. Howard* (Civ. App.) 174 S. W. 719.

Charges should not be on the weight of the evidence. *Thornburg v. Moon* (Civ. App.) 180 S. W. 959.

**183. — Nature of instruction in general.**—An instruction consisting of abstract statements of the principles of law governing the case, and not affirmatively presenting to the jury the issues involved, is not on the weight of the evidence. *Atchison, T. & S. F. Ry. Co. v. Bryan* (Civ. App.) 162 S. W. 400.

An instruction as to the inconclusiveness of recited consideration in deed should be omitted or so phrased as not to be on the weight of the evidence. *Crass v. Adams* (Civ. App.) 175 S. W. 510.

**185. — Conflicting evidence.**—An instruction that a person who stated to vendor in purchaser's presence that he made no claim to land was estopped thereby held properly refused as on the weight of evidence, where the evidence was conflicting as to what was said in such conversation. *Blount v. Henry* (Civ. App.) 160 S. W. 418.

**186. — Uncontroverted evidence.**—A charge that the undisputed evidence showed that defendant was indebted to plaintiff after all the undisputed items were deducted in a certain sum held to invade the province of the jury, where such evidence was not undisputed. *Look v. Bailey* (Civ. App.) 164 S. W. 407.

In lumber company's servant's action for injuries, charge was not on weight of evidence which told jury that there was a customary and proper passageway for hauling of logs other than way which defendant's mule driver took, a point undisputed in evidence. *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

**188. — Nature of action or issue in general.**—In an action for a broker's commission, a requested instruction that letters, introduced by the plaintiff as declarations on the part of the defendant of plaintiff's exclusive agency, failed to show such agency, was a charge upon the weight of the evidence. *McFarland v. Lynch* (Civ. App.) 159 S. W. 303.

**189. — Actions relating to property.**—In an administrator's action to recover certain property, an instruction that the jury should consider a house and lot in G. as the community property of the deceased wife of plaintiff's intestate and her former husband held erroneous, as on the weight of the evidence. *Douthitt v. Farrar* (Civ. App.) 159 S. W. 182.

An instruction in trespass to try title held objectionable as on the weight of the evidence. *Davis v. Houston Oil Co. of Texas* (Civ. App.) 162 S. W. 913.

An instruction, in an action for land claimed by defendant by adverse possession in submitting the question of defendant's intention, that the intention or lack of intention of a party may be determined by the facts and circumstances in evidence was not on the weight of the evidence. *Allison v. Arlington Heights Realty Co.* (Civ. App.) 164 S. W. 1033.

A requested instruction relative to the comparative weight of locative calls, and directory or incidental passing calls contained in field notes, held properly refused as on the weight of evidence. *Hermann v. Bailey* (Civ. App.) 174 S. W. 865.

A charge that the jury should not consider the fact that defendant's deed made calls for an alley, the existence of which was in controversy, is improper, being on the weight of the testimony. *Perrow v. San Antonio & A. P. Ry. Co.* (Civ. App.) 178 S. W. 973, rehearing denied 181 S. W. 496.

In an action involving disputed boundary line, a charge on an agreed boundary line held improper as on the weight of the evidence. *Cosgrove v. Smith* (Civ. App.) 183 S. W. 109.

Instructions, in trespass to try title to land alleged to be part of an old grant, that the jury should consider only the boundary on issue of mistake in old plat and as it existed at the time of the grant, were not erroneous, as they left the jury free to determine where the boundary was. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

A charge that it was the duty of a surveyor to extend a correct description of courses and distances into the field notes, and map accompanying such field notes, and until reverse was proven it would be presumed the surveyor did his duty in those respects, held not erroneous, as on the weight of the evidence. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

190. — **Contracts and actions relating thereto in general.**—An instruction that plaintiff would be entitled to recover if the jury believed its testimony, unless the contract, if any was made, was not breached or canceled by defendant "as alleged by it," was not objectionable as a charge on the weight of the testimony. *Cooper Cotton Oil Co. v. Cooper Gin Co.* (Civ. App.) 160 S. W. 401.

In an action for breach of a lease to which defendants claimed their signatures had been obtained by the fraud of plaintiffs' agent, an instruction, containing a clause "by reason of the fraudulent representation" of such agent, was not objectionable as on the weight of the evidence. *Taber v. Eyer* (Civ. App.) 162 S. W. 490.

In an action for broker's commissions, alleged to have been earned by negotiating a contract for the exchange of real property, an instruction that if the jury believed a certain fact, hypothesized, plaintiff was entitled to recover \$171, held not objectionable as on the weight of the evidence. *Tevebaugh v. Smith Land Co.* (Civ. App.) 163 S. W. 664.

Instructions that, in an action on implied contract, it is only necessary for the plaintiff to show that he performed acts as the broker of the seller, and that the latter adopted his acts and accepted his agency, and that, "where a broker was the procuring cause of a sale, \* \* \* it is immaterial \* \* \* that he did not personally conduct the negotiations, \* \* \*" were not objectionable as upon the weight of evidence, being mere abstract legal propositions not applicable directly to any issue. *McKinney v. Thedford* (Civ. App.) 166 S. W. 443.

In a garnishment proceeding against the owner of a building for labor and materials furnished a contractor, an instruction that, if the latter did not construct the house in accordance with the contract, the owner could only retain an amount sufficient to remedy the defects held not objectionable as on the weight of the evidence. *Funk v. House* (Civ. App.) 163 S. W. 481.

In action for alleged necessities, instruction to find the goods to be necessities as against the wife held calculated to impress the jury that they were necessities as against the husband. *Trammell v. Neiman-Marcus Co.* (Civ. App.) 179 S. W. 271.

Instruction on right of the holder of an option to purchase land to have proceeds of sales to other persons applied to his debt held not on the weight of evidence. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

191. — **Bills and notes.**—In action on a note, a requested instruction held properly refused, being on the weight of the evidence. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

192. — **Sales.**—In action for price of lumber which defendant claimed to have rejected, where his pleading and evidence showed the use of a small quantity of the lumber by mistake, instruction that he could not accept in part and reject in part held properly refused as on the weight of the evidence. *Continental Lumber & Tie Co. v. Miller* (Civ. App.) 161 S. W. 927.

193. — **Carriage of goods and live stock.**—In an action against a carrier for injuries to a shipment of live stock, a charge that one claim of negligence was that the cars were improperly bedded, and that if this fact was true it was negligence, was not upon the weight of the evidence, in that it detailed facts relied upon by the plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Mulkey & Allen* (Civ. App.) 159 S. W. 111.

In action for injuries to shipment of cattle which the shipper accompanied and unloaded and dipped under quarantine regulations, instruction that the carriers owed no duty to deliver them in good condition, but were only responsible for negligence, held not on the weight of the evidence. *Good v. Texas & P. Ry. Co.* (Civ. App.) 166 S. W. 670.

In an action against connecting carriers for injuries to cattle, a charge that there was no evidence warranting a finding that the cattle were roughly handled by the first carrier, where there was evidence from which that fact might have been inferred, was a charge upon the weight of testimony. *Houston & T. C. R. Co. v. Hawkins & Nance* (Civ. App.) 167 S. W. 190.

In an action against a carrier for rough handling and delay in transporting cattle, an instruction held properly refused as on the weight of the evidence. *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708.

In action for damages to shipment of live stock, requested charge as to the manner in which cattle recovered after the injury should be refused, as a charge on the weight of the evidence. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

194. — **Transmission of telegrams.**—The requested instruction, in an action for delay in delivering a telegram, announcing death and place and time of funeral of the sister of plaintiff's wife, that the wife was presumed to know the schedule of trains which she could take and thereby seasonably reach such place is properly refused as on the weight of evidence. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

195. — **Torts in general.**—In an action for libel, defendant's requested charge on its liability in the absence of express malice held properly refused, as being on the weight of the evidence. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

196. — **Negligence in general.**—A requested charge that the existence of certain facts constituted negligence held objectionable as a charge on the weight of the evidence. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

In an action for the injury to plaintiff's sailboat by defendants' failure to lift a bridge, which they were operating under a contract with the owner, high enough to permit the vessel to pass, it was error to charge, as a matter of law, that a failure to lift the bridge to a perpendicular position was negligence; that being a jury question. *Galveston-Houston Electric Ry. Co. v. Stautz* (Civ. App.) 166 S. W. 11.

A requested instruction that, if the hostler cut off a valve, and thereafter the valve was opened by some person unknown, a verdict should be returned for defendant, held properly refused, as being, in effect, a peremptory instruction that defendant's hostler was not negligent. *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 171 S. W. 1097.

Where the instructions in their entirety required the jury to find as facts the particular acts of negligence complained of, they were not objectionable as on the weight of the evidence. *Kansas City Southern Ry. Co. v. Coomber* (Civ. App.) 173 S. W. 544.

In action against sleeping car company for loss of wearing apparel and consequent mental embarrassment, instruction upon defendant's negligence held to be upon the weight of the evidence and reversible error. *Pullman Co. v. Moise* (Civ. App.) 187 S. W. 249.

In an action for damages to an automobile by a street car, an instruction held properly refused as upon the weight of the evidence. *Adams & Washam v. Southern Traction Co.* (Civ. App.) 188 S. W. 275.

In action for destruction of property by fire communicated from boarding cars on defendant's siding, defendant's requested special charges, directly on the weight of the evidence, were properly refused. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

197. — **Personal injuries in general.**—An instruction in a personal injury action held on the weight of the evidence. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 173 S. W. 937; *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 173 S. W. 967.

Instruction that brakeman had right to assume that no telephone wires crossed track with which he could come in contact, and that character of work and surrounding conditions might be considered in determining contributory negligence, held not objectionable as charging upon the weight of evidence. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

An instruction that unless you believe from the evidence by a preponderance thereof that the said injuries, if any, received by said H. were direct and proximate cause of death, you cannot find for plaintiff, is not on weight of evidence in assuming that defendant is responsible for injuries. *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

198. — **Personal injuries in operation of railroads in general.**—In an action for injury to plaintiff by frightening his team while waiting to drive across the track, an instruction held not objectionable as intimating that a safe place to stop in approaching a railroad crossing with a team was a place where travelers usually stopped. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 160 S. W. 629.

An instruction requiring the operatives of trains over city crossings to keep such a lookout to avoid injuring persons on the crossings as a person of ordinary prudence would keep under like circumstances, considering the character and extent of the use of such crossings, held not on the weight of the evidence. *Missouri, K. & T. Ry. Co. of Texas v. Kennon* (Civ. App.) 164 S. W. 867.

A requested instruction as to contributory negligence in a railroad crossing collision case held not on the weight of the testimony. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

199. — **Injuries to passengers.**—In action for injuries sustained while riding on freight train with cattle, instructions as to liability if plaintiff voluntarily rode in the cattle car held not on the weight of the evidence. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

An instruction, in an action for injuries to a street car passenger, held not on the weight of the evidence. *Dallas Consol. Electric St. Ry. Co. v. Stone* (Civ. App.) 166 S. W. 708.

In an action for injuries to an intoxicated passenger by falling out of an open vestibule door of defendant's coach, an instruction that the door should have been closed, and that the carrier was bound to exercise a high degree of care to accomplish that end, held erroneous as on the weight of the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Christian* (Civ. App.) 169 S. W. 1102.

Instruction that it was negligence for passenger to pass from car to platform while the car was moving held properly refused as invading the province of the jury. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

200. — **Injuries to servants.**—In a switchman's action for personal injuries, a charge that, if the roadbed was so defective as to make switching dangerous, defendant would be negligent was error. *Trinity & Brazos Valley Ry. Co. v. Lunsford* (Civ. App.) 160 S. W. 677.

In a brakeman's action for injuries by slipping from a step of the tender, instruction as to the dangerous condition of the step and as to defendant's negligence in maintaining it held not on the weight of the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

An instruction in an action for injuries to an employé in a coal mine held not on the weight of the evidence. *Burnet Fuel Co. v. Ellis* (Civ. App.) 162 S. W. 911.

A charge, in an action for the death of a servant, killed by an explosion of steam pipes, held not erroneous as on the weight of the evidence. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

In a personal injury action by a servant, a charge that, if plaintiff was guilty of contributory negligence which directly contributed to his injuries, if any, this would not bar recovery, but would only go in diminution of damages, is in substantial accord

with Rev. St. 1911, art. 6649 and is not on the weight of the evidence. *Galveston, H. & S. A. Ry. Co. v. Boshier* (Civ. App.) 165 S. W. 93.

In an action for the death of an engineer by the failure of switch tenders to properly throw switches, where there was evidence that the engineer had the right to rely upon a signal received from one only of the switch tenders, a request requiring him to receive a signal from all was properly refused because upon the weight of the evidence. *Trinity & B. V. Ry. Co. v. Dodd* (Civ. App.) 167 S. W. 238.

In an action for a brakeman's death from falling from a freight car, the submission of the issue whether he was killed directly and proximately by defendant's negligence, together with a definition of negligence, and the expression "violently thrown," used in several of the issues, were not objectionable as a charge on the weight of evidence, but a requested charge that there was no presumption that deceased was killed as a result of defendant's negligence was improper as invading the province of the jury. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

A charge on contributory negligence in a personal injury action by a servant held not erroneous as on the weight of the evidence. *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

Instruction that if, after employé fell in front of moving train, switchman exercised ordinary care to signal the engineer, and the engineer used ordinary care to stop the train, to find for defendant, held properly refused, as whether this was all within their power was for the jury. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

An instruction on the weight of the evidence held properly refused. *Id.*

In servant's action for injury charge held not to violate this article. *Pierce-Fordyce Oil Ass'n v. Farrow* (Civ. App.) 173 S. W. 1007.

Charge that burden is on defendant of showing assumption of risk by preponderance of evidence, no matter by which side adduced, to be considered in its entirety, held not objectionable as invading province of jury. *Barnhart v. Kansas City, M. & O. Ry. Co. of Texas* (Sup.) 184 S. W. 176.

In a servant's action for injuries, there being a conflict in evidence as to the fact of employment, an instruction that plaintiff was acting as the servant of defendant was improper. *Houston Chronicle Pub. Co. v. Murray* (Civ. App.) 185 S. W. 407.

In a servant's action for injuries, where plaintiff testified that he was ordered by the conductor to uncouple cars, language of an instruction, if plaintiff went between the cars to manipulate the couplers, under immediate control and eye of the conductor to uncouple two of the cars, was not on the weight of the evidence or an enlargement on the testimony. *Pecos & N. T. Ry. Co. v. Chatten* (Civ. App.) 185 S. W. 911.

Instruction in servant's action for injuries, held properly refused as being on the weight of evidence. *Missouri, K. & T. Ry. Co. v. Masqueda* (Civ. App.) 189 S. W. 328.

201. — **Damages or amount of recovery.**—In an action against a carrier for injuries to a shipment of cattle which were fed for some time after the injury, an instruction that there could be no recovery for any apparent damage to the cattle if they afterwards recovered is properly refused as on the weight of the evidence, because singling out part of the evidence, tending to show no loss. *Missouri, K. & T. Ry. Co. of Texas v. Mulkey & Allen* (Civ. App.) 159 S. W. 111.

An instruction fixing plaintiff's measure of damages to a shipment of goats as the difference in the market value at destination, if properly transported, and their market value in the condition in which they actually arrived was on the weight of the evidence where the evidence made it a jury question whether the written contract fixing the maximum value of the goats was valid. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943.

A requested charge, in an action for damage to realty by the construction of railroad terminal yards, that, if the market value of the property for any use to which it might be put immediately after the construction of the tracks was equal to or greater than its market value immediately before their construction, the jury should find for defendant held not upon the weight of the evidence. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 165 S. W. 560.

Instruction that, if the cars contained the amount shown by the bills of lading, the carrier was not liable for a shortage held not objectionable as taking from the jury the question whether the plaintiff's scales weighed short and the determination of what the shortage actually was. *Gulf, C. & S. F. Ry. Co. v. Justin Mill & Elevator Co.* (Civ. App.) 168 S. W. 411.

An instruction on diminished earning capacity as a measure of damages for personal injuries held not objectionable as a charge upon the weight of the evidence. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 171 S. W. 1091.

In action for damages to shipment of cattle, requested charge as to temporary nature of damages and the degree to which cattle would have recovered with proper care and handling by shipper, should be refused, because on the weight of the evidence. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

A charge in an action for damages for flooding lands that the jury could consider certain specific elements of damage held on the weight of the evidence. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

## II. FORM, REQUISITES AND SUFFICIENCY OF INSTRUCTIONS

### (A) *In General*

212. **Written instructions—Reading or delivery to jury.**—Despite Court Rule 62a (149 S. W. x), the failure of the trial court to prepare and read its charge to the jury before argument held prejudicial, though no objections to the charge given were given or reserved. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

This article and article 1970, which require the court to prepare and read its charges to the jury before argument, are mandatory. *Id.*

215. — **Language and punctuation.**—Court should avoid word "desideratum" and use instead words generally used and concerning the meaning of which jury can have no doubt. *Dunn v. Land* (Civ. App.) 193 S. W. 698.



218. **Repetition.**—In action for injuries to person attempting to pass between cars of train blocking a crossing, special charge held not to unduly repeat an issue already submitted in the general charge. *Englefield v. International & G. N. Ry. Co.* (Civ. App.) 159 S. W. 1033.

Repeated references in an instruction as to the conditions upon which plaintiff may recover, or what defenses will defeat a recovery, is not reversible error, if the repetitions are necessary to apply the rules of law to the various phases of the evidence, and the grouping of the facts of the particular case in an instruction, after generally defining assumed risk, and the application of law thereto, was not erroneous as an undue repetition of the defense of assumed risk. *Carter v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 160 S. W. 987.

Where the evidence is so conflicting as to authorize the jury to find for either party, instructions so emphasizing and repeating the theory of plaintiff's cause that they amount to a peremptory instruction for him are erroneous. *Risinger v. Sullivan* (Civ. App.) 161 S. W. 397.

In trespass to try title, held, that a charge as to defendant's claim under a void sheriff's deed and by estoppel, containing a repetition of what constituted an estoppel and as to defendant's burden of proof was not a proper presentation of the law of the case. *Lafferty v. Wilson* (Civ. App.) 162 S. W. 379.

Where the issue of contributory negligence was submitted in several paragraphs of the charge, it was immaterial that other paragraphs did not refer to such issue. *Missouri, K. & T. Ry. Co. of Texas v. Stogner* (Civ. App.) 163 S. W. 319.

Where contributory negligence is defined in one paragraph of a charge, the definition need not be repeated in another. *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063.

Repeating 12 times in the charge that the jury must believe "from a preponderance of the evidence" the facts alleged by plaintiff tended to emphasize the burden cast by law on plaintiff, and was probably harmful. *Cook v. Urban* (Civ. App.) 167 S. W. 251.

219. **Sufficiency as to subject-matter in general.**—*Vernon's Sayles' Ann. Civ. St. 1914, art. 1970*, providing that judge shall prepare and deliver written charge to jury on law of case, and this article, requiring charge to be presented to counsel before being read to jury, do not relieve trial judge of common-law duty to give charge on law of case, unless expressly waived. *Whaley v. McDonald* (Civ. App.) 194 S. W. 409.

221. — **Definition of terms.**—An instruction defining "equivalent to cash," as used in the court's charge, held not misleading. *Brown v. First Nat. Bank of Corsicana* (Civ. App.) 175 S. W. 1122.

224. **Statement of issues.**—Where the issues were correctly set forth in the charge, error cannot be assigned to the failure in the preliminary statement of the case to state the allegations of the petition in connection with an instruction that the burden of proof rests upon the plaintiff. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

While it may not be necessary to make a preliminary statement of the issues raised by the pleadings, it is not error in the charge to state the issues by copying a part of the petition. *Lisle-Dunning Const. Co. v. McCall* (Civ. App.) 167 S. W. 810.

In an action against a surety, where the answer alleged that the plaintiff had failed to record the mortgage securing the debt, an instruction that defendant's answer alleged an agreement between the parties that the plaintiff was to exhaust the mortgaged property before the defendant should become liable was a misstatement of the issues. *Baker v. Drake* (Civ. App.) 185 S. W. 879.

It is the better practice for the trial judge to summarize the pleadings on the issues to be determined. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

225. — **Referring jury to pleadings.**—It is the better practice for the court in its charge to distinctly instruct the jury as to the issues involved, and the practice of referring the jury to the pleadings for the issues is not to be encouraged. *Adams & Washam v. Southern Traction Co.* (Civ. App.) 188 S. W. 275.

Instruction referring jury to plaintiff's petition for statement of injuries claimed is not erroneous, although the court mentioned wrong paragraph of the petition. *Andrews v. Wilding* (Civ. App.) 193 S. W. 192.

226. — **Conflicting issues and grounds of verdict.**—A plaintiff may rely upon inconsistent grounds of recovery, and, where he may prevail upon either, he can have both submitted to the jury; but the instructions embodying such submission should be in the alternative, rendering it plain that a recovery may be had upon only one. *Texas & P. Ry. Co. v. Matkin* (Sup.) 174 S. W. 1098, affirming judgment (Civ. App.) 142 S. W. 604.

227. **Evidence and matters of fact in general.**—Where junior surveys were admissible to show their general location on the ground, but not to establish lines and corners of a senior survey, instructions that the junior surveys were to be considered for all purposes except the bald declaration as to the location of the line should not be considered, were sufficient to limit the legitimate purpose of the evidence. *Maddox v. Day-ton Lumber Co.* (Civ. App.) 188 S. W. 958.

228. — **Stating, grouping or summarizing facts or evidence.**—When it is proper for an instruction to refer to a statute, its provisions should be stated and the jury informed as to what bearing they have on the case. *International & G. N. Ry. Co. v. Bandy* (Civ. App.) 163 S. W. 341.

In an action against railway company for failure to maintain substantial bridge which in flood damaged county bridge, requested instructions held not to present a consideration of all relevant facts. *San Antonio & A. P. Ry. Co. v. Milam County* (Civ. App.) 191 S. W. 571.

230. — **Directing verdict if specified facts are proved.**—Whether certain facts constitute negligence being for the jury, unless duty is imposed by statute, etc., it is error to direct finding upon mere finding of existence of acts alleged, without further finding on part of jury that such acts constitute negligence. *Quanah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

233. — Presumptions and burden of proof.—In an employe's action for injuries, where it is not clear that contributory negligence has been shown, as a matter of law, the court should charge that the burden is on the defendant to prove contributory negligence. *Reliable Steam Laundry v. Schuster* (Civ. App.) 159 S. W. 447.

Where there was no contention that notices of assessments were or could have been mailed at any other time than that claimed by defendant, an instruction that the burden of proof was upon defendant to show that notices were mailed at that time held not objectionable. *State Division, Lone Star Ins. Union, v. Blassengame* (Civ. App.) 162 S. W. 6.

In action on policy prohibiting assignment, unless otherwise provided by agreement, instruction that notification to the insurer was not sufficient, that assent by the insurer was also required, and that, if notification was given, its assent would be presumed, unless it declined to accept the transfer, held proper and not erroneous, as placing the burden on insurer to prove nonconsent. *Northern Assur. Co., Limited, of London v. Morrison* (Civ. App.) 162 S. W. 411.

Where the court charged that plaintiff had the burden of proving the material allegations of the petition by a preponderance of the evidence, a charge directing a recovery for defendant if certain facts were not established was not objectionable as leading the jury to believe that defendant had the burden of proof. *McIndoo v. Wood* (Civ. App.) 162 S. W. 488.

An instruction that, if the jury found from the preponderance of the evidence that plaintiff had no reasonable expectation of receiving any pecuniary benefit from the decedent, the jury should find for defendant was erroneous as placing the burden of proof upon defendant to show that decedent would not have contributed anything to plaintiff. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 163 S. W. 621.

In action to rescind contract for fraud, instruction that contracts are presumed fair, and not fraudulent, and that the party attacking them had the burden of proving fraud, held properly refused, as it was improper to charge as to the effect of such presumption. *Underwood v. Jordan* (Civ. App.) 166 S. W. 88.

In an action for injuries to an employe from the negligence of the foreman giving an improper order, a charge directing a verdict for the employer if an ordinarily prudent person, under same circumstances, would have given the order, and that, though the foreman gave the order, that fact alone was not negligence, did not shift to the employer the burden of proving freedom from negligence. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 685.

In an action for an employer's breach of a contract of employment, an instruction placing on plaintiff the burden of showing that he made diligent efforts to obtain other employment without success was error. *Miller v. Sealy Oil Mill & Mfg. Co.* (Civ. App.) 166 S. W. 1182.

In an action for injuries to a licensee who was struck while on the right of way of a railroad company by a piece of scantling thrown from a moving train, an instruction on the negligence of the railroad company held not improper, as casting upon the company the burden of keeping its tracks in good condition for the benefit of licensees. *St. Louis Southwestern Ry. Co. of Texas v. Balthrop* (Civ. App.) 167 S. W. 246.

In an action against a carrier for injury to live stock, a charge held not error as placing the burden upon defendant to show a defense, where the burden was expressly placed on plaintiff to prove his case by another instruction. *Missouri, K. & T. Ry. Co. of Texas v. Cauble* (Civ. App.) 174 S. W. 880.

In an action for injuries to horses during shipment, instructions as to the burden of proof held sufficient. *Southern Pac. Co. v. W. T. Meadors & Co.* (Civ. App.) 176 S. W. 882.

The court, in charging the jury, should apply the rule as to the burden of proof to plaintiff's alleged cause of action, and then apply it also to defendant's defense or defenses. Instruction to find for defendant if certain facts are found by a preponderance of the evidence held misleading and by implication to shift the burden of proof, where such facts are a mere negative of the cause of action, but not objectionable when such facts constitute special defensive matter. *Boswell v. Pannell* (Sup.) 180 S. W. 593.

Instruction, that burden was on plaintiff to show defendant instituted prosecution without probable cause and with malice and intent to injure, was not bad as depriving plaintiff of benefit of presumption of malice and intent arising from want of probable cause, or as asserting that defendant could be actuated with malice while without intent to injure. *Rainey v. Old* (Civ. App.) 180 S. W. 923.

A charge that shipper had burden of proof in an action for injuries to a shipment held not objectionable on theory that where carrier receives shipment in good condition, it is bound to excuse injury. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070.

A requested charge on the burden of proof in an action against a railroad company for the killing of a cow, held incomplete and properly refused. *Kansas City, M. & O. Ry. Co. of Texas v. Oates* (Civ. App.) 185 S. W. 1014.

In an action on purchase price notes, a requested instruction that plaintiff had the burden of proving its compliance with the sales contract is properly refused as misleading, since, after introduction of the notes, defendant buyer had the burden of showing the contract was obtained by fraud or breached by plaintiff. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

234. — Failure to produce evidence.—Where the general charge authorized a recovery if defendant was negligent in constructing or operating its electric plant, it was error to refuse instructions eliminating grounds of negligence alleged, but not supported by evidence. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 194 S. W. 1016.

235. Weight and effect of evidence.—The rule that in a particular case the evidence must be clear and convincing to justify equitable relief by reformation of an instrument should not be given in the charge to the jury. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

240. Preponderance of evidence.—Where the court had charged that the burden was upon the plaintiff to establish his case by a preponderance of the evidence, it was prop-

er to refuse a requested charge that if the evidence left the jury in doubt, they should return a verdict for the defendant. *Moore v. Lehmann* (Civ. App.) 165 S. W. 81.

242. — **Degree of proof required in general.**—Charge requiring facts relied upon as grounds for recovery to be established by clear preponderance of evidence, held to impose too great a burden. *Wyatt v. Chambers* (Civ. App.) 182 S. W. 16.

245. **Argumentative instructions.**—Argumentative instructions held properly refused. *W. P. Carmichael Co. v. Miller* (Civ. App.) 178 S. W. 976; *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176; *Bomar v. Munn* (Civ. App.) 158 S. W. 1186; *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063; *Kansas City, M. & O. Ry. Co. of Texas v. Treadwell & Wilkison* (Civ. App.) 164 S. W. 1089; *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807; *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

In action to rescind contract for fraud, instruction that contracts are presumed fair, and that the party attacking them had the burden of proving fraud, held properly refused as argumentative. *Underwood v. Jordan* (Civ. App.) 166 S. W. 88.

A requested charge, which is argumentative, and which, so far as proper, is covered by the main charge, is properly refused. *Miller v. Campbell* (Civ. App.) 171 S. W. 251.

Instruction in action by optionee on contract of sale held not argumentative. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

246. **Confused or misleading instructions.**—Instructions in an action for injuries to an employé defining vice principal, held not misleading. *Kirby Lumber Co. v. Williams* (Civ. App.) 159 S. W. 309.

In an action against connecting carriers for injury to cattle, an instruction that defendants were liable, if at all, only for the loss or damage, if any, accruing on its own line, and neither defendant was liable for any loss occurring on any other of the defendants' lines, was not defective as confusing the terms "occurred" and "accrued." *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427.

Inadvertent use of the word "act" instead of "injury" in defining proximate cause held not to have misled the jury, nor subject to complaint by a party who asked no special charge. *Reliable Steam Laundry v. Schuster* (Civ. App.) 159 S. W. 447.

An instruction allowing compensation for nursing and attention to plaintiff's child until "cured" is not erroneous, because, her limb having been amputated, defendant claims she would never be cured, as "cured" means the act of healing, to heal a wounded limb, and the jury could not have construed it as contended. *Ft. Worth & D. C. Ry. Co. v. Winger* (Civ. App.) 159 S. W. 881.

In an action against a carrier for personal injuries, charge as to plaintiff's efforts to procure treatment and as to defendant's liability held not objectionable as being misleading or confusing. *Missouri, K. & T. Ry. Co. of Texas v. McCormick* (Civ. App.) 160 S. W. 429.

Charge, in brakeman's action for injury, that unless the jury should find the existence of all the facts enumerated in a previous paragraph of the charge they should return a verdict for defendant, held not confusing. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

An instruction on contributory negligence held not misleading. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445.

In a will contest, an instruction that it was incumbent upon proponent to prove to the satisfaction of the jury that testator was possessed of testamentary capacity was misleading. *In re Bartels' Estate* (Civ. App.) 164 S. W. 859.

Where, in trespass to try title, plaintiffs claimed no title by limitation to land which passed from their ancestor to defendant, but only as to another tract in controversy, a charge that plaintiffs could not claim by limitation land which passed by regular chain of title from their ancestor to defendant was not misleading; there being no contention that defendant claimed title to the tract in controversy from plaintiffs' ancestor. *Gosch v. Vrana* (Civ. App.) 167 S. W. 757.

Where court charged that to constitute sale the agreement must be unconditional, failure to again use the term "unconditional" in stating facts to be found to warrant finding for plaintiff held not misleading. *Alamo Trust Co. v. Prudential Life Ins. Co. of Texas* (Civ. App.) 183 S. W. 787.

Instruction, in action by optionee on contract of sale, held not ambiguous. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

In an action against a carrier for damage to cattle by delay an instruction that plaintiff might recover for extra shrinkage and bad appearance was not improper as misleading in mixing two elements of damage, since they are so nearly similar in character as to be substantially a common cause of loss. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

In action for injuries from crossing accident, an instruction held erroneous as confusing and apt to mislead. *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 189 S. W. 284.

Though the doctrine of presumed grant had no application in trespass to try title in which the issue was as to boundary, a charge that there was no issue of limitation and that the evidence should not be considered as establishing any adverse claim or right was unnecessary and misleading. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

In an action for injuries to a passenger when thrown from defendant's street car, an instruction on negligence of plaintiff in attempting to alight while car was in motion, and as to proximate cause held not misleading. *Northern Texas Traction Co. v. Evans* (Sup.) 193 S. W. 1067.

247. **Inconsistent or contradictory instructions.**—In an action against a carrier for personal injuries, charge as to plaintiff's efforts to procure treatment and as to defendant's liability held not objectionable as being contradictory. *Missouri, K. & T. Ry. Co. of Texas v. McCormick* (Civ. App.) 160 S. W. 429.

A jury cannot be required to harmonize conflicting charges, and, where such charges are given which may be material, the case will be reversed. *Trinity & Brazos Valley Ry. Co. v. Lunsford* (Civ. App.) 160 S. W. 677.

Instructions, in an action for commissions for assisting to exchange property, concerning plaintiffs as acting for both parties held not inconsistent. *T. A. Hill & Son v. Patton & Schwartz* (Civ. App.) 160 S. W. 1155.

A special charge making the carrier responsible for overloading cars with live stock, if it supervised the loading, was conflicting with another charge exempting the carrier from liability for overloading the cars, if the contract so provided. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943.

Instruction that burden was on plaintiffs to prove facts submitted as material to recovery, and was likewise on defendant to prove facts submitted as material to its defense, held contradictory and calculated to lead the jury to believe that defendant had the burden of disproving negligence. *Galveston, H. & S. A. Ry. Co. v. Dozier* (Civ. App.) 162 S. W. 1019.

Where, in an action for the price of cotton, defendant pleaded estoppel, and the court charged affirmatively in one part of the charge that plaintiff must prove his case by a preponderance of the evidence and in another part charged to find for plaintiff if defendant had not established its plea of estoppel, there was error, as it could not be told upon which theory the verdict was rendered. *Weld-Neville Cotton Co. v. Lewis* (Civ. App.) 163 S. W. 667.

Instructions that burden was on defendant to prove payment pleaded, and that receipt was prima facie evidence of payment, held not to conflict. *Richards v. Osborne* (Civ. App.) 164 S. W. 392.

In action against carriers for delay in transportation, instruction that neither carrier was responsible for damage not directly or proximately caused by it, and another instruction that the initial carrier was responsible for the delay on any of the connecting carriers, and therefore entitled to recover over against the carrier responsible, held contradictory. *Texas & P. Ry. Co. v. Cauble* (Civ. App.) 168 S. W. 369.

Instruction authorizing recovery if right of way fence was not sufficient under ordinary circumstances, and an instruction that it was not the company's duty to keep gates shut, and that if the cattle entered while the gates were open to find for defendant, held not in conflict. *Ft. Worth & D. C. Ry. Co. v. Scheer* (Civ. App.) 169 S. W. 1069.

On the trial of a claim to property levied as property of judgment debtor, a charge that a debtor's sale must be accompanied by open change of possession held not to conflict with one explaining delivery and possession. *First Nat. Bank of Ft. Wayne, Ind., v. Howard* (Civ. App.) 174 S. W. 719.

In action for damages for failure to deliver telegram addressed to plaintiff relative to seller's offer of stock, charge and special charge as to such offer held not conflicting. *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925.

In a street car passenger's action for injuries from falling from the running board of a car, held, that instructions given relative to negligence and contributory negligence were not conflicting. *Tennegkeit v. Galveston Electric Co.* (Civ. App.) 182 S. W. 72.

The second part of an instruction on proximate cause held explanatory of what preceded, and not a different definition. *Missouri, K. & T. Ry. Co. of Texas v. Whitsett* (Civ. App.) 185 S. W. 406.

**248. Undue prominence of particular matters.**—A requested special charge embodied in the main charge should be refused, where to give it serves to unduly emphasize the point. *Rodgers v. Texas & P. Ry. Co.* (Civ. App.) 172 S. W. 1117.

Defendant is not entitled to select a single allegation of the petition and require the court to charge that, to recover, plaintiff must have established it by a preponderance of the evidence. *Hamilton Compress Co. v. Lawson* (Civ. App.) 175 S. W. 474.

Undue emphasis of the cause of one party by reiteration of charges as to damages is improper. *Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County* (Civ. App.) 182 S. W. 386.

In suit for damages to a shipment of cattle, instruction repeating all the issues of negligence already submitted in preceding instructions gave undue emphasis to those issues. *St. Louis Southwestern Ry. Co. of Texas v. Kerr* (Civ. App.) 184 S. W. 1058.

**249. — Evidence and matters of fact in general.**—A party's right to a charge on any specified group of facts which might constitute a defense does not require the giving of numerous differently phrased charges on such group of facts since this would probably give undue prominence to such facts. *Mayfield v. Gause* (Civ. App.) 164 S. W. 927.

Charge held improper because singling out facts in case and giving them undue emphasis. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

An instruction emphasizing evidence is properly refused. *Texas & P. Ry. Co. v. De Long* (Civ. App.) 176 S. W. 374.

In an action on a note plaintiff claimed to have secured for value before maturity, submission of issue whether plaintiff received the note on a particular day held improper, giving undue weight to evidence that it was not received on that date; for plaintiff was holder in due course of it and received it before maturity. *First Nat. Bank of Garner, Iowa, v. Smith* (Civ. App.) 183 S. W. 862.

**250. — Nature of action or issue in general.**—Where the only evidence to contradict defendant's testimony that he claimed adversely was by plaintiff's manager that defendant stated that he did not intend to claim the land, and the general charge did not affirmatively submit the issue of intention, held, that the charge affirmatively submitting such issue was not objectionable, as giving undue prominence to the question of intention. *Allison v. Arlington Heights Realty Co.* (Civ. App.) 164 S. W. 1033.

In an action for the purchase price of an automobile, which defendant denied had been delivered, it was improper for the court to single out and weaken or destroy testimony as to the furnishing of a demonstrator to run the car and as to the housing of the car by explaining to the jury the effect of such testimony. *Lange v. Interstate Sales Co.* (Civ. App.) 166 S. W. 900.

In an action against a carrier for rough handling and delay in transporting cattle, an instruction held properly refused as giving undue prominence to a part of the evidence. *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708.

In action to try title, defended on title by adverse possession, requested charge as to

continuous possession held properly refused, as giving undue prominence to the matter of continuity. *City of El Paso v. Wiley* (Civ. App.) 180 S. W. 661.

In a suit to determine a boundary, special charge, making the "agreement" generally charged between the parties' predecessors have reference to the concrete point of difference in the evidence whether it was intended to be temporary or permanent, held not erroneous as unduly emphasizing the issue. *Talley v. Bailey* (Civ. App.) 181 S. W. 230.

In action for damages to shipment of live stock, requested charge singling out certain facts which in part were claimed as an excuse for the delay was properly refused. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

251. — **Negligence and personal injuries.**—An instruction which, in stating the converse of a proposition presented in a previous instruction, repeated the facts relied on by plaintiff to constitute defendant's negligence was not erroneous as unduly impressing the jury with plaintiff's side of the case. *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426.

In action for injuries sustained while riding on freight train with cattle, instruction held not erroneous as placing too great emphasis on the question of negligence in handling the train. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

A requested instruction as to contributory negligence in a railroad crossing collision case held not an isolation of acts disconnected with other facts sufficient to condemn it. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

An instruction specifying different features of negligence for which, if established, defendant might be liable, held not error as unduly emphasizing defendant's claimed negligence. *Rio Grande, E. P. & S. F. Ry. Co. v. Starnes* (Civ. App.) 185 S. W. 366.

In section hand's action for injuries, splitting up in instructions single issue of train crew's negligence in failing to give warning of approach of train was improper, tending to place undue emphasis upon such issue and divert attention from true issue. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 194 S. W. 622.

254. **Instructions correcting previous erroneous instructions and omissions.**—Refusal of requested charges that in determining the value of bank stock the jury could not deduct the debts and circulation of the banks held improper, in view of another instruction. *Brown v. First Nat. Bank of Corsicana* (Civ. App.) 175 S. W. 1122.

### (B) Particular Actions or Issues

256. **In general.**—The denial of a special charge submitting the question whether the testatrix executed an alleged will with full knowledge of its contents was improper, where the instruction given did not clearly submit such issue. *Rucker v. Carr* (Civ. App.) 163 S. W. 632.

An instruction defining residence as meaning living in a particular locality, although the intent to make it a permanent home be not present, held correct. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

257. **Adverse possession.**—In trespass to try title, instruction that a failure to keep up the fence so as to exclude others did not necessarily interrupt the running of limitations held not misleading under the evidence. *Dryden v. Makey* (Civ. App.) 160 S. W. 302.

In trespass to try title, a charge that, if the land was inclosed by a fence for ten years, plaintiffs could not recover, unless they asserted ownership by "continuous use" for ten years, was not erroneous in failing to use the words "continuous cultivation, use, or enjoyment" employed in the statute. *Buie v. Penn* (Civ. App.) 172 S. W. 547.

Instruction that if the public had used any portion of the land in controversy for a street, plaintiff, claiming by limitation, could not recover was too general and calculated to mislead the jury. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

A charge that "adverse possession is a claim inconsistent with and hostile to the claim of another" held not misleading as suggesting that defendant's possession could be adverse, although against "another" than the owner. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

In trespass to try title, instruction on adverse possession held sufficient without giving requested instructions thereon. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

259. **Assumption of risk.**—When plaintiff seeks a recovery upon the issue of discovered peril as well as upon other theories, charges on assumed risk should be limited to be considered only upon the other theories, as such defense cannot be urged to defeat liability arising by reason of discovered peril. *International & G. N. R. Co. v. Walters* (Civ. App.) 161 S. W. 916, judgment reversed on rehearing 165 S. W. 525.

An instruction on assumption of risk which fails to except from the general definition of "assumed risk" those resulting from the master's negligence is properly refused, being misleading and erroneous. *Houston & T. C. R. Co. v. Menefee* (Civ. App.) 162 S. W. 1038.

Instruction in switchman's action for injuries held erroneous for attempting to combine contributory negligence and assumption of risk. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

Instruction making decedent car repairer assume risk of the danger by which he was killed, by merely working outside a derail switch, held erroneous for ignoring negligence of defendant in leaving switch to the repair track open. *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194.

In action for injuries to section hand while removing wreck, instruction that he did not assume the risk of extrahazardous work unless he was warned and instructed, and after such warning continued to work, held proper as applied to the facts. *Missouri, K. & T. Ry. Co. of Texas v. Mooney* (Civ. App.) 181 S. W. 543.

Instruction that application assuming risk of injury from obstructions near track is void and to be considered only as notice of obstructions is not objectionable as minimizing its effect for that purpose. *Barnhart v. Kansas City, M. & O. Ry. Co. of Texas* (Sup.) 184 S. W. 176.

262. **Bona fide purchase.**—In an action on a note where the maker set up the payee's fraud, the refusal of an instruction that, if plaintiff purchased the note in good faith

and without notice, judgment should be for it held improper. *First Nat. Bank v. Chapman* (Civ. App.) 164 S. W. 900.

**262½. Boundaries.**—In an action by a county to locate its school lands, an instruction precluding the jury from considering certain surveys as evidence bearing upon the location of monuments named in a prior survey held erroneous where there was close accord between the first and later surveys. *Colorado County v. Travis County* (Civ. App.) 176 S. W. 845.

In an action where the boundary line of a railroad grant block was in dispute, the refusal of a special charge requested by defendant as to the effect of the finding of original corners held erroneous under the evidence. *Higginbotham v. Weaver* (Civ. App.) 177 S. W. 532.

**263. Brokers' commissions.**—Where, in an action for broker's services in negotiating an exchange of real property, the evidence showed an unconditional and enforceable contract, the court did not err in refusing to charge that if the sale was not performed by the purchaser, without defendant's fault, plaintiff could not recover. *Tevebaugh v. Smith Land Co.* (Civ. App.) 163 S. W. 664.

In an action for the half of a real estate brokers' commission which he had agreed to waive, induced by defendant's false statement, the questions whether the false statement was a fraudulent misrepresentation, and whether the broker relied upon it, are immaterial, the action being for an amount due under contract. *Spires v. McElroy* (Civ. App.) 166 S. W. 457.

In action by broker for commissions for procuring an exchange of realty, instruction submitting question whether an agreement for exchange was made, and making right to recovery dependent on affirmative finding, held proper. *Lanham v. Cockrell* (Sup.) 194 S. W. 936.

**264. Carriage of goods and live stock.**—Charges in an action against carriers for damage to a shipment of live stock to the effect that the basis of the action is unnecessary and unreasonable delay, and that when a railroad company accepts stock for transportation it is bound to use ordinary care in the handling of the cars, do not cast upon the carriers the penalty of handling the cattle at their peril. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

In action for injuries to shipment of cattle accompanied by plaintiff, instruction that the damages need not become manifest on the line of the railway company causing the damages, it being sufficient if the damages were caused by negligence of the railway company, held properly refused. *Good v. Texas & P. Ry. Co.* (Civ. App.) 166 S. W. 670.

A charge as to the liability of a carrier for injury to cattle in transit held misleading. *Rodgers v. Texas & P. Ry. Co.* (Civ. App.) 172 S. W. 117.

In an action for injuries to a shipment of cattle, the charge held to sufficiently safeguard the carrier's interests. *International & G. N. Ry. Co. v. Frank* (Civ. App.) 177 S. W. 168.

In an action against railroads for damage to shipment of fruit by freezing, refusal of charge as to effect of directions given agent of defendant roads by shipper's agent to leave car vents open during transit held error. *Abilene & S. Ry. Co. v. Ward* (Civ. App.) 178 S. W. 638.

In an action for delay in the shipment of live stock, refusal of an instruction for defendant, if a connecting carrier failed to run a special train, held not error, where no such duty rested on the carrier. *Quanah, A. & P. Ry. Co. v. Collier* (Civ. App.) 179 S. W. 96.

In action for delay in transporting live stock, defendant's contention, supported by evidence, that after arrival of shipment at connecting point it repaired defective cars and delivered to connecting road as quickly as possible should have been submitted to jury in affirmative form. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

In an action against a carrier of live stock for delay in transportation, an instruction on duty of carrier to maintain its tracks, etc., to withstand ordinary floods held not error. *Ft. Worth & D. C. Ry. Co. v. Atterberry* (Civ. App.) 190 S. W. 1133.

**265. Carriage of passengers.**—Personal injuries, see note 311, post

Instruction as to plaintiff's rights, after surrender of his ticket to an employé of defendant, held objectionable, as calculated to lead the jury to believe that, if such employé was not authorized to take it, plaintiff could not be ejected. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

In an action for the failure of a railroad company to keep its depot warmed after the departure of a passenger train, as required by art. 6591, a special charge as to the duty of the company held misleading, as possibly denying the duty of the company to keep its depot warm. *Missouri, K. & T. Ry. Co. of Texas v. Cook* (Civ. App.) 166 S. W. 453.

In an action against a carrier for wrongful ejection of a passenger, a request, though correct in the main, held properly refused. *Missouri, K. & T. Ry. Co. of Texas v. Dice* (Civ. App.) 168 S. W. 478.

In action for injuries to passenger carried by her station, instruction held erroneous as calculated to lead the jury to believe that some notice to the passenger other than the announcement of the station was required, and the correct portion of a requested instruction should have been given. *Missouri, K. & T. R. Co. of Texas v. Middleton* (Civ. App.) 172 S. W. 1114.

**269. Contracts—Sales.**—Where, in an action for the price, defendant relied on breach of warranty, a charge authorizing a verdict for the buyer if the machinery did not possess certain good qualities was not sufficient; but the charge should require the jury to find that the machinery was defective in the particulars alleged. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 167 S. W. 256.

In a suit for breach of an agreement to procure an extension of an option to purchase land, a charge on the duty of defendant held sufficient. *Hahl v. McPherson* (Civ. App.) 176 S. W. 804.

In an action on notes given for the price of a registered horse, the refusal of a requested charge that the horse was registered if the certificate in evidence was issued for him, though the description was inaccurate, held erroneous. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 177 S. W. 528.

Submission of issue whether goods were necessities, considering husband's financial circumstances and station in life at "and prior" to the time of the purchase, held erroneous. *Trammell v. Neiman-Marcus Co.* (Civ. App.) 179 S. W. 271.

Instruction on right of the holder of an option to purchase land to have proceeds of sales to other persons applied to his debt held not calculated to confuse. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

270. — **Transmission of telegrams and telephonic service.**—In an action for mental anguish for failure to deliver telegram informing plaintiff of her father's death, an instruction held correct. *Western Union Telegraph Co. v. Gest* (Civ. App.) 172 S. W. 183.

272. **Contributory negligence.**—Refusal to tell the jury that if plaintiff was guilty of contributory negligence he could not recover, even though they might believe from the evidence that defendants were also guilty of negligence held error. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

Where the court did not present in an affirmative way the defense of contributory negligence, it was error to refuse a special charge calling the jury's attention to facts which, if found to be true, would defeat a recovery on that issue. *Id.*

In an action against an express company for injuries by being struck by a box falling from an express truck while plaintiff walked along the depot platform, the charge held to sufficiently present the question of contributory negligence. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

An instruction on contributory negligence, in an action for injuries to a servant, held not erroneous, though not to be approved. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

273. — **Children and persons under physical disability.**—In an action for the wrongful death of a 14 year old boy, an instruction that a person of immature years need not exercise the same degree of care as is required of a person of mature years was not erroneous in the use of the phrase "immature years" instead of "tender years." *Stephenville, N. & S. T. Ry. Co. v. Voss* (Civ. App.) 159 S. W. 64.

Where a plaintiff was a boy 16 years old, and had lived around railroads three or four years, and there was no suggestion that he had not the discretion to appreciate the danger of a near approach to a moving train, it was not error to refuse plaintiff's request that to prevent a recovery because of contributory negligence he must have failed to exercise the degree of care and caution which persons of his age and discretion would exercise under the circumstances. *Heflin v. Eastern Ry. Co. of New Mexico* (Civ. App.) 159 S. W. 499.

In an action for injuries to an intoxicated passenger by a fall from the open vestibule of a railroad coach, instructions given held not to present the isolated question of plaintiff's intoxication as a contributing cause as explicitly as defendant had a right to demand. *St. Louis Southwestern Ry. Co. of Texas v. Christian* (Civ. App.) 169 S. W. 1102.

275. — **Acts in emergencies.**—In section hand's action for injuries due to fall in removing hand car from track to avoid approaching train, requested instruction that plaintiff could not recover if he and those with him had ample time in which to remove car was not bad for failure to add with "safety to plaintiff." *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 194 S. W. 622.

276. — **Employés.**—An instruction as to the contributory negligence of a servant which required the jury to find the master guilty of negligence before they could find contributory negligence is not prejudicial. *Wichita Falls Motor Co. v. Bridge* (Civ. App.) 158 S. W. 1161.

An instruction in an action for death held erroneous as prejudicing the defense of contributory negligence. *Texas Cent. R. Co. v. Neill* (Civ. App.) 159 S. W. 1180.

A charge that plaintiff, a switchman, engaged in opening defective couplings, could assume that the engine would not be moved without a signal held proper. *Missouri, K. & T. Ry. Co. of Texas v. Barber* (Civ. App.) 163 S. W. 116.

Instruction in switchman's action for injuries held erroneous for attempting to combine contributory negligence and assumption of risk. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

Charge that employé might assume that track of employer was free from obstruction so near as to expose him to danger, and he was not required to examine it to see that it was free therefrom, held proper. *Barnhart v. Kansas City, M. & O. Ry. Co. of Texas* (Sup.) 184 S. W. 176.

In a servant's action for injuries, defendants' requested charge that if plaintiff in discharge of his duty could have uncoupled the cars by use of available means which did not require him to go between the cars, and that in the exercise of ordinary care he should have used other available means for cutting the cars without going between them, verdict must be for the defendant was properly refused. *Pecos & N. T. Ry. Co. v. Chaten* (Civ. App.) 185 S. W. 911.

277. — **Passengers.**—Where, in a passenger's action for injuries in alighting by negligently failing to hold the train long enough and not providing sufficient exits, the evidence raised the issue whether the station was called in plaintiff's coach and whether two doors were open for the exit of passengers, the court should have fully instructed on plaintiff's duties. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

An instruction negating plaintiff's contributory negligence in failing to buy another ticket held not erroneous. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

In an action for injuries to a female passenger by slipping down the steps of defendant's passenger coach, an instruction held to properly submit the issue of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Gresham*, 106 Tex. 452, 167 S. W. 724, affirming judgment (Civ. App.) 140 S. W. 483.

In action for injuries to plaintiff in leaving railroad car, instruction held to fully submit issue of plaintiff's contributory negligence in manner of leaving car. *Galveston, H. & S. A. Ry. Co. v. Brassell* (Civ. App.) 186 S. W. 428.

280. — **Persons at railroad crossings.**—Where plaintiff's decedent received fatal injuries in a collision between the ambulance in which he was riding and a railroad

train, an instruction that, if the defective sight of the driver was the proximate cause of or contributed to the accident, the railroad company was not liable held properly refused. *Missouri, K. & T. Ry. Co. of Texas v. Kennon* (Civ. App.) 164 S. W. 867.

Under Rev. St. 1911, art. 1068, requiring railroads to keep their roadbeds and rights of way at crossings in proper condition for travel, an instruction, in an action for injury to plaintiff from having his shoe caught between the rails, that he had a right to presume that the tracks were in proper condition held not objectionable as relieving him from the exercise of any care, or as not defining the term "proper condition." *St. Louis Southwestern Ry. Co. of Texas v. Matthews* (Civ. App.) 164 S. W. 1092.

A charge permitting recovery for injuries sustained from plaintiff's horse running away at a railroad crossing which was torn up, if plaintiff relied upon the representations of defendant's foreman that he could cross, was not defective, because not submitting knowledge of facts putting plaintiff on inquiry. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 166 S. W. 702.

Refusal of an instruction that, if he might have avoided collision by stopping and listening, he was guilty of contributory negligence defeating a recovery, held error. *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

Requested instruction as to contributory negligence held sufficient, in view of the evidence. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

283. — **Persons injured in operation of street railroads.**—In an action for injuries to plaintiff's wife in a collision between a street car and a vehicle in which she was riding, an instruction on contributory negligence held proper. *Kelly v. Dallas Consol. Electric St. Ry. Co.* (Civ. App.) 158 S. W. 221.

284. — **Discovered peril or last clear chance rule.**—When plaintiff seeks a recovery upon the issue of discovered peril as well as upon other theories, charges on contributory negligence should be limited to be considered only upon the other theories, as such defense cannot be urged to defeat liability arising by reason of discovered peril. *International & G. N. R. Co. v. Walters* (Civ. App.) 161 S. W. 916, judgment reversed on rehearing 165 S. W. 525.

It was not error to charge, in an instruction on discovered peril, that "after the motorman discovered the peril of deceased, if he failed to use all the means and appliances he had at command," etc., instead of charging that it was the motorman's duty to exercise ordinary care in using the means at hand, etc. *El Paso Electric Ry. Co. v. Davidson* (Civ. App.) 162 S. W. 937.

In an action for the killing of mules at a railroad crossing, held, on the evidence, that an instruction on the defendant's duty after its engineer discovered their peril was properly given. *Galveston, H. & S. A. Ry. Co. v. Templeton* (Civ. App.) 175 S. W. 504.

An instruction, in an action for injuries in being caught between stock cars suddenly moved, held not to submit the issue of discovered peril. *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822.

In an action against a railroad for a death, where there was evidence that the engineer discovered decedent sitting on the track, instruction, on discovered peril, failing to state that defendant was not required to stop its train until it was reasonably apparent that decedent probably could not or would not save himself, was error. *Gulf, C. & S. F. Ry. Co. v. Phillips* (Civ. App.) 183 S. W. 806.

In an action for damages to an automobile by collision with a street car, an instruction that, if after the motorman discovered the perilous condition of the automobile, he used all the means within his power to prevent the collision, then verdict will be for defendant was favorable to plaintiff. *Adams & Washam v. Southern Traction Co.* (Civ. App.) 188 S. W. 275.

285. — **Comparative negligence.**—Even though instruction that contributory negligence defeats a recovery may not be error prejudicial to an employe, the court should follow the statute (*Vernon's Sayles' Ann. Civ. St. 1914, art. 5246h*) under which such negligence merely diminishes the damages proportionately. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

287. **Conversion.**—An instruction, in an action against a gin company, held to place too great a burden upon the company. *Staley v. Colony Union Gin Co.* (Civ. App.) 163 S. W. 381.

288½. **Divorce.**—Though there was evidence of a number of acts of violence by the husband, the refusal of a charge that one act of personal violence by the husband may be sufficient cause for divorce held error, and an instruction that if plaintiff sought a divorce because of the influence of her mother, instead of the wrongs of defendant, to find for defendant was also erroneous as authorizing a verdict solely on the issue whether the mother induced the suit. *Powell v. Powell* (Civ. App.) 170 S. W. 111.

291. **False imprisonment and malicious prosecution.**—In action for malicious prosecution for theft of bale of cotton, instruction that relation of landlord and tenant, under which plaintiff claimed to have sold cotton to satisfy his landlord's lien, did not exist, held not objectionable under the evidence, nor did instruction that jury should consider only facts known to defendant when instituting criminal proceedings, in determining question of defendant's probable cause, improperly limit jury on question of malice. *Rainey v. Old* (Civ. App.) 180 S. W. 923.

292. **Fraud and undue influence.**—A charge, submitting the question whether a testatrix was under undue influence "at or before the time of the execution of the will" to such an extent as to induce her to make a disposition different from what she would have made had she been left free, correctly defined undue influence at the time of the execution of the will. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

Instructions in a will contest, where the only material issue was that of undue influence, held sufficiently definite to confine the jury to that one issue, and where the court defined undue influence to be such as to destroy the testator's free agency and prevent the exercise of his own will, an instruction, permitting a verdict for contestant if the will was procured by undue influence of the contestee, was not erroneous in failing to require a finding that such undue influence caused him to make his will, and that but for it he



would have made a different will. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed, 106 Tex. 322, 166 S. W. 1138.

Instruction to find for buyer for rescission and the amount of purchase price, if false and fraudulent representations were made by the seller, held not objectionable, as failing to hypothesize plaintiff's reliance on the representations and damage therefrom. *Underwood v. Jordan* (Civ. App.) 166 S. W. 88.

Instruction held to present fairly the issue of fraud under the policy by excessive demand in proof of loss. *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

In suit for rescission of a contract for exchange of land and for cancellation of plaintiff's deed, on the ground of fraud and mistake as to the character of defendant's land, a charge that if all of defendant's representations were true the verdict should be in his favor held not objectionable. *Kincaid v. Tant* (Civ. App.) 180 S. W. 1103.

**293. Fraudulent conveyances.**—In suit by the grantee of land to restrain sale on execution against the grantor, fraud being charged, issues of fraudulent intent and of notice and of market value of debtor's property and property received by him from plaintiff in exchange should have been submitted separately. *Citizens' Nat. Bank of Plainview v. Slaton* (Civ. App.) 189 S. W. 742.

**294. Statute of frauds.**—In an action for debt, where the pleadings and testimony presented the defense of the statute of frauds as to some of the items sued upon, the refusal of a requested charge correctly submitting that issue was erroneous. *Newman v. Bengé & Flemister* (Civ. App.) 167 S. W. 6.

**295. Homestead.**—Where the charge on defendant's claim that because the land was the grantor's homestead and his wife did not join, the conveyance to plaintiff did not pass title, directed a verdict for plaintiff in case the grantor upon removing from the land to another residence intended to make his second residence his home, is not erroneous, in using the word home instead of homestead, for the jury must so have understood it. *Johnson v. Conger* (Civ. App.) 166 S. W. 405.

**295½. Indemnity.**—Instruction in action for personal injuries by falling in coalhole negligently closed, held not error where it correctly stated certain conditions under which one defendant might recover from the other as a joint tort-feasor, but did not state that they were the only conditions. *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867.

**296. Insurance.**—In an action on a fire policy, an instruction defining total loss held sufficiently favorable to insurer. *Fire Ass'n of Philadelphia v. Strayhorn* (Civ. App.) 165 S. W. 901.

In a suit on a fire policy on household goods, instruction held to present fairly the issue of the effect of noncompliance with the policy as to proof of loss. *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

In an action on a fire insurance policy, void if additional insurance was taken out without consent, an instruction as to what constituted waiver of consent held misleading, and a requested instruction as to what constituted notice of an intention to take out additional insurance, and waiver was erroneously refused. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 668.

**297. Landlord and tenant.**—Where defendant under a modification of a rent contract was authorized to and did cancel the rent notes sued on, an instruction that the jury should allow plaintiff for the three years during which defendant used the plaintiff's property without complaint was erroneous and properly refused. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

In landlord's suit against tenant, instruction held not to have affirmatively stated any rule that lessor could, in bad faith, without excuse or justification, take advantage of word "deem" in lease to arbitrarily terminate it after fire injured the premises. *Land v. Johnson* (Civ. App.) 189 S. W. 337.

**298. Libel and slander.**—In action for libel, it was not error to refuse special charge defining actual malice. *Houston Chronicle Pub. Co. v. Quinn* (Civ. App.) 184 S. W. 669.

**300½. Mental incapacity.**—In an action to set aside a deed and a judgment confirming it because of insanity of the grantor, an instruction that the jury must find that the grantor was insane at the time of the conveyance and also when the judgment was rendered; that the grantee had knowledge thereof, and fraudulently procured the conveyance—was as favorable to the defendant as he could ask. *Pyle v. Pyle* (Civ. App.) 159 S. W. 488.

In proceedings to contest a will on the grounds of mental incapacity, an instruction held to submit the issue. *Kell v. Ross* (Civ. App.) 175 S. W. 752.

A charge on contracting capacity that the question to decide was whether there was sufficient mental soundness and capacity to understand the contract in detail, and as a whole to appreciate values and obligations held not overextracting. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

**302. Negligence in general.**—Instructions that proof of certain facts would show negligence held proper. *St. Louis Southwestern Ry. Co. of Texas v. McGrath* (Civ. App.) 160 S. W. 444.

In an action for negligent death in collision between vehicles, caused by the viciousness of a team of mules belonging to defendant, a corporation, an instruction authorizing recovery if the team was uncontrollable, and was known to be so by defendant, or would have been known to be so by the exercise of ordinary care, held to properly predicate liability on the negligence of the company alone. *American Express Co. v. Parcarello* (Civ. App.) 162 S. W. 926.

Instruction held not so erroneous as to require a reversal, though it did not expressly state the acts that the jury might consider as negligence. *Missouri, K. & T. Ry. Co. v. Wallace* (Civ. App.) 167 S. W. 168.

Instruction held properly refused, because not sufficiently full as to what character of diligence constituted ordinary care. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

In action for value of mule struck by automobile while the mule was running loose on public highway in violation of stock law, instructions held improperly refused as clearly presenting the issue of gross negligence. *Dillon v. Stewart* (Civ. App.) 180 S. W. 648.

Instruction that if jury failed to find that placing of tank or leaving it where accident occurred was negligence the finding should be for defendant held to present defense that defendant did not place the tank there, and could not have known that it was placed there by reasonable care, only negatively if at all. *Wichita Falls Traction Co. v. Adams* (Sup.) 183 S. W. 155.

In action for negligent injuries, an instruction that if the jury believed that plaintiff's injury was the proximate result of his own negligence and not due to the negligence of the defendant to find for defendant, was error as requiring the jury, in order to find for defendant, to find not only plaintiff's contributory negligence, but also absence of any negligence of defendant. *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 189 S. W. 284.

In action for malpractice, assignment of error complaining of court's definition of negligence, which is but verbal criticism and without substantial merit, will be overruled. *Miles v. Harris* (Civ. App.) 194 S. W. 339.

In action for damages to automobile from collision, held, that instruction given was not erroneous, as stating that it was defendant's duty to turn onto generally traveled detour in order to turn to right. *Auto Sales Co. v. Bland* (Civ. App.) 194 S. W. 1021.

**303. Injuries to employes.**—In a servant's action for personal injuries, a charge affirmatively presenting defendant's theory, based on the foreman's negligence, and in no way limiting the right of recovery, was not ground for reversal because it failed to define particularly the foreman's duties. *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063.

Where, in an action for injuries to plaintiff while assisting in setting in place an electric light pole, the court submitted the issue of the employer's negligence in selecting the tools for plaintiff and his coemployes, refusal to direct the jury not to consider as a ground of negligence the failure to select another method of doing the work was not erroneous. *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 680.

In an action for injuries to a railroad brakeman, an instruction as to negligence held not erroneous under the evidence as predicated negligence on a necessary act which was done in the usual and customary manner. *Atchison, T. & S. F. Ry. Co. v. Hargrave* (Civ. App.) 177 S. W. 509.

In servant's action for injury, refusal of defendant's requested special issue held not error, where the question was one of evidence merely bearing on the issues submitted and determined. *Thurber Brick Co. v. Matthews* (Civ. App.) 180 S. W. 1189.

Refusal of instruction predicated master's liability for injuries to servant on question of ordinary care held not error, where the question was the duty of the master to appreciate the facts which caused the injury, and not whether he used ordinary care in the premises. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 181 S. W. 238.

**304. — Appliances and places for work.**—In a brakeman's action for injuries from a defective step on the tender, instruction held not objectionable as authorizing a verdict for plaintiff, even though defendant had exercised ordinary care to furnish a proper step and keep it in repair. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

In employe's action for injuries, held, that the court should have charged that it was the employer's duty to exercise ordinary care to furnish reasonably safe appliances and to keep them in condition. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 163 S. W. 439.

In an action for injuries due to defective tongs used in unloading from a ship, an instruction calculated to lead the jury to believe that plaintiff could not recover if the tongs became defective while the ship was being unloaded held properly refused. *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809.

An instruction held proper as not having predicated liability of defendant railroad on the sole ground that it had equipped its locomotive with a "straight" air brake. *Texas & P. Ry. Co. v. Matkin* (Sup.) 174 S. W. 1098, affirming judgment (Civ. App.) 142 S. W. 604.

Instruction held not objectionable as imposing upon defendant a greater burden than was required by law with regard to what it must do to provide a safe place for work. *Southwestern Portland Cement Co. v. Moreno* (Civ. App.) 181 S. W. 221.

**305. — Knowledge of defect or danger and duty as to inspection.**—An instruction, in an action for a railroad engineer's death by derailment after a storm, that if decedent knew of the company's rules requiring an inspection of the roadbed, etc., after rains he could rely thereon and assume that the track, etc., was safe, in the absence of warning, held erroneous as requiring the company to inspect the roadbed after the storm, regardless of the time intervening between the rain and the accident. *Texas Cent. R. Co. v. Neill* (Civ. App.) 159 S. W. 1180.

Where defendant failed to inspect hand car, an instruction that it was defendant's duty to inspect, instead of giving general charge on duty to furnish safe appliances, held proper. *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Civ. App.) 180 S. W. 300.

**306. — Operation of locomotives, trains, or cars.**—In an action for injuries to a railroad construction employe, a charge that it was the duty of the engineer and fireman in charge of the train, before starting the same, to give warning, such as by ringing the bell or blowing the whistle, is not erroneous, as requiring warning to be given in one of those two ways. *Angelina & N. R. Ry. Co. v. Due* (Civ. App.) 166 S. W. 918.

In an action for the death of an engineer caused by the failure of switch tenders to throw the switch, a charge that if the engineer gave the switch tender the signal that his train was approaching, etc., and the tender negligently failed, etc., to find for plaintiff, was not erroneous in not specifying the kind of signal. *Trinity & B. V. Ry. Co. v. Dodd* (Civ. App.) 167 S. W. 238.

Though in an action for the death of a railway employe, who fell in front of a moving train, the facts as to his peril were uncontroverted, the charge should have given the jury the hypothesis upon which they were to measure what would be ordinary care. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

Where a car inspector was injured while inspecting a locomotive on a turntable which was moved without warning in spite of custom to give warning if any one could be seen about the engine, it was error to refuse to instruct that the employe could not recov-

er if, had the turntable operator looked, he could not have seen the employé. Galveston, H. & S. A. Ry. Co. v. Muhlemann (Civ. App.) 182 S. W. 448.

In an action for injuries to a fireman, an instruction as to the facts the jury must find to render a verdict for plaintiff, held erroneous for omitting reference to the engineer's duty to know that the fireman was in a place of danger. Atchison, T. & S. F. Ry. Co. v. Stevens (Civ. App.) 192 S. W. 304.

In section hand's action for injuries, instruction on alleged negligence of train crew in not giving warning of approach of train held likely to lead jury to believe negligent failure of train crew to discover hand car was itself proximate cause of injury. Chicago, R. I. & G. Ry. Co. v. Mitchum (Civ. App.) 194 S. W. 622.

307. — **Promulgation and enforcement of rules.**—In an action for injuries received by a freight handler, an instruction as to the duty of the company to furnish safe means and manner of work held not erroneous as requiring it to prescribe rules and regulations for the doing of such work. St. Louis & S. F. R. Co. v. Cox (Civ. App.) 159 S. W. 1042.

308. **Warning and instructing servants.**—Instruction as to defendant's failure to warn of dangers must be qualified by advising as to plaintiff's knowledge of the dangers, or his acquiring such knowledge by exercising ordinary care. Stockey & White v. Mears (Civ. App.) 181 S. W. 774.

310. — **Negligence of fellow servants.**—Where the jury must have understood from the court's charge that they could not find for an employé suing for a personal injury unless they found that a coemployé had authority to hire and discharge him, and the court directed a verdict for the employer if the coemployé did not have authority to control the employé and to hire and discharge him, the issue of vice principal was sufficiently presented. Kirby Lumber Co. v. Williams (Civ. App.) 159 S. W. 309.

In employé's action for injuries, an instruction as to who was a vice principal and as to the master's responsibility for his orders, acts, directions, instructions, or conduct held proper. Reliable Steam Laundry v. Schuster (Civ. App.) 159 S. W. 447.

Where there was no evidence of negligence of any fellow servants except two Mexicans, an instruction authorizing recovery if the injury resulted from negligence of fellow servants, without limiting it to negligence of the Mexicans, was not erroneous. Galveston, H. & S. A. Ry. Co. v. Reinhart (Civ. App.) 182 S. W. 436.

311. **Injuries to passengers.**—Breach of contract of carriage not involving injury to the person, see ante, note 265.

A special charge that common carriers are held to the highest degree of care in operation for the protection of passengers was correct so far as it went. St. Louis Southwestern Ry. Co. v. Moore (Civ. App.) 161 S. W. 378.

An instruction, in a passenger's action for personal injuries from not furnishing sufficient exits for alighting, that if some other person not in defendant's employment informed plaintiff that she could not leave by certain doors, because they were closed, such statement did not bind defendant was not sufficiently full, as not limiting the effect of such statements to the person making them, but another instruction using the term "safe accommodations to alight," held reasonably accurate in the use of such term. Ft. Worth & D. C. Ry. Co. v. Taylor (Civ. App.) 162 S. W. 967.

Where plaintiff testified that he was injured when the train, after stopping for passengers to alight, jerked in some way, throwing him against a seat, the use of the terms "suddenly moved, lurched, and jerked" in a charge on negligence, which were also used in the petition, held not erroneous. St. Louis Southwestern Ry. Co. of Texas v. Farris (Civ. App.) 166 S. W. 463.

In an action for injuries to a street car passenger thrown from the car while running on a curve, a charge held to properly submit the issue of the negligence of the conductor in permitting the exit door to remain open. Dallas Consol. Electric St. Ry. Co. v. Stone (Civ. App.) 166 S. W. 708.

In an action by one thrown off of the steps of a car which he was entering, a charge that plaintiff was entitled to enter if not interfering with other passengers, held not erroneous. St. Louis Southwestern Ry. Co. of Texas v. Hassell (Civ. App.) 177 S. W. 518.

An instruction making it a condition to perfect self-defense, for an assault by a brakeman on a passenger, that the passenger's prior assault on him had not been provoked by his wrongful conduct, held proper under the evidence. St. Louis Southwestern Ry. Co. of Texas v. Huddleston (Civ. App.) 178 S. W. 704.

An instruction as to the duty of a carrier to a passenger can be given without the use of the word "possible," as in the expression, "the highest degree of care possible." San Antonio, U. & G. R. Co. v. Vivian (Civ. App.) 180 S. W. 952.

Instructions that passenger riding in freight train assumes risk of dangers arising from ordinary operation of train, but not those arising from negligent operation of train, though not telling jury of the greater dangers normally incident to careful handling of freight trains, held not erroneous. Paris & G. N. Ry. Co. v. Atkins (Civ. App.) 185 S. W. 306.

In an action for injuries to a passenger on falling from defendant's street car, instructions that plaintiff could recover if his fall was not due to a sudden movement of car held to sufficiently present affirmative defense that there was no such movement. Northern Texas Traction Co. v. Evans (Sup.) 193 S. W. 1067.

313. **Injuries at railroad crossings.**—An instruction, in an action for damages to property from being struck at a street crossing by a train, held not open to the objection that it permitted the jury to find negligence solely upon the ground that standing cars were so placed by defendant as to obstruct plaintiff's view. Missouri, K. & T. Ry. Co. of Texas v. Burnett (Civ. App.) 162 S. W. 458.

Instruction as to duty of railroad company to maintain watchman at crossing, and liability for failure to do so, held not unintelligible, misleading, or confusing, nor was a reference to the circumstances, conditions, and danger "at and before" the time of the accident erroneous or harmful to the company. St. Louis Southwestern Ry. Co. of Texas v. Waits (Civ. App.) 164 S. W. 870.

An instruction held not objectionable as imposing a greater burden on defendant than the law imposed. Texas & N. O. R. Co. v. Cunningham (Civ. App.) 163 S. W. 428.

In a pedestrian's action for injuries when struck by railway cars, a charge that if

the railway had no watchman on the cars and gave no signal by bell or whistle, it was liable, even though it had exercised ordinary care in other respects, and the plaintiff was adequately warned of the danger in crossing the track, was erroneous. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

In action for personal injuries alleged to have been caused by defendant's negligence in blocking a street with its cars and moving them upon plaintiff without warning, instruction when as a whole held not subject to objection that jury is permitted to find for plaintiff upon theory that, even if crossing was blocked for less than five minutes allowed by ordinance, there would be a duty on the part of defendant to anticipate presence of trespassers at or near the point where plaintiff was injured. *Houston Belt & T. Ry. Co. v. Price* (Civ. App.) 192 S. W. 359.

**315. Injuries to animals on or near railroad tracks.**—In an action for injuries to plaintiff's mule at a railroad cattle guard, an instruction as to the facts to be found before plaintiff could recover held more favorable to defendant than it was entitled to. *Stephenville N. & S. T. Ry. Co. v. Schrank* (Civ. App.) 175 S. W. 471.

In an action against a railroad for the killing of cattle, a charge, authorizing verdict for plaintiff, held erroneous under art. 6603, as authorizing verdict against the company though the cattle were killed at places where it was not bound to fence, and in placing too great a burden on the operatives of the railroad company. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

**316. Injuries by fire set out in operation of railroads.**—In an action against a railroad company for damages for fire which ignited the grass on plaintiffs' land, an instruction held not misleading. *Houston & T. C. R. Co. v. Ellis* (Civ. App.) 160 S. W. 606.

**317. Injuries in operation of street railroads.**—Passengers, see ante, note 311.

An instruction, in an action for decedent's death in a collision between a street car and his automobile held not erroneous. *El Paso Electric Ry. Co. v. Davidson* (Civ. App.) 162 S. W. 937.

It was error to give a charge making defendant liable, not only if its servants operating the car did in fact discover plaintiff's position before it was too late to stop it, but also if they, "by the exercise of ordinary care, could have discovered him in a position of danger." *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

**318. Injuries from obstruction or diversion of water.**—In an action against a railroad company for failing to provide proper culverts, an instruction to find the failure of defendant to properly construct such culverts, sluices, etc., before returning a verdict for plaintiff was equivalent to charging that they must find defendant negligent before they could find for plaintiff. *Stephenville N. & S. T. Ry. Co. v. Walton* (Civ. App.) 160 S. W. 651.

**319. Injuries from live electric wires.**—In an action against a light company and a city for injury from an electric shock, the company's requested charge, purporting to submit a definition of active negligence, held properly refused. *McKinney Ice, Light & Coal Co. v. Montgomery* (Civ. App.) 176 S. W. 767.

**325. Partnership.**—An instruction that if the purchase of horses by plaintiff was under an agreement by which defendant was to have a third interest upon paying plaintiff a third of the price, unless he paid within a reasonable time, he would not be a partner, was not erroneous as authorizing a finding that failure to so pay would dissolve the partnership, but a requested instruction submitting the issue of partnership was defective for not stating what would constitute a partnership. *Coody v. Shawver* (Civ. App.) 161 S. W. 935.

**326. Proximate cause.**—In an action for injuries to person who attempted to pass between cars of train blocking crossing, instruction held not such as to mislead jury to believe that they could not consider the blocking of the street as a proximate cause alone or in conjunction with the starting of the train without a signal. *Englefield v. International & G. N. Ry. Co.* (Civ. App.) 159 S. W. 1033.

Where there was an unreasonable delay in shipping plaintiff's horses, and evidence that the delay tended to cause them to contract "shipper's cold," a request to charge that there should be a verdict for defendant if the horses were damaged by such disease, without reference to the causes thereof, was properly refused. *Houston & T. C. R. Co. v. Meadors* (Civ. App.) 169 S. W. 1106.

In an action by a husband for injuries to the wife, in which the wife claimed that she had suffered a miscarriage, a charge that defendant was not liable if a physician had caused the miscarriage is too broad, since it might have been necessary in order to save her life. *Galveston, H. & S. A. Ry. Co. v. Bibb* (Civ. App.) 172 S. W. 178.

In an action for damages for the flooding of land, a charge held to sufficiently present the issue that defendant's obstruction of the river bed did not cause the overflow. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

Refusal of instruction as to liability of one defendant to the other if his act in placing a cover in a sidewalk coalhole was negligent and proximately caused injuries to a pedestrian, held erroneous, since in law, if the placing was negligent, it was the proximate cause. *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867.

In an instruction in action for death of a person injured in a railway crossing accident, the words "negligence without which he would not have been injured" mean negligence proximately causing the injury. *Texas & P. Ry. Co. v. Miles* (Civ. App.) 192 S. W. 1138.

In action for injuries when horse was frightened by steam exhaust, instruction on anticipation of accident that method of construction and operation of cotton gin might probably cause horses of ordinary gentleness to be frightened did not import mere possibility, and was correct. *Scott v. Shine* (Civ. App.) 194 S. W. 964.

In action for damages for personal injuries in collision between buggy and defendant's street car, instruction held to sufficiently require jury to find that failure to give warning of street car's approach was proximate cause of injury. *Southwestern Gas & Electric Co. v. Duke* (Civ. App.) 194 S. W. 1010.

**328½. Ratification.**—Instruction, in action to foreclose a vendor's lien, as to ratification by defendant, a surviving wife and sole heir, of contract of deceased husband for

exchange of lands sought to be rescinded for insanity held properly refused, where it omitted the essential element of knowledge of previous conditions. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

329. **Rescission and cancellation.**—In an action on purchase-money notes and for the foreclosure of a vendor's lien, instructions held objectionable, for failing to make the jury understand that unreasonable delay on the part of the purchaser in complaining of fraud was an absolute defense to his demand for rescission. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

333. **Title, ownership, and possession.**—In trespass to try title, where plaintiff claimed an interest in land acquired by an attorney under a contract for a conditional fee, and where it did not appear that associated attorneys were to share with such attorney, held, that an instruction that plaintiff on recovery should be charged with the share of such associated attorneys was as favorable to defendant as he was entitled to under the facts. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

In trespass to try title by one holding a certificate of purchase for school lands against a subsequent applicant prior to plaintiff's proof of occupancy, instruction held not to authorize a recovery by defendant without a finding that he actually settled upon and was in good faith residing on the land as a home prior to the date of his application, and a requested instruction as to abandonment by defendant was properly refused, since the only question involved was whether plaintiff was an actual settler. *Patrick v. Barnes* (Civ. App.) 163 S. W. 408.

335. **Trusts.**—In an action against a testamentary trustee to recover for care of the beneficiary under a trust providing for maintenance for life and expenses of last illness, instruction as to plaintiff's right to recover held not erroneous, or at least favorable to defendant. *McLean v. Breen* (Civ. App.) 183 S. W. 394.

### (C) Damages and Amount of Recovery.

338. **In general.**—Instruction as to measure of recovery in action to recover the penalty under Rev. St. 1911, art. 6594, of \$50 a week for failure to maintain water-closets within a reasonable and convenient distance of a depot held not calculated to induce a compromise. *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 194 S. W. 462.

339. **Double recovery.**—An instruction that the jury should allow plaintiff a sum which will compensate him for time lost, and for time plaintiff will lose in the future, and for his decreased earning capacity, if any, and present and future mental suffering held to permit double recovery. *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied 106 Tex. 160, 160 S. W. 471.

Instruction as to measure of damages for delay in transportation of cattle held erroneous, as authorizing double recovery for the decline in price. *Ft. Worth & D. C. Ry. Co. v. Morgan* (Civ. App.) 179 S. W. 901.

In an action against a railroad for damage to a shipment of live stock instruction authorizing double recovery was erroneous. *Kansas City, M. & O. Ry. Co. v. Russell* (Civ. App.) 184 S. W. 299.

In an action for breach of marriage contract, an instruction held erroneous as authorizing recovery of double damages for the seduction of plaintiff by means of the promise to marry. *Huggins v. Carey* (Sup.) 194 S. W. 133.

340. **Speculative and future or permanent damages.**—The rule for ascertaining the sum to be awarded as damages for future impairment of earning capacity is one of law, of which the jury cannot be presumed to know, so that the court should carefully instruct thereon. *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183.

An instruction, in a personal injury action, that in estimating damages the jury could consider "the probable effect in the future upon" plaintiff's health was defective for not limiting such damages to such as were "with reasonable probability likely to result." *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

Where the evidence does not conclusively show that plaintiff has fully recovered, it is not error to give an instruction which submits prospective loss of time as an element of the damages recoverable for the injuries. *Davis, Pruner & Howell v. Woods* (Sup.) 180 S. W. 100.

Giving instruction that plaintiff could recover compensation "for any loss of time which he \* \* \* will probably sustain \* \* \* by reason of his diminished capacity, if any, to earn money" held not error, though the evidence shows that, excepting for loss of an arm, he has fully recovered. *Id.*

A requested instruction to allow no conjectural damages for impairment of physical condition is properly refused, because prospective damages, where the injury is permanent, is necessarily uncertain. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 191 S. W. 374.

342. **Mitigation of damages and reduction of loss.**—An instruction, if plaintiff's negligence and defendant's negligence were concurrent proximate causes of the injuries, plaintiff's damages should be diminished proportionately to the amount of negligence attributable to him held not affirmatively erroneous or misleading. *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

An instruction precluding recovery of any damages if plaintiff could have diminished them is error. *Donada v. Power* (Civ. App.) 184 S. W. 793.

343. **Injuries to the person.**—A charge that the jury should assess damages at such sum as will reasonably compensate plaintiff for physical pain and the diminution of earning capacity directs the award of such sum as paid presently will compensate plaintiff for the injuries. *Texas & Pacific Coal Co. v. Choate* (Civ. App.) 159 S. W. 1058.

Where evidence as to character and extent of employé's injuries was conflicting, instruction to allow such sum as would compensate him "for the injuries complained of" held erroneous. *Houston Belt & Terminal Ry. Co. v. Montello* (Civ. App.) 165 S. W. 540.

In a miner's action for injuries, a charge after telling the jury specifically and correctly what they might consider in estimating damages, which also stated they might consider other facts in evidence, if any, held not erroneous. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

346. **Mental suffering.**—An instruction on the question of mental anguish resulting from plaintiff's inability to properly embalm and bury his wife as a result of failing to receive an answer to a telegram held not affirmatively erroneous or misleading. *Western Union Telegraph Co. v. McFarlane* (Civ. App.) 161 S. W. 57.

347. **Injuries resulting in death.**—An instruction, in a father's action for his son's death, held erroneous as preventing the jury from passing upon the amount which would, if now paid, compensate plaintiff for the loss. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 163 S. W. 621.

Where, in action for death, court submitted issue as to amount which, paid then, would be equal to the pecuniary benefit, instruction as to ascertaining the present worth of anticipated contributions held not necessary. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 172 S. W. 984.

Instruction as to damages for death of infant held erroneous for failure to exclude damages for grief, loss of society, and mental pain and anguish. *Houston & T. C. R. Co. v. Gant* (Civ. App.) 175 S. W. 745.

In action for death of child, instructions as to measure of damages held proper. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

349. **Breach of contract—Contract of carriage.**—In an action for injuries to a shipment of cattle, an instruction that the measure of damages was the difference between their market value as they should have arrived and as they did arrive was erroneous, if there was no market value at the place of destination. *Missouri, K. & T. Ry. Co. of Texas v. Mulkey & Allen* (Civ. App.) 159 S. W. 111.

An instruction, in an action for damages to a piano in transit, that if it was injured by defendant's negligence the jury should find for plaintiff the difference in its cash market value in the condition in which it was delivered to it if delivered in good condition, and "said piano should have arrived in at Dallas, the difference in" its cash market value in the condition in which it did arrive at Dallas, held not erroneous because of the quoted part. *Missouri, K. & T. Ry. Co. of Texas v. Western Automatic Music Co.* (Civ. App.) 161 S. W. 380.

In an action against a carrier for damages to cattle by delay, where there was evidence that a train wreck, and consequent delay and confinement for 12 hours, caused depreciation, an instruction that the plaintiff was entitled to recover for extra shrinkage and bad appearance, although he was able to sell immediately upon arrival, was proper. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

In a suit for injury to live stock in transit, a charge to consider the extent of recovery of the cattle from their injuries, and if recovery was complete, to find for the carrier, is not objectionable as confining consideration to complete recovery. *Panhandle & S. F. Ry. Co. v. Norton* (Civ. App.) 188 S. W. 1011.

351. — **Telegraphic and telephonic service.**—An instruction, in an action for delay in the delivery of a message, held objectionable as imposing on the company the absolute duty to deliver the message in a reasonable time. *Western Union Telegraph Co. v. Kersten* (Civ. App.) 161 S. W. 369, rehearing denied 161 S. W. 1091.

355. **Conversion.**—There being some evidence that the goods had a market value, an instruction that, if the jury found a market value, such value with interest was plaintiff's damage; otherwise they should allow the value of the goods to plaintiff was proper. *Texas Warehouse Co. v. Imperial Rice Co.* (Civ. App.) 164 S. W. 396.

357. **Libel and slander.**—Where an article is in evidence and is libelous per se, the court cannot direct a verdict for defendant for failure to prove damage. *Chapa v. Abernethy* (Civ. App.) 175 S. W. 166.

In an action for damages for publication libelous per se, an instruction that the jury might find for plaintiff such damages as from the evidence they believed he suffered was proper, but an instruction submitting as special damages items which would properly come under the head of general damages was technical error. *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45.

361. **Exemplary damages.**—See *Cotton v. Cooper* (Civ. App.) 160 S. W. 597; *McKee v. Garner* (Civ. App.) 168 S. W. 1031.

### III. APPLICABILITY TO PLEADINGS AND EVIDENCE

362. **Abstract instructions in general.**—An instruction submitting to the jury an abstract principle of law held properly refused. *Hammel v. Benton* (Civ. App.) 162 S. W. 34.

363. **Application of instructions to case in general.**—Trial court is never justified in submitting any issue to the jury unless it is raised by both pleadings and proof. *Bruns Kimball & Co. v. Amundsen* (Civ. App.) 188 S. W. 729; *Martin v. Stires* (Civ. App.) 171 S. W. 836.

Instructions which are not supported by evidence or based on the issues are properly refused. *Crass v. Adams* (Civ. App.) 175 S. W. 510; *Ablon v. Wheeler & Motter Mercantile Co.* (Civ. App.) 179 S. W. 527; *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691; *Western Union Telegraph Co. v. Kersten* (Civ. App.) 161 S. W. 369.

Where the instructions were not incorrect or misleading, the fact that they included matters not necessary to enable the jury to decide the case is no ground for complaint. *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729.

An instruction eliminating the grounds of recovery and submitting issues not made by the pleadings nor sustained by the evidence is properly refused. *Gulf, C. & S. F. Ry. Co. v. J. A. Bowers & Son* (Civ. App.) 175 S. W. 861.

A charge on the duty of a railroad company to give the crossing signals prescribed by *Vernon's Sayles' Ann. Civ. St. 1914, art. 6564*, is not appropriate in an action for the

killing of cattle, unless they were killed on a crossing. Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co. (Civ. App.) 179 S. W. 1104.

364. **Pleadings and issues.**—An issue not raised by the pleading should not be submitted. World's Special Films Corporation v. Fichtenberg (Civ. App.) 176 S. W. 733; Petty v. City of San Antonio (Civ. App.) 181 S. W. 224.

The refusal of instructions submitting questions not in issue held proper. Rodgers v. Texas & P. Ry. Co. (Civ. App.) 172 S. W. 1117; Galveston, H. & S. A. Ry. Co. v. Roemer (Civ. App.) 173 S. W. 229.

366. — **Nature of action or issue in general.**—Instruction that the undisputed evidence showed that defendant, in an action for fraud, had not guaranteed the solvency of notes given to plaintiff as consideration for a contract held properly refused as not being within the issues. Benton v. Kuykendall (Civ. App.) 160 S. W. 438.

The question of estoppel not being raised by the pleadings, an instruction thereon is properly refused. Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin (Civ. App.) 179 S. W. 541.

In action by former partner for share of commissions on deal completed after dissolution on an issue as to whether deal was pending at time of dissolution definition of "pending" held sustained by the petition. Daniel v. Lane (Civ. App.) 179 S. W. 906.

A statement of a contract in plaintiff's petition not being pleaded to by defendant as required by Vernon's Sayles' Ann. Civ. St. 1914, art. 1902, was in the case as admitted, and an instruction submitting its truth or falsity to the jury was not error. American Mfg. Co. v. O. C. Frey Hardware Co. (Civ. App.) 180 S. W. 956.

Refusal of instruction as to mental capacity at time will not offered for probate was executed held not error. Wolnitzek v. Lewis (Civ. App.) 183 S. W. 819.

In proceedings on judgment creditor's motion against constable and sureties on bond to recover against them amount of plaintiff's judgment, where there were no pleadings upon which to base a requested instruction, the court did not err in refusing it. Sharp v. Morgan (Civ. App.) 192 S. W. 599.

367. — **Issues withdrawn or otherwise eliminated.**—Where in an action, aided by sequestration, to recover property and damages, defendant replevied the property, but at the trial admitted the title was in plaintiff and abandoned claim thereto, the bare legal right of defendant to replevy was not an issue so as to entitle him to an instruction thereon. Banner v. Thomas (Civ. App.) 159 S. W. 102.

In suit to enforce a lien for materials, issue as to whether defendant company had been in possession of the park property on which the material was used, since a certain date held immaterial. Cleburne St. Ry. Co. v. Barber (Civ. App.) 180 S. W. 1176.

368. — **Actions relating to property and for injuries thereto.**—Where a husband, sued for trespass by his wife from whom he had separated and to whom he had transferred property for her support, alleged fraud in the procurement of the transfer, and asked for its cancellation, instructions that a lien reserved in the contract in favor of defendant's children by another wife, and plaintiff's promise to pay it, were inoperative, and that defendant was still liable for the support of their children, held foreign to the issues. Versyp v. Versyp (Civ. App.) 159 S. W. 165.

Where the petition, in a suit to set aside a deed, was based on a fraudulent concealment of facts, an instruction submitting the issue as to concealed facts was not misleading, whether the word "concealment" was used in the petition or not. McIndoo v. Wood (Civ. App.) 162 S. W. 488.

In an action for conversion of a rice mixer, there being no pleading to support a recovery of charges for rice stored with the machine, an assignment that the court erred in charging that defendant could not hold the mixer for storage charges on other property was unsustainable. Texas Warehouse Co. v. Imperial Rice Co. (Civ. App.) 164 S. W. 396.

In replevin, where defendant set up as a counterclaim plaintiff's breach of a construction contract, but did not allege plaintiff's conversion of material deposited on the lot where the building was to be erected, the submission to the jury of the question whether plaintiff was liable for the conversion was erroneous. Gordon v. Ratliff (Civ. App.) 169 S. W. 372.

Refusal of instruction on sufficiency of evidence as to line of old grant held not erroneous, where giving it would have nullified the issues submitted and would have been contrary to the evidence in the cause. Crosby v. Stevens (Civ. App.) 184 S. W. 705.

369. — **Contracts and actions relating thereto in general.**—In an action upon a collateral agreement for a loan contained in a contract subscribing for stock in an insurance company, an instruction allowing a recovery of the money paid for the stock from the promoters if the company had not accepted the contract in good faith held improper as submitting an issue not made by the pleadings, which alleged an acceptance of the contract by the company and a refusal thereafter to make the loan. American Home Life Ins. Co. v. Compere (Civ. App.) 159 S. W. 79.

Where one of the defendants was liable only as a surety, it is error to give instructions allowing the jury to find against him either as a principal or surety. Willingham v. Brown (Civ. App.) 163 S. W. 107.

Where a broker's contract of exchange of property was unconditional and carried out by the purchaser, an instruction that if the purchaser failed to carry out the contract, through no fault of defendant, he could not recover was properly refused. Tevebaugh v. Smith Land Co. (Civ. App.) 163 S. W. 664.

In an action for services, instructions held not erroneous under the pleading for failure to charge that, if defendant had paid plaintiff for all services rendered under the first contract of employment, he could not recover thereon. Red Mineral Springs Development Co. v. Davis (Civ. App.) 164 S. W. 427.

In action for breach of contract to keep a road under a bridge free from inflammable material and to indemnify for damage from fire, instructions resting the liability on negligence held erroneous. Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co. (Civ. App.) 171 S. W. 1103.

In broker's action for commissions, objection to instruction on ground that the pleadings raised no issue as to failure to consummate deal being due to defendants' fault held

unfounded. *Levy v. Dunken Realty Co.* (Civ. App.) 179 S. W. 679, dehying rehearing *Levy v. Duncan Realty Co.*, 178 S. W. 984.

In action on contract, even if plaintiff's testimony showed modification of original contract, the refusal of his requested charge thereon was proper, where there was no pleading by plaintiff authorizing its submission. *Tyler Box & Lumber Mfg. Co. v. City Nat. Bank of Paris* (Civ. App.) 185 S. W. 352.

370. — **Contracts of carriage.**—Where it is alleged that the damage to a shipment of bananas resulted from negligence and delay, followed by specific allegations ascribing the damages to the failure to stop the car as per contract, it is error to submit to the jury as a separate ground of recovery the failure to ice the car. *Houston & T. C. R. Co. v. Corsicana Fruit Co.* (Civ. App.) 170 S. W. 849.

In view of answer and supplemental petition, held that, in an action for damages to shipment, it was not error to define negligence, though original petition was based on breach of contract. *Ft. Worth & D. C. Ry. Co. v. Morgan* (Civ. App.) 179 S. W. 901.

In suit for damages to shipment of cattle, defendant, under general denial of its negligence, held entitled to instruction that no damages could be recovered for injuries due to the inherent nature or proper vice of the animals. *St. Louis Southwestern Ry. Co. of Texas v. Kerr* (Civ. App.) 184 S. W. 1058.

In an action for damages to shipment of live stock, requested instruction that carrier's receivers were required by federal statutes to give the train crew not less than 10 hours' consecutive rest was properly refused, because irrelevant to the issues. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

371. — **Telegraphic and telephonic service.**—Where plaintiff claimed damages for defendant's failure to deliver on the 15th a death message, but asserted no damage for subsequent delay, and the evidence showed that the message did not reach the delivering office until the 16th, a charge to find for plaintiff if defendant was negligent in delivering the message after receipt at destination was erroneous because it might have caused the jury to believe that the court was of the opinion that the message arrived on the 15th and tended to allow a recovery for negligence not counted upon. *Western Union Telegraph Co. v. Cathey* (Civ. App.) 166 S. W. 714.

In action for negligent failure to deliver a message, instruction permitting recovery though the message could not have been delivered at the address, on the theory that the sender told the agent plaintiff might be at another place, held erroneous, as on an issue not made by the pleadings. *Western Union Telegraph Co. v. Fabian* (Civ. App.) 189 S. W. 1008.

372. — **Contracts of sale and actions relating thereto.**—In an action by the purchaser of seed oats for damages for fraud in misrepresenting the quality and variety agreed to be delivered, a request to charge as to what would constitute a warranty was properly refused. *Handy v. Roberts* (Civ. App.) 165 S. W. 37.

In action for balance of a bill for lumber, furnished to build a house, held that, upon the pleadings, instructions as to defendant's waiver or estoppel in respect to the size of the house actually built should not have been given. *Scruggs v. E. L. Woodley Lumber Co.* (Civ. App.) 179 S. W. 897.

373. — **Actions on insurance contracts, policies, or certificates.**—In insurance agent's action for amount of first premium, wherein defendant did not contend that condition precedent to his acceptance had not been complied with, there was no error in omitting reference thereto in the charge. *Just v. Herry* (Civ. App.) 174 S. W. 1012.

In an action on an accident insurance policy, a requested charge as to partial disability was properly refused, where the only issue raised by the pleadings was as to total disability. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

374. — **Actions on notes.**—In an action on certain rent notes for a pumping plant and canal, a request to charge that if plaintiff promised to forego rents if salt water appeared in the river at the plant, and salt water did appear, but defendant continued to cultivate the premises without electing to rescind, the jury should find for plaintiff held properly refused as not within the issues. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

A bank which acted as liquidating agent for another bank, held not entitled, in a suit as absolute owner upon a note given by the stockholder in the defunct bank, to an instruction which would enable it to recover if the note was held as security merely. *Farmers' & Merchants' Bank v. Owens* (Civ. App.) 178 S. W. 734.

The only real issue being whether a note was delivered on condition that it should not be paid unless B.'s note was paid, an issue of whether B.'s note was paid, when it clearly was not, unless there was collusion, not claimed, was error. *Hamilton v. Hannus* (Civ. App.) 185 S. W. 938.

375. — **Actions for personal injuries in general.**—In an action for injury to a pedestrian who fell into a coalhole, error cannot be predicated on the use by the court in an instruction of the word "slipped," instead of the word "tilted," as used in the petition, where the evidence on the nature of the injury was clear, and no prejudice could have resulted. *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867.

376. — **Injuries in operation of railroads in general.**—In an action for injuries to plaintiff while leading his horse over a defective railroad crossing at the suggestion of the foreman of defendant's repair crew, an instruction authorizing a recovery if the foreman's invitation for plaintiff to cross was negligent, and the proximate cause of the injury, held erroneous, where plaintiff's petition counted exclusively on defendant's failure to perform its duty to provide a safe crossing as actionable negligence. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 158 S. W. 1179.

In an action for injuries from a lump of coal falling from defendant's trestle into street below, held that where no particular defect was charged, an instruction thereon was properly refused. *Missouri, K. & T. Ry. Co. of Texas v. Hendricks* (Civ. App.) 160 S. W. 1158.

A charge on the duty of a railroad company to keep a proper lookout at a crossing, while abstractly correct as to one of defendants who had pleaded such duty, should have been so framed as not to give the benefit thereof to plaintiff, who had not pleaded breach of that duty as a ground of negligence. *Missouri, K. & T. Ry. Co. of Texas v. Kennon* (Civ. App.) 164 S. W. 867.



In an action against an interurban electric railroad for injuries in collision at a street crossing, the court, in charging on the issue of negligence, should omit any reference to an ordinance relating to speed of steam engines. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

A requested charge that there was no evidence showing the train was being run at excessive speed is properly refused in an action for killing cattle, where excessive speed was not made a basis of recovery. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

The issue whether the track was used as a passway held properly submitted, though deceased was lying down when struck, since it had a bearing on whether it was defendant's duty to keep a lookout. *San Antonio & A. P. Ry. Co. v. Jaramilla* (Civ. App.) 180 S. W. 1126.

**377. — Injuries to passengers.**—In a passenger's action for injuries from an assault by a fellow passenger, held, that the pleadings and evidence justified an instruction charging that plaintiff could not recover if the assault was so sudden that it could not have been reasonably prevented by the conductor. *Ft. Worth & R. G. Ry. Co. v. Stewart* (Sup.) 182 S. W. 893.

Where a passenger alleged that he slipped on a banana peel on the floor at the door and fell, receiving injuries, submission of the issue whether leaving that particular door unlocked, though another door was open, was an implied invitation to the passenger to leave the car at that door was error; that being immaterial. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

**378. — Injuries to employés.**—In an action by a car repairer for personal injuries from falling into a ditch, held, that on the pleading and the evidence a charge as to defendant's knowledge of such ditch and its failure to notify defendant thereof was proper. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639.

In an action for the wrongful death of a servant, killed by an explosion of steam pipes, the petition held to authorize an instruction on the negligence of the master in failing to inspect for defects so that necessary repairs could be made. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

The petition of a servant, injured by the fall of a scaffold, alleging that the master failed to furnish the servant a safe place in which to work, in that the scaffold was weak and insufficient, and the evidence showing that the scaffold was insufficient because the material furnished was inadequate, the giving of an instruction submitting the issue of the insufficiency of the material was proper. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

Defendant's requested instruction, requiring, as a condition to recovery, in an action for injury to a brakeman from the pulling out of a handhold on a car, an affirmative finding that the handhold had not been inspected as alleged, is properly refused; the answer alleging the car had been inspected and tagged as a bad-order car, and this not being denied. *Galveston, H. & S. A. Ry. Co. v. Dickens* (Civ. App.) 170 S. W. 835.

In an action for injuries to an employé, refusal to charge on an allegation in the petition held not erroneous. *Hamilton Compress Co. v. Lawson* (Civ. App.) 175 S. W. 474.

An allegation that the master negligently furnished the servant an engine out of repair supports an instruction that it was the master's duty to exercise ordinary care to furnish an ordinarily safe engine, and to have it inspected and repaired, especially where the specific duty was by later instruction specifically defined. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

In a telephone lineman's action for injury from wire of an electric light company joined as defendant, its requested charge on its liability was properly refused, where no such issue was raised by the pleadings. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

**379. — Contributory negligence.**—An instruction on contributory negligence, correct in form, is properly refused, where contributory negligence is not pleaded. *Bartley v. Marino* (Civ. App.) 158 S. W. 1156.

Where the master's answer failed to allege contributory negligence of his employé, in suit for wrongful death, and the petition failed to show him prima facie negligent, it was not error to refuse a requested charge on that question. *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194.

Defendant, having specifically pleaded certain acts as contributory negligence, was not entitled to have other acts submitted to the jury as a basis for finding contributory negligence. *North Texas Gas Co. v. Meador* (Civ. App.) 182 S. W. 708.

Where contributory negligence of plaintiff was not pleaded, the matter should not be submitted in the charge. *International & G. N. Ry. Co. v. Vogel* (Civ. App.) 184 S. W. 229.

Where defendant railroad company, in action for injuries at crossing, did not plead contributory negligence in choice of crossings, it was proper to refuse to submit that issue. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

**381. — Assumption of risk.**—Special charge on assumed risk held properly refused in view of plaintiff's contention as to negligence at time of injury. *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

**382. — Amount of recovery.**—A request to charge in a railroad passenger's action for personal injuries, which excluded traumatic hysteria as an element of recovery when it was an issue, was properly refused. *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145.

Where plea of reconvention alleging that plaintiff had circulated false reports concerning defendant preventing him from marketing a crop of cotton and causing him humiliation, etc., failed to allege and there was no evidence of the amount of his pecuniary loss from his inability to market the cotton, held, that this claim should not have been submitted to the jury. *Gillispie v. Ambrose* (Civ. App.) 161 S. W. 937.

Where no actual damages were claimed for the levy of a garnishment, the court properly refused a request to charge that the jury should measure the actual damages by the reasonable market value of the property taken, with legal interest thereon from the time of taking to the time of the trial. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

A petition for personal injuries, which alleges that plaintiff's leg was broken by a violent blow, and was subsequently amputated, that he was confined to his bed for more than four months, that he suffered great pain, and which does not allege that the wound had healed, authorizes a charge permitting a recovery for physical and mental pain plaintiff may suffer in the future. *Waterman Lumber Co. v. Shaw* (Civ. App.) 165 S. W. 127.

Where, in an action for trespass, no issue was raised as to the rental value of the sawmill operated by defendants on the land, the court properly refused to instruct the jury to not consider such rental value. *Fairchild v. Wilson* (Civ. App.) 168 S. W. 409.

A petition held insufficient to authorize the submission of an issue of aggravation of previous injury. *Bulloch v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 171 S. W. 808.

On pleadings and evidence, in an action to recover for expenses necessarily incurred in the repair of an automobile damaged by defendant, held, that a loss of earnings or net profits during repairs was properly submitted. *Galveston-Houston Electric Ry. Co. v. English* (Civ. App.) 178 S. W. 666.

Where a complaint in libel suit sought actual damages only, charge that jury might consider that defendant had filed plea alleging truth in assessing damages held error. *Ft. Worth Pub. Co. v. Armstrong* (Civ. App.) 181 S. W. 554.

In an action for damages occasioned the shippers of live stock by delay in transit, where there was no basis in the pleadings for proof of shrinkage in weight after the shipment's late arrival, or for decline in the market for which the cattle were held over, the court erred in submitting such matters as well as an item for additional feed. *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384.

Under an allegation of injury to an automobile, a charge that measure of damages was the difference in its value before and after the injury is abstractly correct, but where pleading sought to recover the cost of repair, a charge submitting such a measure of damages is erroneous. *Pecos & N. T. Ry. Co. v. McMeans* (Civ. App.) 188 S. W. 692.

**383. Facts and evidence.**—An instruction that submits to the jury facts not presented by the evidence is improper. *St. Louis Southwestern Ry. Co. of Texas v. Cole* (Civ. App.) 159 S. W. 146; *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063; *Miller v. Sealy Oil Mill & Mfg. Co.* (Civ. App.) 166 S. W. 1182; *Lisle-Dunning Const. Co. v. McCall* (Civ. App.) 167 S. W. 810; *Jones v. Nix* (Civ. App.) 174 S. W. 685; *Walker v. Flanary* (Civ. App.) 178 S. W. 992; *Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin* (Civ. App.) 179 S. W. 541.

A requested charge having no basis in the evidence should be refused. *Adams v. Wm. Cameron & Co.* (Civ. App.) 161 S. W. 417; *S. H. Kress & Co. v. Lawrence* (Civ. App.) 162 S. W. 448; *Missouri, K. & T. Ry. Co. of Texas v. Ward* (Civ. App.) 164 S. W. 922; *Andrew v. Mace* (Civ. App.) 194 S. W. 598.

A charge submitting a mere abstract proposition of law, not warranted by the facts in the case, was properly refused. *Blount v. Henry* (Civ. App.) 160 S. W. 418.

Where an issue is supported by evidence, it is proper for the court to charge thereon. *Owens v. First State Bank of Bronte* (Civ. App.) 167 S. W. 798.

Pleadings without proof do not justify submission of an issue. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

**384. — Sufficiency of evidence to warrant instruction.**—Where the evidence was wholly insufficient to show that representations made by defendant were mere expressions of his opinion, the refusal of his requested instruction that, if they were such, plaintiff could not recover was proper. *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438.

**385. — Evidence excluded or withdrawn or improperly admitted.**—In an action for breach of a lease, the court having withdrawn from the jury the issue of mistake in executing the lease without a prohibition defeasance clause, a request to charge on such issue was properly refused. *Taber v. Eyster* (Civ. App.) 162 S. W. 490.

The refusal of special issues on uncontroverted and immaterial facts is not improper. *Tinkham v. Wright* (Civ. App.) 163 S. W. 615.

Where evidence raising an issue was received without objection, though the issue was not presented by the pleadings, instructions submitting the issue were proper. *McKee v. Garner* (Civ. App.) 168 S. W. 1031.

Refusal of requested charges, based upon testimony withdrawn from the jury, is not error. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Where the only evidence of agreed boundary line was incompetent, and it was withdrawn from the jury, a charge on such agreed boundary line is improper. *Cosgrove v. Smith* (Civ. App.) 183 S. W. 109.

**386. — Nature of action or issue in general.**—Where the evidence did not present the issues of laches and stale demand, it was error to submit such issues, though they were presented by defendants' pleadings. *Norton v. Lea* (Civ. App.) 170 S. W. 267.

In an action by a stockholder asserting mismanagement by the directors, a charge on the duty of directors held abstract and properly refused. *Thomas v. Barthold* (Civ. App.) 171 S. W. 1071.

**387. — Actions relating to property in general.**—In trespass to try title by a vendor against a purchaser, an instruction that the purchaser could not recover for improvements on the land if he had himself failed to perform the contract, and if the vendor was ready and willing to perform, held proper under the evidence. *Pollard v. McCrummen* (Civ. App.) 160 S. W. 1148.

A charge on the rule that in arriving at the bounds of a survey courses and distances yield to natural or artificial objects of demarkation, but courses and distances will not be made subordinate to an unmarked line or corner in an older survey, held not applicable to facts. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**388. — Actions for torts in general.**—Instruction that every man was responsible for damage occasioned by his stock to the lands of another, unless done under a contract anticipating such injury and paid for, held erroneous, where there was no evidence that plaintiff made any contract authorizing the use of her land so as to permanently injure the freehold. *Gorman v. Brazelton* (Civ. App.) 168 S. W. 434.

Instruction authorizing recovery for cattle killed, if right of way was not fenced so as to effectually turn live stock under ordinary circumstances, held justified by evi-

dence as to defective condition of fastening of a gate, through which cattle went on the track. *Ft. Worth & D. C. Ry. Co. v. Scheer* (Civ. App.) 169 S. W. 1069.

**389. — Negligence in general.**—Where there was no evidence that the fact that plaintiff left certain vehicles standing in a city street was the proximate cause of a collision between plaintiff's horse and defendants' automobile, the court properly refused an instruction that permitting the vehicles to stand in the street was negligence. *Staten Auto Co. v. Hogg* (Civ. App.) 160 S. W. 982.

Submission of the issue of the killing of a horse by a train, being caused by failure to ring the bell and sound the whistle, is not justified, in the absence of evidence of proximity of the place to a crossing, or that such signals would probably have prevented the accident, nor should issue of negligence in not stopping the train be submitted when no facts are shown on which negligence in not stopping it can be predicated. *International & G. N. Ry. Co. v. Bandy* (Civ. App.) 163 S. W. 341.

Though a railroad company need only exercise ordinary care to equip its engines with suitable spark arresters, yet where, in an action for loss of property by fire set by sparks, there was no evidence by the company on that issue, it was not reversible error to charge that it was its duty to use suitable spark arresters. *Texas & N. O. R. Co. v. Cook* (Civ. App.) 167 S. W. 158.

The word "willfully," in connection with "knowingly," in an instruction that, if defendants did a thing willfully and knowingly, etc., they were negligent, authorized the jury to conclude the court was of opinion there was some evidence that defendant did such thing with a bad intent, making the instruction prejudicial; there being no such evidence. *Corrigan, Lee & Halpin v. Heubler* (Civ. App.) 167 S. W. 159.

In action for death of cattle, which went on railroad tracks through gate, instruction that it was not the company's duty to remedy trivial defects held properly refused, in view of the evidence. *Ft. Worth & D. C. Ry. Co. v. Scheer* (Civ. App.) 169 S. W. 1069.

It was error to submit the issue whether defendant's negligence contributed to the injury sustained by plaintiff's cattle, where there was no evidence on such issue. *Ft. Worth & D. C. Ry. Co. v. Berry* (Civ. App.) 170 S. W. 125.

In action for destruction of property by fire communicated from boarding cars on defendant's siding, special charges requested by defendant upon immaterial issues and upon matters not raised by the testimony were properly refused. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

In an action for damages caused by defendant's automobile driven by employé, where there was no evidence of incompetency or recklessness, an instruction on that subject held properly refused. *Gordon v. Texas & Pacific Mercantile & Mfg. Co.* (Civ. App.) 190 S. W. 748.

Under pleading and proof in action for damages to automobile from collision, held, that refusal of instruction on law of accident was not error. *Auto Sales Co. v. Bland* (Civ. App.) 194 S. W. 1021.

**390. — Personal injuries in general.**—In a personal injury action, a charge held erroneous as tending to mislead the jury. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

Instructions in a personal injury action submitting issues of negligence held erroneous, as not warranted by the evidence. *Southwestern Telegraph & Telephone Co. v. Sanders* (Sup.) 173 S. W. 865, affirming judgment (Civ. App.) 138 S. W. 1181.

The giving of a charge correctly defining implied and apparent authority to consent, on behalf of parents, to an operation on their child, over the objection that there was no evidence to support the charge, held prejudicial error. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

In action to recover for death by electrocution, instructions submitting all issues of negligence raised by the pleadings are erroneous, where all but one were unsupported by evidence. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 194 S. W. 1016.

**391. — Personal injuries in operation of railroads in general.**—In an action for injury from a lump of coal falling from a locomotive tender on defendant's trestle upon plaintiff driving in the street below, held that instruction limiting defendant's negligence to a particular means was properly refused in view of the evidence. *Missouri, K. & T. Ry. Co. of Texas v. Hendricks* (Civ. App.) 160 S. W. 1158.

An instruction that, if inspection would not have disclosed the defect, the railroad company would not be liable, to one injured thereby, held erroneous, in the absence of evidence of any inspection. *St. Louis Southwestern Ry. Co. v. Moore* (Civ. App.) 161 S. W. 378.

Instruction to find railroad company not liable if the engineer was not negligent held properly refused where there was evidence that driver's view of crossing was obstructed by the company's cars on a siding. *Texas Midland R. R. v. Nelson* (Civ. App.) 161 S. W. 1038.

In an action for injuries to a licensee while in a railroad car, an instruction that the plaintiff could not recover for any defect in the brake was proper, where there was evidence that the brake was defective, but no evidence that there was any attempt to use the brake, since the defect could not have been the proximate cause of the injury. *Beard v. International & G. N. Ry. Co.* (Civ. App.) 171 S. W. 553.

Evidence held not to warrant charge to find for the injured pedestrian if the car had no fender, since it tended to show that there was a fender, and such charge was therefore prejudicial. *Galveston Electric Co. v. Swank* (Civ. App.) 188 S. W. 704.

Direction of verdict for the railway, if the jury found the injuries to plaintiff were the result of unavoidable accident, is error where there is no evidence suggesting unavoidable accident. *Terrell v. Houston & T. C. Ry. Co.* (Civ. App.) 189 S. W. 575.

**392. — Injuries to passengers.**—Where a passenger was shown to have been thrown down and injured in a coach by an unusual bump, an instruction that the carrier was bound to employ skillful and competent agents held supported by the evidence. *Quanah, A. & P. Ry. Co. v. Johnson* (Civ. App.) 159 S. W. 406.

Where, in an action for injuries to a passenger, plaintiff's evidence showed an unwarranted assault by a trainman, while defendant's evidence showed that plaintiff was

struck while he was making an assault on the trainmen, there was no issue of the right of self-defense arising from apparent danger in the case on which it was the court's duty to charge. *St. Louis, B. & M. Ry. Co. v. Fielder* (Civ. App.) 163 S. W. 606.

In an action by a passenger for injuries caused by a stray bullet fired by another passenger at a drunken passenger who was making an assault upon him, where all the evidence tended to show a clear case of self-defense, it was proper for the trial court to refuse to inject into the case the question of justification for the shooting. *Galveston, H. & S. A. Ry. Co. v. Bell* (Civ. App.) 165 S. W. 1.

In an action for injuries to plaintiff's wife caused by an unusual jar to the coach in which she was a passenger, where there was no evidence that she had warning that a coupling was about to be made between coaches, an instruction which predicated a verdict for the plaintiff upon a finding, among other things, that the collision was without notice or warning was not erroneous. *St. Louis Southwestern Ry. Co. of Texas v. McNatt* (Civ. App.) 166 S. W. 89.

In an action for personal injuries to one traveling with a fruit car on a nontransferable pass issued to his principal, an instruction that plaintiff was a passenger if the conductor consented to his riding thereon is inapplicable to evidence that the consent to his riding was given by the conductor of a train other than the one on which he was when injured. *Beard v. International & G. N. Ry. Co.* (Civ. App.) 171 S. W. 553.

Evidence in a street car passenger's action for injuries from falling from the running board of a car held to authorize an instruction on unavoidable accident. *Tennegkeit v. Galveston Electric Co.* (Civ. App.) 182 S. W. 72.

In a passenger's action for injuries from an assault by a fellow passenger, held, that the pleadings and evidence justified an instruction that plaintiff could not recover if assault was so sudden that it could not have been reasonably prevented by conductor. *Ft. Worth & R. G. Ry. Co. v. Stewart* (Sup.) 182 S. W. 893.

In an action under the separate coach law for injuries to a negress assaulted by a white passenger in a coach for blacks, instructions authorizing a finding against the road if its servants knew that a white passenger was in the negro coach held not erroneous on account of testimony. *Texas & P. Ry. Co. v. Baker* (Civ. App.) 184 S. W. 664.

Instruction in passenger's action for injuries held erroneous for permitting recovery for carrier's negligence in inviting passengers to alight from a certain door independent of the presence of a banana peel on which plaintiff slipped and fell. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

In an action for injuries to a passenger who fell on stepping on a piece of wood in the car, an instruction to find for passenger if carrier's employes permitted the wood to be in the car, etc., held not objectionable on the ground there was no evidence of permission. *Texas & Pac. Ry. Co. v. Hanson* (Civ. App.) 189 S. W. 289.

In action for injuries from being struck by a truck on platform, it was not error to refuse charge to find for defendant if plaintiff walked between the truck and the track and person of ordinary prudence would have walked between the truck and the depot, it not appearing that route taken was dangerous. *St. Louis Southwestern Ry. Co. of Texas v. McMichael* (Civ. App.) 191 S. W. 186.

In an action for injuries from contracting a cold in defendant's station, where there was no suggestion that plaintiff's physical condition was abnormal, held, that it was not error to submit issue whether station was kept warm to such a degree as would be reasonably comfortable for plaintiff. *Chicago, R. I. & G. Ry. Co. v. Faulkner* (Civ. App.) 194 S. W. 651.

393. — **Injuries to servants.**—The refusal of a charge that if the jury could not determine what caused the accident they should find for plaintiff held proper, where the evidence was sufficient to show that the negligence of the master was the proximate cause of the explosion, although it did not show the exact reason therefor. *Fred A. Jones Co. v. Drake* (Civ. App.) 159 S. W. 441.

In action by car repairer for personal injuries from falling into a ditch, held that, on the pleadings and evidence, a charge as to defendant's knowledge of such ditch and its failure to notify defendant thereof was proper. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639.

In an action for a servant's death by being struck by a piece of iron falling in the elevator shaft at the bottom of which he was working, held that, there being no evidence on the subject, the refusal to submit special issues as to how the iron got to the shaft and as to whether it was brought there and negligently or unintentionally allowed to fall was not error. *Selden-Breck Const. Co. v. Kelley* (Civ. App.) 168 S. W. 985.

In an action for the death of a servant, killed by a falling piece of iron, held on the evidence that the submission of a special issue as to whether his death resulted from negligence on the part of some employe of defendant not a vice principal was properly refused. *Id.*

In an action for personal injury to plaintiff while performing a service in the barn in which he was required by his immediate master to deposit his tools, etc., a charge which referred to his loitering about the barn was improper, though the barn belonged to defendant. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

A charge submitting a phase of the case in accordance with the testimony of the injured employe is not inapplicable to the facts because the defendant master offered much evidence in contradiction. *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

In action for death of railway employe, due to slipping on wet paint on brake platform, instruction confining negligence to that of the employes operating a switch train held properly refused, in the absence of evidence that it was the duty of the switching crew to inspect the cars. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 283.

Where, in an action for injuries due to defective tongs used in unloading steel rails from a ship, there was evidence that an inspection made after the tongs had been in use would have disclosed the defect, it was not error to give an instruction authorizing a recovery because of defendant's failure to inspect them. *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809.

In a coal miner's action for injuries from a falling roof, refusal of charge that the mere happening of an accident is no proof of negligence held proper under the evidence. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

Evidence in action for injuries to section hand while removing wreck, held not to warrant instruction as to foreman's negligence, or as to defendant's liability for failure to use ordinary care in selecting competent servants. *Missouri, K. & T. Ry. Co. of Texas v. Mooney* (Civ. App.) 181 S. W. 543.

In action against railroad for death of yard clerk, submission of issue of failure to keep lookout was erroneous in the absence of evidence showing connection between such failure and the death. *Galveston, H. & S. A. Ry. Co. v. Fred* (Civ. App.) 185 S. W. 896.

In a servant's action for injuries, the words "suddenly and unexpectedly" in an instruction, used with reference to the movement of the train at the time plaintiff was injured in going between two cars to uncouple them, must necessarily have been understood by the jury as relative, and in that sense is supported by the plaintiff's testimony that the movement was sudden and unexpected in one direction, and he had given the signal to go in the other. *Pecos & N. T. Ry. Co. v. Chatten* (Civ. App.) 185 S. W. 911.

In action for injuries by servant of lumber company, general charge of court held not erroneous in that it submitted as issue whether log being snaked was pulled against end of log on skids, whereas evidence showed it was not, but was thrown against skids by reason of tongs coming in contact with a stump. *Kirby Lumber Co. v. Bratcher* (Civ. App.) 191 S. W. 700.

Evidence held sufficient to justify instruction in an action for injury to servant caused by other cars colliding with the car in which plaintiff was working, that the cars were not coupled together, and that it was the employer's duty to keep them coupled. *Rule Cotton Oil Co. v. Russell* (Civ. App.) 191 S. W. 802.

In action for injuries to freight conductor in yards when he stumbled over an object variously described as a stake, stob, or stub, where testimony referred to it in each of those terms, submission of issue whether there was a stake or stub without limiting it to a grade stake was not error; the word "stob" being a variation of the word "stub," which means a small post. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

Where there was testimony that rules of company required foreman of section gang to give warning of approaching trains, and that foreman had specifically told section men to keep eyes on him, and that he would give warning, court did not err in submitting issue of alleged negligence of foreman in failing to give warning. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 194 S. W. 622.

394. — **Assumption of risk.**—Where there was no testimony in a servant's action for injury raising the question of assumed risk, the court properly refused a special charge thereon. *San Antonio Brewing Ass'n v. Gerlach* (Civ. App.) 185 S. W. 316; *Southwestern Telegraph & Telephone Co. v. Coffey* (Civ. App.) 163 S. W. 112.

Where the evidence showed that plaintiff at the time of his injury was not employed as a section hand, but to assist in extinguishing a fire, it was not error to charge that he assumed all the risk of injury while discharging the duties ordinarily "incident to his employment," instead of "incident to his duties as a section hand." *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426.

Instruction on assumption of risk held properly refused as unsupported by the evidence. *Missouri, K. & T. Ry. Co. v. Masqueda* (Civ. App.) 189 S. W. 328.

In an action for personal injuries to a fireman, a charge on assumption of risk held not erroneous as disregarding an exception to the rule where there was no evidence to support the exception. *Atchison, T. & S. F. Ry. Co. v. Stevens* (Civ. App.) 192 S. W. 304.

It is not error in freight conductor's action for injuries when he stumbled over a stake in the yards, where the evidence is overwhelming that he did not know of its presence, to refuse requested instructions on assumption of risk. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

395. — **Contributory negligence.**—In passenger's action for personal injury, where the issue of contributory negligence was not raised by the evidence, there was no error in refusing a special charge thereon. *Paris & G. N. Ry. Co. v. Atkins* (Civ. App.) 185 S. W. 306; *St. Louis Southwestern Ry. Co. of Texas v. McNatt* (Civ. App.) 166 S. W. 89.

Failure to submit defendant's claim that an injured servant went voluntarily upon the car from which he fell was not error, where the uncontradicted evidence showed that he was employed by defendant's foreman for the specific duties in which he was engaged when injured. *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426.

Evidence held insufficient to raise an issue as to brakeman's knowledge of presence of pile of cinders over which he stumbled as he was getting on a moving car. *Texas Midland R. Co. v. Geron* (Civ. App.) 162 S. W. 471.

In an action for the death of a servant caused by cotton seed hulls falling upon him, where there was no direct evidence of contributory negligence, there being no eyewitnesses, the court properly refused to charge on contributory negligence. *Industrial Cotton Oil Co. v. Lial* (Civ. App.) 164 S. W. 40.

In telephone lineman's action for personal injury from electricity from electric light wire to a guy wire, charge, assuming that he knew that electric light wire was charged with electricity was properly refused, where evidence failed to show such knowledge. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

396. — **Discovered peril.**—In an action for injuries to an employé, evidence held to raise the issue of discovered peril. *Kirby Lumber Co. v. Williams* (Civ. App.) 159 S. W. 309.

In car repairer's action for personal injuries, instruction as to duty of defendant's employé after discovering his peril held not without support in the evidence. *International & G. N. R. Co. v. Walters* (Civ. App.) 161 S. W. 916, judgment reversed on rehearing 165 S. W. 525.

Where in section hand's action for injuries there is insufficient evidence to show actual knowledge by train crew of plaintiff's peril, submission of issue of negligence of

train crew after discovery of peril is unwarranted. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 194 S. W. 622.

397. — **Contracts and actions relating thereto in general.**—A charge requested by the landlord, denying recovery if the tenant could have procured another lease of the same kind, held properly refused under the evidence. *Bost v. McCrea* (Civ. App.) 172 S. W. 561.

A charge, in an action for amounts due on corporate stock, held erroneous in allowing verdict for plaintiff, without regard to the evidence. *Rich v. Park* (Civ. App.) 177 S. W. 184.

In an action on account and note made by defendant's father which it was alleged defendant agreed to pay, an instruction that verdict should be for plaintiff on his claim on an open account if he was entitled to recover held not proper under the evidence. *Thornburg v. Moon* (Civ. App.) 180 S. W. 959.

In action on vendor's lien note, subsequent purchaser's requested instruction that part of the alleged shortage had been in the adverse possession of other parties more than 10 years held properly refused, where there was no evidence of such adverse possession. *Orand v. Whitmore* (Civ. App.) 185 S. W. 347.

In action on contract, where testimony for plaintiff did not show a modification of the contract, plaintiff's requested instruction on that theory was properly refused. *Tyler Box & Lumber Mfg. Co. v. City Nat. Bank of Paris* (Civ. App.) 185 S. W. 352.

398. — **Contracts of carriage.**—In an action for wrongful ejection of a passenger, where the evidence was not sufficient to raise the issue of the use of unnecessary force, it was error to instruct that defendant would be liable if it arrested the passenger, and defining "arrest" as any restraint upon his movements, etc. *Missouri, K. & T. Ry. Co. of Texas v. Dice* (Civ. App.) 163 S. W. 478.

In action for damages to shipment of cattle, instruction as to liability for rough handling held without support in the evidence and prejudicial. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

In action for delay in transportation of cattle instructions submitting issue as to special contract concerning time of shipment held at least misleading under the evidence. *Ft. Worth & D. C. Ry. Co. v. Morgan* (Civ. App.) 179 S. W. 901.

In suit for damages to shipment of cattle, where there was no evidence of a want of care in loading, an instruction that a want of care would be negligence was without support in the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Kerr* (Civ. App.) 184 S. W. 1058.

In an action for damages to a shipment of live stock, where there was no evidence as to what was an ordinarily reasonable time for transportation between two points, the issue as to reasonable time should not have been submitted. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

In action for damages to shipment of live stock, requested charge not to consider any application or order for cars made at a certain point held properly refused as inapplicable to evidence. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

Where evidence was undisputed that a train was stopped and a passenger ejected for not paying fare at the station where the train usually stopped, it was not error to refuse to submit to the jury plaintiff's question whether defendant's servants rendered the plaintiff and her children such assistance as was required by defendant's rules and the circumstances of the case. *Fleck v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 191 S. W. 386.

399. — **Contracts for telegraphic or telephonic service.**—In action for damages for failure to deliver telegram, instruction assuming that certain stock had been offered to plaintiff at \$25 a head held not at variance with evidence. *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925.

400. — **Contracts of sale and actions relating thereto.**—Where machinery for irrigation was never installed in accordance with the contract, and the purchasers sought damages for injuries to their crops, a charge on the question of unreasonable delay in installation was unnecessary. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

In an action for personal property claimed not to have been included in contract of sale, charge that defendant, in reconviction, might recover a stove, was properly refused, where without any support in the evidence. *James v. Doss* (Civ. App.) 184 S. W. 623.

401. — **Actions on insurance policies.**—A requested charge that, the market value after the fire of the piano insured not having been shown, no recovery could be had, held properly refused, under the evidence. *Occident Fire Ins. Co. v. Linn* (Civ. App.) 179 S. W. 523.

In an action on an employe's indemnity policy, an instruction concerning the intention of the parties held inapplicable to the evidence. *Southwestern Surety Ins. Co. v. Thompson* (Civ. App.) 180 S. W. 947.

402. — **Bills and notes.**—In an action on certain rent notes for a pumping plant and canal, a request to charge that if plaintiff promised to forego rents if salt water appeared in the river at the plant, and salt water did appear, but defendant continued to cultivate the premises without electing to rescind, the jury should find for plaintiff, held properly refused as not within the proof. *Savage v. Mowery* (Civ. App.) 166 S. W. 905.

In an action on a note, where there was no evidence to support the issue as to whether plaintiff had failed to account for collateral, it should not have been submitted. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

403. — **Actions for personal services and commissions.**—Though an owner could sell the land himself and thus revoke the broker's authority, the mere fact of a sale by the vendor to a purchaser interested by the broker did not raise the issue of revocation; hence it was not error to refuse defendant's request presenting such issue, nor where there were circumstances tending to show that the terms were changed to defeat the right to commissions, it was not error to submit such issue, nor to charge that a joint owner of land with knowledge of circumstances charging him with notice of the rights

of a broker, would be equally liable if he consummated the sale with such notice. *Webb v. Harding* (Civ. App.) 159 S. W. 1029.

There was no error in refusing an instruction, in an action for brokers' commissions, that any agreement between plaintiffs and the buyer's agent relative to the exchange would not bind defendant without his consent, where there was no evidence of any such agreement to which it could apply, nor was an instruction that plaintiffs were not partners of R., who represented the other party, and that they might recover, though R. got all of the commission from the other party, objectionable on the ground that an agent who receives a secret commission from the other party cannot recover, where the evidence showed that the brokers on both sides represented their respective principals only, nor was the instruction that plaintiffs could recover if they procured a buyer themselves or through their agent R. objectionable on the ground that R. was the buyer's agent and that an agent cannot delegate his authority without his principal's consent and cannot represent both parties, where the evidence showed that R. represented the buyer only, and the brokers on both sides represented their respective principals in the negotiations. *McKinney v. Thedford* (Civ. App.) 166 S. W. 443.

An instruction as to a broker's right to a commission, where he did not personally conduct the negotiations, was not present when the bargain was closed, and where his principal did not at the time know that he found the purchaser, was not inapplicable to the facts, where plaintiff did not personally negotiate the exchange and was not present when it was made. *Id.*

In an action by a broker's assignee for commissions on an exchange of lands, an instruction to find for defendant because the evidence showed that a third party was a partner with the broker was properly refused, where the partnership was not a party to the suit, and the broker's authority to transfer the account to plaintiff was not questioned. *Anderson v. Jackson* (Civ. App.) 168 S. W. 54.

In action against railroad ticket agent to recover money converted by him to his own use, with cross-action for services in the same amount, instruction as to plaintiff's ratification of contract of employment held reversible error, where the evidence did not raise such issue. *Stephenville North & South Texas Ry. Co. v. Grier* (Civ. App.) 178 S. W. 984.

Where there was no evidence that a broker was limited to three months in which to sell, defendant's request seeking to inject such issue into the case was properly refused. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

In an action to recover commissions for sale of land, where there was no evidence of the reasonable value of the agent's services, the trial court was not required to submit the issue of quantum meruit. *Witcher v. Adams* (Civ. App.) 191 S. W. 399.

**404. — Fraud, mistake, duress, and undue influence.**—In an action against a street railroad company for personal injuries, testimony of 17 claims by plaintiff's relatives against defendant and that plaintiff witnessed a release in one suit will not justify a charge on conspiracy to fabricate claims. *San Antonio Traction Co. v. Cox* (Civ. App.) 184 S. W. 722.

**406. — Release.**—Where evidence refuted alleged settlement of plaintiff's claim for defendant's failure to deliver water for irrigation, submission of issue whether settlement was made held properly refused. *Orange County Irr. Co. v. Sandefur* (Civ. App.) 181 S. W. 777.

**407. — Extent of injury and amount of recovery.**—In an action for personal injuries, an instruction allowing reasonable compensation for necessary artificial limbs already purchased or that might be required was reversible error, where there was no evidence that the amount paid for artificial limbs already purchased was reasonable, and where there was no evidence that the plaintiff suffered any mental anguish, there was no error in refusing to instruct that the jury should not take into consideration any mental anguish suffered by plaintiff. *Ft. Worth & D. C. Ry. Co. v. Wininger* (Civ. App.) 159 S. W. 881.

In a brakeman's action for injuries, instruction permitting the consideration of the reasonable value of the time lost in consequence of the injury held applicable to the evidence. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

In a buyer's action for breach of contract to furnish cotton seed hulls, where it could not be said that it was undisputed that the seller's failure to furnish the contract quality was the proximate cause of the injury to the buyer's cattle, the submission of that issue was proper, and where no other verdict than one for the seller could have been returned, there was no error in giving or refusing charges upon his failure to furnish the contract quality and as to whether such failure was the proximate cause of damage to the cattle. *Major v. Hefley-Coleman Co.* (Civ. App.) 164 S. W. 445.

In an action for injuries to a section hand sustaining a rupture while attempting to remove a hand car from a track, the refusal to submit as an issue of proximate cause his weakness or diseased condition held not erroneous under the evidence. *Missouri, O. & G. Ry. Co. v. Boring* (Civ. App.) 166 S. W. 76.

In an action for damages for the destruction of a wagon and seed cotton by fire, submission of an issue as to the market value of the property held error, where there was no evidence thereof. *Continental Oil & Cotton Co. v. Wristen & Johnson* (Civ. App.) 168 S. W. 395.

Where the defense to a purchase-money note was fraud, but there was no evidence as to the market value of the goods, it was error to give an instruction authorizing recovery, for the difference between the value as represented, and the market value. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

Where there was no evidence that other obstructions caused the backing of flood waters on plaintiff's premises, refusal of a charge that there should have been no verdict against the defendant railroad company whose fills it was charged caused the inundation, where the jury could not determine what damages were caused by them and what by other obstructions was proper. *Galveston, H. & S. A. Ry. Co. v. Vogt* (Civ. App.) 181 S. W. 841.

There being no evidence that plaintiff's injury was caused by a weakened condition of her arm, though it had previously been broken, a requested instruction predicated on a

finding of such fact was properly refused. *North Texas Gas Co. v. Meador* (Civ. App.) 182 S. W. 708.

In an action for injuries, where the plaintiff was earning the same amount after as he had earned prior to the injuries, and there was no evidence that his earning capacity had been affected, the submission of the issue whether plaintiff's future earning capacity had been impaired was error. *San Antonio Traction Co. v. Cox* (Civ. App.) 184 S. W. 722.

A charge that there could be no recovery if the injury to plaintiff's scrotum was caused by infection from scratching an ulcer held not warranted by the evidence. *Burkes v. Northern Texas Traction Co.* (Civ. App.) 185 S. W. 428.

In an action against a carrier of live stock for damages caused by delay in transportation, it was error to submit as an element of damage items of feed which plaintiff claimed was purchased en route, in absence of evidence that whole amount was necessary or price paid was reasonable, and where there was no evidence showing amount plaintiff expended for labor to care for stock while unloaded, that issue should not have been submitted to jury. *Ft. Worth & D. C. Ry. Co. v. Atterberry* (Civ. App.) 190 S. W. 1133.

In an action for damages to a shipment of live stock, the submission of the measure of damages based on their market value at a certain point held warranted by the evidence as to their market value at such point. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

Testimony of physician that he made five or six visits to plaintiff, and that \$200 was a reasonable charge therefor, is sufficient to warrant an instruction to find for plaintiff the reasonable value of medical services. *Houston Electric Co. v. Pearce* (Civ. App.) 192 S. W. 558.

**408. Instructions excluding or ignoring issues, defenses, or evidence.**—A requested charge which ignored one of the issues was properly refused. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

Instruction to find for plaintiff under certain circumstances unless the jury found for defendant under other instructions "herein given" held not to preclude consideration of affirmative defenses submitted by special charges requested by defendant. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

An issue clearly raised by the evidence should be submitted to the jury. *World's Special Films Corporation v. Fichtenberg* (Civ. App.) 176 S. W. 733.

It is error to refuse to give an instruction requiring the jury to pass directly upon an issue raised by the pleadings and evidence. *W. P. Carmichael Co. v. Miller* (Civ. App.) 178 S. W. 976.

The refusal of the request to charge which ignored one phase of the case was not erroneous. *First Nat. Bank v. Mangum* (Civ. App.) 194 S. W. 647.

**410. — Nature of action or issue in general.**—An instruction ignoring the liability of a principal for acts of his agent beyond private instructions, where an apparent general authority was relied on, held error. *Bergere v. Parker* (Civ. App.) 170 S. W. 808.

In suit to enjoin collection of justice's judgment, instruction held properly refused, as ignoring issue as to reliance on promise by justice and opposing counsel to send notice when judgment was rendered in order that an appeal might be taken. *Woodard v. Eskridge* (Civ. App.) 174 S. W. 868.

In an action for injuries from being struck by an automobile, a requested instruction to find ownership in the driver, if he had agreed to purchase the car, held properly refused, as omitting the element of intention of the parties to the sale. *Olds Motor Works v. Churchill* (Civ. App.) 175 S. W. 785.

A charge that if the jury found that a corporation's manager acting for the corporation made the false representations, they should find against it, held erroneous under the pleading and evidence as not requiring a finding that the manager was authorized by the corporation. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

Charge as to notice to third persons dealing with mortgaged property, which wholly eliminated constructive notice, held properly refused. *Conley v. Dimmit County State Bank* (Civ. App.) 181 S. W. 271.

**412. — Negligence in general.**—Refusal of instruction on proximate cause, in an action for the killing of a mule by defendant's train, held error, in view of instructions given on negligence without mention of proximate cause. *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 171 S. W. 245.

Instruction to find for defendant if facts were as hypothesized held properly refused because it covered only one of the grounds of negligence relied on. *Missouri, K. & T. R. Co. of Texas v. Middleton* (Civ. App.) 172 S. W. 1114.

In an action for the killing of plaintiff's mules at railroad crossing, held, that a charge ignoring question of slowing down train, and as to which there was evidence, was objectionable. *Galveston, H. & S. A. Ry. Co. v. Templeton* (Civ. App.) 175 S. W. 504.

In an action for killing cattle, an instruction held improper as tending to exclude the defense that the cattle were killed on a public road, where the tracks were not required to be fenced. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

In an action for value of a horse killed on defendant railroad's right of way, an instruction which, in authorizing a verdict for plaintiff if defendant's acts were as alleged, did not require a finding that such acts were negligent, held erroneous. *Quanah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

**413. — Personal injuries in general.**—A charge to find for plaintiff if defendant was guilty of either or all of the negligent acts charged in an action for injury when struck by defendant's street car without informing the jury as to the negligent acts charged, and as to which there was testimony, was reversible error. *Corpus Christi St. & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 185 S. W. 430.

**414. — Contributory negligence and assumption of risk.**—In an action for injuries received while crossing defendant's track at a place not a crossing, where the issue of contributory negligence was clearly raised by the pleadings and evidence, it was reversible error to refuse defendant's request for an affirmative charge upon that issue. *Ft. Worth & D. C. Ry. Co. v. Winger* (Civ. App.) 159 S. W. 881.



A requested charge, in a servant's action for injuries permitting a recovery regardless of whether contributory negligence was shown to have existed, held properly refused. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

An instruction in an action for injuries to an employé held properly refused for ignoring plaintiff's age, want of discretion, and defendant's failure to warn him. *T. B. Allen & Co. v. Shook* (Civ. App.) 160 S. W. 1091.

A minor servant's requested charges as to his minority held properly refused, where they ignored the issues of assumed risk and contributory negligence. *Lawson v. Hamilton Compress Co.* (Civ. App.) 162 S. W. 1023.

Where the issue was as to the custom for employes to remove the tender from an engine without notifying workmen in the fire box, a requested instruction that, though its employes did sometimes notify those in the fire box, yet as it frequently had been done without such notice, plaintiff assumed the risk of such custom, ignored the issue made. *St. Louis, S. F. & T. Ry. Co. v. Overturf* (Civ. App.) 163 S. W. 639.

In an action for the death of a servant, a teamster, caused by a clevis breaking, causing the doubletree to fly back and strike him in the head, a request predicated a finding for defendant if the doubletree was in the exclusive control of the servant was properly refused, because ignoring another ground of liability charged, and because there was no evidence that the servant had exclusive control, etc. *Stone & Webster Engineering Corporation v. Goodman* (Civ. App.) 167 S. W. 10.

In an action by a railroad brakeman, a request to charge that the undisputed evidence showed that plaintiff assumed the risk of the defective track, and therefore could not recover, held properly refused as eliminating the speed issue. *Missouri, O. & G. Ry. Co. of Texas v. Love* (Civ. App.) 169 S. W. 922.

A charge as to the burden of proving contributory negligence held objectionable as excluding consideration of plaintiff's testimony tending to show negligence. *Gulf, C. & S. F. Ry. Co. v. Loyd* (Civ. App.) 175 S. W. 721.

Where plaintiff requested correct issues as to contributory negligence, and the court did not submit in any issue whether the acts of plaintiff's deceased were negligent, the requested issues should have been submitted. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

In action for injuries to woman alighting from street car, instructions held not erroneous as authorizing a finding for plaintiff in spite of contributory negligence. *Galveston Electric Co. v. Hanson* (Civ. App.) 187 S. W. 533.

An instruction which ignored the issues of plaintiff's contributory negligence and the proximate cause of the injury held improper. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

In an action for damages to an automobile by collision with a street car, an instruction which ignored the defense of contributory negligence was properly refused. *Adams & Washam v. Southern Traction Co.* (Civ. App.) 188 S. W. 275.

In action to recover for death by electrocution, an instruction that defendant had the burden of proving deceased's contributory negligence is erroneous, where plaintiff's testimony tended to establish such defense. *Abilene Gas & Electric Co. v. Thomas* (Civ. App.) 194 S. W. 1016.

416. — **Injuries to passengers.**—An instruction that plaintiff could not recover unless he was thrown from the car by the act of the conductor in pushing between him and the car held not erroneous, as ignoring other negligent acts charged, where there was no evidence as to such other negligent acts. *Tennegkeit v. Galveston Electric Co.* (Civ. App.) 182 S. W. 72.

In an action by a passenger, who claimed that, having given signal for street car to stop, he went to the step and was thrown by sudden jerk, a charge held erroneous as taking from the jury the negligence charged. *Burkes v. Northern Texas Traction Co.* (Civ. App.) 185 S. W. 428.

417. — **Injuries to servants.**—Instruction that, if railway engineer was negligent in failing to discover oil on the running board before he fell, he could not recover held properly refused, where the petition alleged negligence not only in permitting oil on the running board but in failing to equip the engine so as to obviate the necessity of going on the running board. *Gulf, C. & S. F. Ry. Co. v. Riordan* (Civ. App.) 166 S. W. 133.

Where, in an action for injuries to an employé from the negligence of the foreman in giving an order, the single act of the foreman in giving the order was submitted to the jury, refusal to submit the issue whether the injuries were due to accident was not erroneous. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 685.

Where a special charge requested by the master disregarded the issue of the master's failure to furnish suitable material for a scaffold which fell with the servant it was properly refused. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

Where plaintiff claimed to recover for injuries because of the incompetency of the fellow servant, and also because of defendant's furnishing dangerous machinery, an instruction on the issue of fellow servant, and concluding that if the jury found the facts as therein stated, they should return a verdict for defendant, was properly refused as eliminating the defective machinery issue. *La Grange & Lockhart Compress Co. v. Hart* (Civ. App.) 169 S. W. 373.

In a brakeman's action for injuries in coupling cars, a requested instruction denying his right to recover if he was contributorily negligent, whether the defendant was negligent or not, was properly refused, since it ignored the state and federal statutes on comparative negligence. *San Antonio, U. & G. R. Co. v. Green* (Civ. App.) 182 S. W. 392.

418. — **Contracts and actions relating thereto in general.**—A charge in an action to enforce vendor's lien notes held not to submit the question of failure of consideration. *Willingham v. Brown* (Civ. App.) 163 S. W. 107.

In an action on a note, defendants' requested instructions on his plea of estoppel, ignoring the issue of his having placed himself in a worse position by reliance thereon, held properly refused. *Senter v. Teague* (Civ. App.) 164 S. W. 1045.

Defendant's requested instruction, in an action by lessors against the lessee for failure to cultivate in a proper manner, as he had agreed, that no damages could be

allowed for the part of the crop that died after it came up is erroneous in eliminating the issue of it having died from negligence. *Henson v. Baxter* (Civ. App.) 166 S. W. 460.

In an action against defendant on assumption of his son's debt, an instruction that if certain land was conveyed to him for the purpose of paying off the son's debt due the father, no further findings need be made held erroneous, as eliminating other issues made by the pleadings. *Bell v. Swim* (Civ. App.) 178 S. W. 850.

In action on fire policy, the court did not err in refusing peremptory instruction for defendant ignoring waiver and estoppel. *Mechanics' & Traders' Ins. Co. v. Dalton* (Civ. App.) 189 S. W. 771.

In an action for price of silo, where defendant alleged fraud entitling him to a rescission, with an alternative plea of damage for breach of warranty if evidence failed to sustain allegations of fraud, charge should have covered both phases of case. *Ames Portable Silo & Lumber Co. v. Gill* (Civ. App.) 190 S. W. 1130.

In action on note for insurance premium, an instruction presenting assured's theory that note was not to be delivered except upon certain conditions properly ignored the insurance company's claim that a written agreement governed the transaction. *Texas Life Ins. Co. v. Huntsman* (Civ. App.) 193 S. W. 455.

419. — **Contracts of carriage and for telegraphic service.**—In an action against a terminal carrier for delay and rough handling of cattle, a requested charge held properly refused because ignoring an issue. *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708.

An instruction to find for defendant carrier if the shipment could not have reached destination in time for a certain market held properly refused as ignoring evidence. *Gulf, C. & S. F. Ry. Co. v. J. A. Bowers & Son* (Civ. App.) 175 S. W. 861.

In an action against a carrier for misdelivery, an instruction held not erroneous as containing language excluding altogether from consideration testimony that one who received delivery was not partner of consignee. *Texas & P. Ry. Co. v. Missouri Iron & Metal Co.* (Civ. App.) 178 S. W. 597.

Where a shipper of live stock sought recovery for negligent delay, as well as mis-handling, a charge that, if the shipment was forwarded on the first train, there could be no recovery, is erroneous, because disregarding other negligence. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

In an action for damages occasioned the shippers of live stock by delay in transit, peremptory instructions for defendants on the ground that the evidence was insufficient as a basis for damages on account of a decline in the market on the day after the cattle arrived late, were properly refused, where the evidence raised the issue of shrinkage in weight. *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384.

In a suit for damages to shipment of cattle based on allegations of negligence in several respects, instruction submitting the converse of the theories on which plaintiff was to recover, omitting one of the issues of negligence, was erroneous. *St. Louis Southwestern Ry. Co. of Texas v. Kerr* (Civ. App.) 184 S. W. 1058.

In an action for negligence in delivery of a telegram presented in the evening at an office which closed at night and did not open until 8 o'clock, an instruction, allowing recovery if the agent agreed to transmit the message by 6:30 or 7 the next morning and failed to do so, held erroneous, the reasonableness of the hours being an issue. *Horn v. Western Union Telegraph Co.* (Sup.) 194 S. W. 386.

420. — **Damages and amount of recovery.**—Instruction that, if plaintiff's stock recovered from injury received in dipping, no recovery might be had by plaintiff, held properly refused, where it ignored evidence that plaintiff had incurred extra expense in bringing the stock to condition again. *Missouri, K. & T. Ry. Co. of Texas v. Cauble* (Civ. App.) 174 S. W. 880.

Where there was no evidence before the jury by which they could correctly measure damages, a peremptory instruction that the undisputed evidence showed the hides to be of a certain value was error. *Herrera v. Marquez* (Civ. App.) 182 S. W. 1143.

In a servant's action for injury, instruction not to consider any amount which the defendant had agreed to pay in settlement of the plaintiff's claim held misleading and erroneous, where there was evidence of a valid adjustment. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

The term "sheep" including ewes and lambs, requested instruction requiring a finding that there was no decline in market value of sheep, when there was such evidence as to either ewes or lambs, is erroneous. *Panhandle & S. F. Ry. Co. v. Bell* (Civ. App.) 189 S. W. 1097.

#### IV. CONSTRUCTION AND OPERATION

422. **Construction of particular instructions.**—A charge in a personal injury action against a railroad company by a passenger held to authorize a recovery for injuries not caused by the defendant's negligence, where there was no evidence of such injuries. *Missouri, K. & T. Ry. Co. of Texas v. Pitkin* (Civ. App.) 158 S. W. 1035.

A charge as to the rights of the parties, after plaintiff's surrender of his ticket to an employé, held calculated to lead the jury to believe that an unauthorized employé was meant. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 163 S. W. 601.

In an action for damages for injuries to plaintiff's wife who was thrown down when entering defendant's train, an instruction held not to require the jury to find that plaintiff's wife had no ticket, and was not boarding the train, in order to find against her. *International & G. N. Ry. Co. v. Kruger* (Civ. App.) 163 S. W. 677.

In an action for slander, a charge that plaintiff stole defendant's property, which was made to one who knew that plaintiff was in possession of defendant's property, and therefore could not have been guilty of technical theft, may be construed as a charge of swindling. *Burkhiser v. Lyons* (Civ. App.) 167 S. W. 244.

A charge on damages, limiting recovery to such amount as would compensate plaintiff if paid now, meant if paid now in cash. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 172 S. W. 1129.

In action for slander by defendant's manager, instructions, authorizing recovery if the manager was the agent of defendant acting within scope of employment, did not authorize recovery merely because language was uttered contemporaneously with employment. *Southwestern Telegraph & Telephone Co. v. Wilkins* (Civ. App.) 183 S. W. 429.

On cross-bill, general charge to find for defendant what would compensate for personal injury to himself and wife from overturning of car would include all injury, past or future, proximately resulting from the plaintiff's alleged negligence. *Roberts v. Houston Motor Car Co.* (Civ. App.) 183 S. W. 257.

**424. Construction and effect of charge as a whole.**—Instructions must be considered as a whole. *Atchison, T. & S. F. Ry. Co. v. Stevens* (Civ. App.) 192 S. W. 304; *Magnolia Motor Sales Corp. v. Chaffee* (Civ. App.) 192 S. W. 562; *Vickrey v. Dockray* (Civ. App.) 158 S. W. 1160; *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400; *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967; *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 163 S. W. 621; *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28.

Assignments of error complaining of isolated paragraphs of the charge will be overruled, where such paragraphs, when read with the charge as a whole, are not erroneous. *Hermann v. Bailey* (Civ. App.) 174 S. W. 865.

An instruction is not erroneous, as confusing, if unobjectionable when read in connection with other instructions given. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

**425. — Errors in general.**—In an action by the state to recover a penalty from a railroad company for failing to keep the toilet at its depot, and the grounds adjacent thereto, lighted at night, charge, when construed as a whole, held not erroneous as requiring defendant to keep lighted the toilet and grounds in the daytime as well as at night. *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 163 S. W. 338.

**426. — Omissions in general.**—A charge is to be construed as a whole, and when the right of recovery on one issue is submitted generally, its omission from another paragraph presents no reversible error. *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063.

**430. — Contributory negligence and assumption of risk.**—In an action for injuries to a brakeman who was knocked from a dump car by a swinging door, an instruction as to the assumption of risk by the brakeman held not to instruct that the company must fasten the door of the car. *St. Louis Southwestern Ry. Co. of Texas v. Tune* (Civ. App.) 158 S. W. 233.

In an action for the wrongful death of a servant, the failure of the court to charge that, in determining the question of contributory negligence, the jury should consider the evidence of plaintiffs, as well as that of defendant, is not error, where other charges summarized the acts which defendant claimed showed contributory negligence, and submitted the question whether they did. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

**432. — Weight and effect of evidence.**—Instructions must be read as a whole, and, if when so considered they correctly present the law, error cannot be predicated on a portion alone, which might be said to be on the weight of the evidence. *Fox v. Houston & T. C. Ry. Co.* (Civ. App.) 186 S. W. 852.

**434. — Measure of damages or amount of recovery.**—An instruction as to damages in a personal injury action held not misleading when construed as a whole, though objectionable when standing alone. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

**435. Error in instructions cured by withdrawal or giving other instructions.**—In trespass to try title instruction held not confusing or misleading, in view of a further instruction. *Wofford v. Strickland* (Civ. App.) 160 S. W. 623.

An erroneous instruction held cured by another instruction. *El Paso Electric Ry. Co. v. Davidson* (Civ. App.) 162 S. W. 937.

An omission in one part of an instruction may be cured by a proper charge elsewhere. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 163 S. W. 621.

Where the entire charge fairly submits plaintiff's case and the facts set up in defense, a charge submitting plaintiff's case is not objectionable as taking defendant's contention from the jury and emphasizing the contention of plaintiff. *Watson v. Rice* (Civ. App.) 166 S. W. 106.

Where the court covered the defense in its charge, a charge calling attention in a brief way to the cause of action, without referring to the defense, was not prejudicial. *Dallas Consol. Electric St. Ry. Co. v. Stone* (Civ. App.) 166 S. W. 708.

Where correct charges do not refer to or modify an erroneous charge, which is in direct contradiction, the two cannot be reconciled and judgment must be reversed. *Western Union Telegraph Co. v. Cathey* (Civ. App.) 166 S. W. 714.

A party failing to request a correct charge on a point may not complain of a charge, which, though verbally inaccurate, was substantially correct, when taken in connection with the other charges given, and not likely to have prejudiced the objecting party. *McKee v. Garner* (Civ. App.) 168 S. W. 1031.

Indefiniteness in an instruction is not error, where the instruction, read in connection with a special charge, could not have misled the jury. *Kansas City Southern Ry. Co. v. Coomber* (Civ. App.) 173 S. W. 544.

Error in a charge held not cured by a contradictory charge. *Gulf, C. & S. F. Ry. Co. v. Loyd* (Civ. App.) 175 S. W. 721.

A deficiency in a particular instruction does not constitute error, if such deficiency is supplied in subsequent portions of the general charge referred to. *Stockey & White v. Mears* (Civ. App.) 181 S. W. 774.

In action for delay in shipment of cattle in transit, deficiency in main charge held cured by giving special charge. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

436. — **Issues and theories of case in general.**—Error in an instruction that under the 10-year statute of limitation the claimant must have paid taxes held not cured by a later instruction that plaintiff might recover upon a showing of peaceable and adverse possession for ten years, since the two charges were contradictory. *Gotoskey v. Grawnder* (Civ. App.) 158 S. W. 249.

An erroneous instruction as to the abstract rule of law concerning the duty of a railroad company to furnish safe means and manner of work for its freight handlers is harmless where it is followed by a charge correctly applying the law to the facts. *St. Louis & S. F. R. Co. v. Cox* (Civ. App.) 159 S. W. 1042.

Where the petition did not authorize an instruction directing a verdict for plaintiff if defendant was negligent in "inducing" plaintiff to descend from the train, the error was cured by another part of the charge that plaintiff must recover under the allegations of his petition. *Houston & T. C. R. Co. v. Loofs* (Civ. App.) 160 S. W. 300.

If defendant's representation as to the value of a mule was an opinion, a charge authorizing a verdict for plaintiff if the jury found the mule not worth the money paid for it by plaintiff was not reversible error, where it was also charged that a verdict was not authorized thereby without a finding that defendant not only made this representation, but also falsely alleged that the mule was sound, and any error in charge authorizing a recovery "regardless of defendant's knowledge" of the unsoundness of a mule, where defendant's contention was that his statement at the sale was "that the mule was sound so far as I knew," was corrected by defendant's special charge "that a statement that the mule was sound so far as he knew would not be sufficient to constitute" the warranty alleged. *Slover v. Goode* (Civ. App.) 163 S. W. 333.

Any error in an instruction in a boundary case, in laying too much weight on the beginning corner of a description was cured, where another paragraph of the charge expressly stated that no one corner had any greater force or dignity than another. *Miller v. Campbell* (Civ. App.) 171 S. W. 251.

In an action on a fire insurance policy, an instruction ignoring the defense of settlement held erroneous, notwithstanding other instructions. *Fire Ass'n of Philadelphia v. Richards* (Civ. App.) 179 S. W. 926.

Where an instruction, purporting to generally define the rights of the parties, omits defenses, the fact that other instructions present those defenses will not cure the error. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

Where it was stipulated that libelous charge of murder was untrue except as to fact of killing, a charge that article was libelous, false, untrue, and unauthorized was not error, where court further charged that defendant had legal right to publish fact of killing. *Houston Chronicle Pub. Co. v. Quinn* (Civ. App.) 184 S. W. 669.

In an action for conversion of automobile alleged by defendant to have been retaken under terms of mortgage because it believed its debt insecure, where instructions in several places referred to taking of car, it was sufficiently plain that "legal right" of defendant meant legal right to retake car. *Magnolia Motor Sales Corp. v. Chaffee* (Civ. App.) 192 S. W. 562.

An instruction on rule regarding unascertained lines in former survey and their control over courses and distances erroneous because not applicable to evidence held not cured by other instructions. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

A charge that a call for a survey to be circumscribed on three sides by waters called for must control proof of a survey inconsistent with such theory, although on weight of evidence when standing alone, held not error in view of other portions of the charge. *Id.*

In buyer's action for damages, an instruction omitting the essential requirement of mutuality in defining mutual mistake is not reversible error, where another portion of the charge covered the omission. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

437. — **Negligence in general.**—The error in permitting a liability of one of several carriers to be based on negligence by itself or by another carrier held cured by a charge that they were separately liable and that no defendant could be rendered liable on account of the negligence of another. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

Where the court charged that defendant was only bound to exercise ordinary care in the operation of M.'s engine over its tracks, it did not err in omitting to also include such proposition in an instruction that defendant would be liable for M.'s negligent operation of such engine over its tracks, and an instruction that it was M.'s duty to use only good engines with best-known appliances, etc., to prevent the escape of fire while operated over defendant's railroad, was not objectionable in not stating that defendant was only liable for damages when it failed to use ordinary care in equipping its engines with the best-known appliances, etc.; the court having otherwise so charged. *St. Louis Southwestern Ry. Co. of Texas v. McGrath* (Civ. App.) 160 S. W. 444.

An instruction, in an action for injuries to a brakeman struck by a switch stand while mounting a switch engine, held not objectionable as placing too great a burden on the railroad company in view of other instructions given. *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400.

Error in submitting as negligence, in a passenger's action for injuries, a sudden jerk of the engine, when the evidence showed that the movement was not unusual, was not prejudicial, where the court charged that the jury could not find for plaintiff because of the operation of the train if it was such as would be proper in the exercise of due care. *Missouri, K. & T. Ry. Co. of Texas v. Cooper* (Civ. App.) 162 S. W. 1179.

A charge that plaintiff could recover for injuries sustained from his horse running away at a railroad crossing which was torn up, if defendant's foreman represented that a wagon had crossed and he could cross over, was not erroneous, because such statements were a mere expression of opinion, where it was further charged that he could not recover if they were expressions of opinion. *St. Louis Southwestern Ry. Co. of Texas v. Evans* (Civ. App.) 166 S. W. 702.

In a personal injury action by a railroad servant, an instruction, allowing recovery for an act of negligence not counted on, held not erroneous in view of the others. *Missouri, O. & G. Ry. Co. v. Dereberry* (Civ. App.) 167 S. W. 30.

Instruction to find for plaintiff if freight train's employes were negligent, if erroneous as failing to state what acts would constitute negligence, held not ground for reversal,

where special charges confined and defined the particular acts of negligence upon which the jury could make a finding. *Missouri, K. & T. Ry. Co. v. Wallace* (Civ. App.) 167 S. W. 168.

A paragraph of a charge which is an affirmative presentation of the issue of negligence charged in count 3 of the petition, and which tells the jury that if they believe there was want of ordinary care in certain respects, which was the proximate cause of plaintiff's injury, to find for him under said count 3, is not objectionable because making no mention of contributory negligence, properly submitted in another paragraph. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545.

An instruction imposing on defendant employer the duty to inspect tongs held not erroneous, where another instruction submitted to the jury the question whether the tongs were a simple tool, and it clearly appeared that they were not such, as a matter of law. *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809.

In action for damage to shipment of live stock, any error in authorizing verdict against defendant carriers jointly held made harmless by instruction limiting connecting carrier's liability to that resulting from its own acts or default. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

In action by a brakeman for personal injuries, instructions held not erroneous in view of other instructions given. *Texas & P. Ry. Co. v. Matkin* (Sup.) 174 S. W. 1098, affirming judgment (Civ. App.) 142 S. W. 604.

Instruction containing contradictory statements of railroad's duty relative to child's safety, one of which was erroneous, was not cured by the correct statement therein. *Gulf, T. & W. Ry. Co. v. Dickey* (Sup.) 187 S. W. 184.

438. — **Contributory negligence.**—A charge to find for plaintiff if the cattle were injured through defendant's negligence will not be held to have led the jury to disregard defendant's plea of contributory negligence, where in another paragraph that plea was expressly submitted and the jury instructed to find for defendant if that plea was sustained. *Chicago, R. I. & G. Ry. Co. v. Swaggerty* (Civ. App.) 163 S. W. 317.

An instruction that plaintiff was chargeable with notice of that which must "necessarily" have come to his knowledge held not erroneous, where the court further instructed that he was chargeable with notice of defects which were obvious, or which an ordinarily prudent person would have discovered. *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809.

An instruction charging the defendant for liability in negligently maintaining the instrumentality which resulted in plaintiff's injury held prejudicial, where the issues of contributory negligence and proximate cause were ignored, although such issues were covered by other proper instructions. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

439. — **Assumption of risk.**—In a brakeman's action for injuries from slipping from a step on the tender, a charge on the assumption of risk, if objectionable as stating an abstract proposition of law, held, when considered with a special charge, to correctly submit that issue. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

In section hand's action for injury while removing a wreck, error in the main charge on the question of assumption of risk was not reversible, where a correct charge requested by defendant was given. *Missouri, K. & T. Ry. Co. of Texas v. Mooney* (Civ. App.) 181 S. W. 543.

Error, if any, in the charge on assumption of risk in an action for injuries to a fireman, held cured by subsequent portions of the charge and by a charge given at defendant's request. *Atchison, T. & S. F. Ry. Co. v. Stevens* (Civ. App.) 192 S. W. 304.

440. — **Evidence and matters of fact in general.**—Where the court charged that the burden was on plaintiff to show by a preponderance of the evidence the facts entitling him to recover, a charge that, if an ordinarily prudent person would have done the act complained of, the verdict must be for the employer did not place on the employer the burden of proving freedom from negligence. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 685.

In an action against a bank for money which a depositor claimed was wrongfully paid out, a charge that the depositor had the burden of proving his case was not misleading and did not improperly place the burden of proof on him, where the court charged that the bank had the burden of proving its affirmative defenses of payment with authority and ratification. *Owens v. First State Bank of Bronte* (Civ. App.) 167 S. W. 798.

In an action to try title, failure to instruct on burden of proof held cured by language submitting issue of limitation, "Do you find from a preponderance of the evidence," etc. *City of El Paso v. Wiley* (Civ. App.) 180 S. W. 661.

An erroneous charge as to rebutting presumption of railway company's negligence in setting fire to cotton held not to have been rendered harmless by a correct instruction inconsistent therewith in not being presumed the correct charge was followed. *Nussbaum & Scharff v. Trinity & B. V. Ry. Co.* (Sup.) 194 S. W. 1099.

441. — **Weight and effect of evidence in general.**—Where an instruction was not on the weight of the evidence or misleading when read in connection with the general charge, the giving thereof was not error. *Good v. Texas & P. Ry. Co.* (Civ. App.) 166 S. W. 670.

An instruction in an action for injury to a shipment of live stock held not to be on the weight of the evidence, nor objectionable as not allowing a finding for defendant, in view of another instruction given. *Texas & P. Ry. Co. v. De Long* (Civ. App.) 176 S. W. 874.

442. — **Invasion of province of jury.**—The error in a charge which was on the weight of the evidence because it assumed facts held cured by others. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

In an action against a carrier for personal injuries, a charge assuming that defendant's employes, after the train had passed the station, stopped it and caused plaintiff's wife to leave it, held, in view of another part of the charge thereon, not objectionable as

a charge on the weight of evidence. *Missouri, K. & T. Ry. Co. of Texas v. McCormick* (Civ. App.) 160 S. W. 429.

Where some paragraphs assumed that defendant was negligent, but in others that issue was expressly submitted as a controverted issue, with instructions that, if plaintiff's case had not been made out by a preponderance of the evidence to find for defendant, and that the jury were the exclusive judges of the credibility of witnesses and the weight of evidence, the jury will not be held to have been misled. *Chicago, R. I. & G. Ry. Co. v. Swaggerty* (Civ. App.) 163 S. W. 317.

In trespass to try title, a paragraph of the charge attacked as assuming plaintiff's possession at a certain time should be read and construed in connection with the succeeding paragraphs as to possession. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

That the court left it to the jury whether contributory negligence in driving on a railroad track in plaintiff's automobile was the proximate cause of his injury did not cure error in charging that he was negligent when that was a jury question, where any negligence by plaintiff was necessarily a proximate cause; nor was such error cured by submitting plaintiff's negligence in stopping upon the track after going there. *Adams v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 164 S. W. 853.

Where though the first part of instruction was confused as to whether court submitted for jury's determination question whether plaintiff was negligent in riding in cattle car, the latter part of the charge told the jury that it was negligence, the apparent discrepancy held harmless. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

Defendant is not harmed by any error in instructing that deceased was an employé on duty; another instruction requiring, for recovery, a finding that he was where the public or an employé off duty could be. *El Paso & Southwestern Co. v. La Londe* (Civ. App.) 173 S. W. 890, writ of error denied (Sup.) 184 S. W. 498.

443. — **Measure of damages or amount of recovery.**—Where the court in one paragraph of the charge submitted specifically the measure and elements of damage recoverable, a subsequent instruction that if the jury found for plaintiff they should allow such damages as seemed to them to be right and proper under all the facts and circumstances in evidence was not erroneous as allowing double damages. *Quanah, A. & P. Ry. Co. v. Johnson* (Civ. App.) 159 S. W. 406.

In an action for a brakeman's death, held, in view of the other issues and instructions, that a charge requiring a finding as to the amount which would "fully compensate" the widow for her pecuniary loss was not objectionable as leading the jury to think that compensation should be large and should cover her mental anguish at the loss of her husband's companionship. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

Failure of paragraph of charge to state that plaintiff could not recover for injuries due to her negligence subsequent to the injury, if error, held harmless, where this matter was clearly stated in another paragraph. *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412.

444. — **Definition or explanation of terms.**—That an instruction merely defines self-defense is not ground of complaint, another instruction having correctly applied the law to the issue of self-defense as a justification of the act of defendant's brakeman. *St. Louis Southwestern Ry. Co. of Texas v. Huddleston* (Civ. App.) 178 S. W. 704.

Failure of court to define "lucid interval" held not erroneous, in view of the instructions given. *Wolnitzek v. Lewis* (Civ. App.) 183 S. W. 819.

445. — **Withdrawal or correction.**—Where two contradictory charges are given, withdrawal of the erroneous instruction is the only possible correction. *Nussbaum & Scharff v. Trinity & B. V. Ry. Co.* (Sup.) 194 S. W. 1099.

## V. OBJECTIONS

446. **Necessity and time for making objections.**—Under this article the error in a charge is waived, where no objection was presented to the trial court. *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495; *Schrader v. International & G. N. Ry. Co.* (Civ. App.) 172 S. W. 201; *United States & Mexican Trust Co. v. Austin* (Civ. App.) 176 S. W. 87; *International & G. N. Ry. Co. v. Frank* (Civ. App.) 177 S. W. 168; *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022; *Yates Mercantile Co. v. Farmers' Guaranty State Bank of Jacksonville* (Civ. App.) 194 S. W. 1157.

It must appear that objection was made before the charge was read to the jury. *Roberds v. Laney* (Civ. App.) 165 S. W. 114; *Saunders v. Thut* (Civ. App.) 165 S. W. 553; *Johnson v. Hoover & Lyons* (Civ. App.) 165 S. W. 900; *International & G. N. Ry. Co. v. Sharpe* (Civ. App.) 167 S. W. 814; *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514; *Texas & P. Ry. Co. v. Brown* (Civ. App.) 168 S. W. 866; *Heath v. Huffhines* (Civ. App.) 168 S. W. 974; *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375; *Schubert v. Voges* (Civ. App.) 169 S. W. 409; *Quanah, A. & P. Ry. Co. v. Chumbley* (Civ. App.) 169 S. W. 1107; *W. R. Case & Sons Cutlery Co. v. Folsom* (Civ. App.) 170 S. W. 1066; *Horton v. Texas Midland R. R.* (Civ. App.) 171 S. W. 1023; *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739; *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 172 S. W. 750; *St. Louis, B. & M. Ry. Co. v. Dawson* (Civ. App.) 174 S. W. 850; *Fuller v. El Paso Live Stock Commission Co.* (Civ. App.) 174 S. W. 930; *Brooke, Smith & Co. v. Dennis* (Civ. App.) 175 S. W. 807; *Consolidated Kansas City Smelting & Refining Co. v. Schulte* (Civ. App.) 176 S. W. 94; *McLaughlin v. Terrell Bros.* (Civ. App.) 179 S. W. 932; *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979; *Hawks v. Longbotham* (Civ. App.) 188 S. W. 734; *Goodson v. Houston & T. C. R. Co.* (Civ. App.) 189 S. W. 82; *Thorne v. Dashiell* (Civ. App.) 189 S. W. 986; *Ross v. Moore* (Civ. App.) 191 S. W. 853.

Where bills of exception to the refusal of special charges recite that "at the proper time" such charges were presented to the trial judge, the recital is sufficient to show that they were presented before the main charge was read to the jury, as required by this article. *Hawks v. Longbotham* (Civ. App.) 188 S. W. 734.

Objections to the charge of the court cannot be reviewed, where it did not appear

that they were presented to the court at the proper time, or that the overruling thereof was excepted to. *Houston B. & T. Ry. Co. v. Lewis* (Civ. App.) 176 S. W. 68; *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925; *Weatherford, M. W. & N. W. Ry. Co. v. Smith* (Civ. App.) 170 S. W. 133; *Williams v. Phelps* (Civ. App.) 171 S. W. 1100; *Rotge v. Simmler* (Civ. App.) 176 S. W. 614; *Fireman's Ins. Co. v. Jesse French Piano & Organ Co.* (Civ. App.) 187 S. W. 691.

Under this article assignment of error will be considered waived by failure of the record to show any objection below to the portions of the charge on which they were based. *Reed v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 174 S. W. 956; *Lake-side Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

Procedure in trial court relative to presentation of objection to charge held substantial compliance with this article. *Gulf, T. & W. Ry. Co. v. Dickey* (Sup.) 187 S. W. 184, 189.

Assignments of error, which do not present the same objections to the appellate court as were presented to the court's charge below, cannot be considered. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025; *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809.

Noncompliance with this article does not affect right to review of rulings on requested instructions; trial being before the act took effect. *Fidelity-Phoenix Fire Ins. Co. v. O'Bannon* (Civ. App.) 178 S. W. 731; *Texas & N. O. R. Co. v. Francis* (Civ. App.) 165 S. W. 40.

An objection to a peremptory instruction need not be taken in the lower court. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482; *Owens v. Corsicana Petroleum Co.* (Civ. App.) 169 S. W. 192.

Despite court rule 62a (149 S. W. x), the failure of the trial court to prepare and read its charge before argument held prejudicial, though no objections to the charge given were made. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

A bill of exceptions to the giving of a special charge should show that the particular objection urged on appeal was called to the attention of the trial court, as required by this article, although the language of the article mentions only the general charge. *Beard v. International & G. N. Ry. Co.* (Civ. App.) 171 S. W. 553.

Under this article, refusal of special charges held not reviewable because not objected to at the time. *Atchison, T. & S. F. Ry. Co. v. Skeen* (Civ. App.) 174 S. W. 655.

Under this article, error in a charge on the only issue in the case cannot be considered on appeal, on the theory that it was fundamental, where there was no objection below. *Gestean v. Bishop* (Civ. App.) 180 S. W. 302, certification to Supreme Court denied 181 S. W. 696.

Under this article, the action of the court in granting certain special charges, in the absence of objection and exception thereto, could not be considered as fundamental error. *Woodruff v. Deshazo* (Civ. App.) 181 S. W. 250.

Under this article and article 2061, as amended, a defendant, to have the giving of a peremptory instruction reviewed, must except before it is submitted to the jury. *Walker v. Haley* (Civ. App.) 181 S. W. 559.

Under this article, objections to a peremptory instruction cannot be raised for the first time on motion for new trial. *J. S. McCall & Sons v. Roemer* (Civ. App.) 186 S. W. 409.

Under Rev. St. 1911, arts. 1970-1972, to obtain review of charge of court on appeal, objection in particular complained of must be presented to trial court before reading to the jury, and, when such objection is made, complaining party can have error considered by appellate court without reserving formal bill of exceptions to the charge. *Gulf, T. & W. Ry. Co. v. Dickey* (Sup.) 187 S. W. 184.

This article applies to peremptory instructions, so that, in the absence of record showing objection to a peremptory charge made before it was read, the objection cannot be considered. *Carr v. Pecos Valley State Bank* (Civ. App.) 189 S. W. 988.

In view of this article, where record fails to show that peremptory instruction was objected to, Appellate Court will not review ruling. *Pearce v. Supreme Lodge, Knights and Ladies of Honor* (Civ. App.) 190 S. W. 1156.

Under this article and article 2061, exceptions first made in an amended motion for new trial are insufficient. *Jones v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 193 S. W. 373.

Under this article objection to submitted special issue not urged at trial, but urged for first time in motion for new trial, held waived. *Rhyme Milling Co. v. Glasgow* (Civ. App.) 194 S. W. 686.

Where no objections are urged against an instruction when it is given, or on motion for new trial, its propriety will not be reviewed. *Witt v. Young* (Civ. App.) 194 S. W. 1019.

Recitals in the record that appellant, prior to the reading of the main charge, excepted thereto as stated, and that, each of the above exceptions to the charge being overruled, appellant excepted, followed by a recital, "Refused," signed by the trial judge, held not to sufficiently raise for review error in the main charge, under this article. *Mutual Life Ins. Ass'n of Donley County v. Rhoderick* (Civ. App.) 164 S. W. 1067.

Under this article, objections waived by not presenting them to the trial court cannot be urged on appeal. *Southern Kansas Ry. Co. of Texas v. Crutchfield* (Civ. App.) 165 S. W. 551.

Where evidence tended to show that plaintiff procured W. as purchaser and lessee, while defendant claimed that B. was the real purchaser and lessee, error in charging to find for plaintiff if he procured W. or both or either of them held not reviewable, in the absence of any objection to the charge which could be considered. *Saunders v. Thut* (Civ. App.) 165 S. W. 553.

Under this article and article 2061, only such objections can be considered on appeal as were made at the trial in the manner specified, and then only when preserved by bill of exceptions. *St. Louis Southwestern Ry. Co. of Texas v. Wadsack* (Civ. App.) 166 S. W. 42.

That an objection to an instruction may be reviewed, the record must show by bill of exceptions that objections were made before the charge was read to the jury, together with the court's action thereon, as provided by Acts 33d Leg. c. 59. *Ford Motor Co. v. Freeman* (Civ. App.) 168 S. W. 80.

Errors in instructions, other than fundamental errors, are waived unless objection is made and exception taken as required by Acts 33d Leg. c. 59. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

Rev. St. 1911, art. 2061, embodied in chapter 19, tit. 37, and amended by Acts 33d Leg. c. 59, refers to the articles of the chapter relating to bills of exceptions, and not to the foregoing articles of the amendatory law, amending articles 1970, 1971, 1973, 1974, of chapter 13, relating to instructions and objections; and the articles as amended govern the exceptions to instructions and refusal of instructions. *Heath v. Huffhines* (Civ. App.) 168 S. W. 974.

Under this article and arts. 1973, 2061, assignments of error to the charge and the refusal to charge cannot be considered, where the bills of exceptions do not show that appellant presented his objections to the charge before it was given, and excepted at the time to the refusal of special charges. *Id.*

Where defendant's requested instructions were refused, but no objection to the charge was made before it was given, under this article and arts. 1973, 1974, 2061, it is to be regarded as approved and as requested by defendant, as regards his right to complain of refusal of the instructions, within the rule that if one requests two different instructions, on the same issue, and one of them is given, he cannot complain of the refusal of the other. *Cleburne St. Ry. Co. v. Barnes* (Civ. App.) 168 S. W. 991.

An assignment complaining of the giving of a special charge requested by plaintiff could not be considered, where the record failed to show that objections were made to such charge when it was presented to defendant's counsel for examination and objection, in accordance with Rev. St. 1911, art. 1973. *Quanah, A. & P. Ry. Co. v. Chumbley* (Civ. App.) 169 S. W. 1107.

Making of objections and taking of exceptions to rulings on charges under Act March 29, 1913 (Acts 33d Leg. c. 59), held not properly shown by the record, in the absence of a bill of exceptions. *Texas Midland R. R. v. Becker & Cole* (Civ. App.) 171 S. W. 1024.

Under Rev. St. 1911, §§ 1971-1973, 2061, plaintiff, not excepting to refusal of his requested special charges, and whose only objection was filed after judgment, held to have approved the charge. *Moore v. Cooper Mfg. Co.* (Civ. App.) 171 S. W. 1034.

Error could not be predicated on the submission of an issue of negligence of defendant's driver, in absence of objection thereto and request for submission of any other theory of negligence pleaded. *Martinez v. Medina Valley Irr. Co.* (Civ. App.) 171 S. W. 1035.

Under this article, assignments of error complaining of instructions cannot be considered, where the record does not show that exceptions were reserved. *Gunter v. Merchant* (Civ. App.) 172 S. W. 191, rehearing denied 173 S. W. 260.

Assignments of error complaining of the general charge and of refusal of requested charges cannot be considered, unless the record shows a compliance with this article and arts. 1973 and 2061. *Texas Midland R. R. v. Fogleman* (Civ. App.) 172 S. W. 558.

Assignments of error complaining of the charge cannot be considered, where the record does not show by bill of exceptions that objections were presented in time, or that the objections presented were preserved by bill of exceptions. *Elliott v. Clark* (Civ. App.) 172 S. W. 560.

In suit to enjoin collection of judgment, held that instruction authorizing verdict for defendant if plaintiff owed the debt sued on was properly refused, in view of defendant's failure to object to an instruction, assuming that plaintiff had shown he did not owe it. *Woodard v. Eskridge* (Civ. App.) 174 S. W. 868.

Court's memorandum on defendants' bill of exception to the general charge held insufficient as not affirmatively showing that, as required by statute, the objections to the court's charge were presented before its reading to the jury, and before the arguments of counsel. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

An instruction to which no objection was presented must, under the amended law, be deemed on appeal as approved. *Kell v. Ross* (Civ. App.) 175 S. W. 752.

Under this article and arts. 1973, 2061, refusal of a requested instruction was not waived, though objection, other than by the request, was not made to the general charge. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

Under this article, defendant, who did not object to the court's charge before it was given or present appropriate charges, waived any errors, and must be considered as having adopted the charge. *Gilbert v. Fuhrman* (Civ. App.) 182 S. W. 51.

Where defendant neither objected to the lack of, nor requested, an instruction submitting the question of market value to the jury, as required by statute, objection to the court's action will be considered waived. *San Antonio & A. P. Ry. Co. v. Schwethelm* (Civ. App.) 186 S. W. 414.

White passengers suing because forced to ride in a coach partly occupied by negroes, not having objected below to instructions which made recovery contingent upon the suffering of actual damages, cannot assert on appeal that they should have been allowed nominal damages in any event. *Weller v. Missouri, K. & T. Ry. Co.* (Civ. App.) 187 S. W. 374; *Connally v. Missouri, K. & T. Ry. Co.* (Civ. App.) 187 S. W. 376.

Where the court without objection submitted to the jury the issue of contributory negligence, defendants cannot complain that there was no evidence to sustain the jury's finding. *Caffarelli Bros. v. Bell* (Civ. App.) 190 S. W. 223.

In view of this article and article 2061, where plaintiff did not except to refusal of instructions, he is in attitude of having approved rulings at trial, and hence assignments of error based thereon will be overruled. *Cummings v. Owen Bros. Const. Co.* (Civ. App.) 192 S. W. 792.

Where no objections are urged against an instruction when it is given, or on motion for new trial, its propriety will not be reviewed on appeal. *Witt v. Young* (Civ. App.) 194 S. W. 1019.

A party who prepares and submits a full charge cannot complain that it is not the law or does not cover the case in view of Acts 33d Leg. c. 59, providing that all objections to instructions not made as provided shall be deemed waived. *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

447. Sufficiency of objections.—An objection that a charge was upon the weight of evidence was of no avail, where it was not pointed out in what respect it was on the



weight of evidence. *Chicago, R. I. & G. Ry. Co. v. Comstock* (Civ. App.) 189 S. W. 109; *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729; *Houston & T. C. R. Co. v. Gant* (Civ. App.) 175 S. W. 745.

The objection to refusal of a request to instruct the jury to return a verdict for defendant, because plaintiff's evidence is insufficient to sustain a verdict, is too general, if it does not point out wherein the evidence is insufficient. *Cleburne St. Ry. Co. v. Barnes* (Civ. App.) 168 S. W. 991.

The objection to a charge during the trial should be as definite as is required of an assignment of error to the giving of it. *Id.*

An objection to a charge held not sufficient to sustain a proposition under an assignment on appeal, complaining of the overruling of the objection, and hence, the charge not being fundamentally erroneous, the assignment must be overruled. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

Objection to a charge, "failing to charge \* \* \* correctly the measure of damages \* \* \* as to difference in market and actual value," held insufficient to show the trial court the error, as required by this article. *Pecos & N. T. Ry. Co. v. Grundy* (Civ. App.) 171 S. W. 318.

Objections to the court's charge, sufficient to direct the attention of the trial court to the point, will raise it on appeal. *Keevil v. Ponsford* (Civ. App.) 173 S. W. 518.

An assignment of error cannot be predicated on the refusal of a peremptory instruction, where no reason for the objections to such refusal is assigned in the bill of exceptions. *Gulf, C. & S. F. Ry. Co. v. Loyd* (Civ. App.) 175 S. W. 721.

Objections that an instruction is an incorrect statement of the law, or is a charge on the weight of the evidence, are too general to be considered. *Texas & N. O. R. Co. v. Petersilka* (Civ. App.) 176 S. W. 70.

In a suit by riparian owners to enjoin a city from removing structures placed in the bed of a river and for damages, an objection to the charge of the court that the definitions of "channel" and "bed" were incorrect was too general to predicate error upon. *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224.

Objection to charge, made only in inferential and general way by objections presented in trial court, is not a sufficient compliance with this article. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

Objection to instruction because it referred jury to plaintiff's petition for statement of his injuries does not raise point that there was no evidence of some of injuries there alleged. *Andrews v. Wilding* (Civ. App.) 193 S. W. 192.

Objections to the charge relative to lines and boundaries held too general and not to show why the rules regarding relative dignity of calls should not be given in the charge, and an assignment of error based thereon will be overruled. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**448. Necessity of rulings on objections.**—Though the record showed an objection purporting to have been made by appellant to the general charge of the court, yet, as the record did not show any ruling on the exception, and appellant's statement did not show any such objection, it could not be considered on appeal. *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 165 S. W. 546.

Under this article, where the record does not show the ruling on objections to the charge, they will not be considered. *Saunders v. Thut* (Civ. App.) 165 S. W. 553.

Where it does not appear how the court ruled on objections to charge an assignment of error complaining of the charge cannot be considered. *Holcomb v. Blankenship* (Civ. App.) 180 S. W. 918.

**449. Necessity of requesting instructions.**—Where a party did not challenge the sufficiency of the evidence to raise an issue by asking a peremptory instruction, he could not, on appeal, complain of a charge submitting the issue. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

Objections to the giving of erroneous charges cannot be made by the medium of special requests, though if special requests are erroneously refused, error may be predicated thereon. *Eldridge v. Citizens' Ry. Co.* (Civ. App.) 169 S. W. 375.

A party objecting to a charge given must submit a proper special charge. *Wells Fargo & Co. Express v. Keeler* (Civ. App.) 173 S. W. 926.

This article contemplates that requested charges shall be requested in time to enable the court to submit the same if given with the main charge before beginning of argument. *Kell v. Ross* (Civ. App.) 175 S. W. 752.

Notwithstanding this article, requiring all objections to the court's charge to be presented in writing to the opposing counsel and the court before the jury is instructed, it is still necessary to request a special instruction to supply an alleged omission in a charge. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

Mere failure to object to the general charge of the court does not estop a party from requesting instructions and excepting to their refusal since under this article if there is no objection to the general charge, the objection only is waived and the charge is not approved. *Rabinowitz v. Smith Co.* (Civ. App.) 190 S. W. 197.

**450. Submitting instructions to attorneys.**—Under art. 1973, and in view of this article and art. 2061, held, that a bill of exceptions not affirmatively showing that the special charge had been presented to the court and to opposing counsel within a reasonable time after they had the court's general charge could not be considered. *W. R. Case & Sons Cutlery Co. v. Folsom* (Civ. App.) 170 S. W. 1066.

Refusal of special instructions will not be reviewed where the record fails to show that they were presented to opposing counsel for examination and objection, as required by Acts 33d Leg. c. 59. *Terrell v. Houston & T. C. Ry. Co.* (Civ. App.) 189 S. W. 575.

This article does not require the submission to opposing counsel of objections made to the charges given. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

Unless contrary is shown it must be presumed that the trial judge would not have passed on motion for peremptory instruction without requiring its submission to opposing counsel in compliance with this article. *Id.*

Where court recessed for 10 minutes, prepared its charge in that time, and allowed 30 minutes to counsel for preparation of objections and special charges, the refusal of further time shows no abuse of discretion where objections which appellant wished to

prepare are not stated in record, and no showing is made that appellant was injured. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 191 S. W. 1178.

451. **Special issues.**—The action of the court in directing the jury to return an answer to a special issue is not a violation of this article, requiring the court's instructions to be submitted to the jury before argument. *Richardson v. Wilson* (Civ. App.) 178 S. W. 566.

452. **Waiving statutory requirements.**—Agreements to waive the provisions of Acts 33d Leg. c. 59, governing objections and exceptions to the charge, should not be respected by the courts. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

453. **Exceptions.**—See arts. 1972, 2061, and notes thereunder.

Cited without definite application, *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21; *Taylor v. Butler* (Civ. App.) 168 S. W. 1004; *Wickizer v. Williams* (Civ. App.) 173 S. W. 288; *King County v. Martin* (Civ. App.) 173 S. W. 960; *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974; *King v. Gray* (Civ. App.) 175 S. W. 763; *Texarkana & Ft. S. Ry. Co. v. Brass* (Civ. App.) 175 S. W. 778; *McCullough v. Hurt* (Civ. App.) 175 S. W. 781; *Moore v. Decker* (Civ. App.) 176 S. W. 816; *Araansas Harbor Terminal Ry. v. Sims* (Civ. App.) 179 S. W. 895; *Crum v. Thomason* (Civ. App.) 181 S. W. 803; *Foster Lumber Co. v. Rodgers* (Civ. App.) 184 S. W. 761; *Beaty v. Missouri, K. & T. Ry. Co. of Texas* (in dissenting opinion) (Civ. App.) 185 S. W. 298; *Houston Chronicle Pub. Co. v. Murray* (Civ. App.) 185 S. W. 407; *Thornton v. Daniel* (Civ. App.) 185 S. W. 585; *Loeb v. Texas & N. O. R. Co.* (Civ. App.) 186 S. W. 378; *Glens Falls Ins. Co. v. Walker* (Civ. App.) 187 S. W. 1036; *Rishworth v. Moss* (Civ. App.) 191 S. W. 843; *Terrell v. Middleton* (Sup.) 191 S. W. 1138; *Terrell v. Middleton* (in dissenting opinion) (Sup.) 193 S. W. 139; *Hattaway v. Planters' Cotton Oil Co.* (Civ. App.) 194 S. W. 1119.

**Art. 1972. [1318] [1318] Charge need not be excepted to.**—Such charge shall be filed by the clerk, and shall constitute a part of the record of the cause, and shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exception thereto.

**Explanatory.**—The above text has not been changed by legislative enactment since the revision of 1911, but it is repeated here for the purpose of correcting an explanatory note contained in *Vernon's Sayles' Civ. St. 1972*, relative to supercession of the article. The Supreme Court has held that the article is not superseded. See note below.

Cited, *St. Louis Southwestern Ry. Co. of Texas v. Wadsack* (Civ. App.) 166 S. W. 42; *Rabinowitz v. Smith Co.* (Civ. App.) 190 S. W. 197; *Rishworth v. Moss* (Civ. App.) 191 S. W. 843. See also arts. 1974, 2061, and notes thereunder.

**Article not repealed as regards general charge.**—This article refers to the general charge, and was not repealed by implication by Acts 33d Leg. c. 59, amending Rev. St. 1911, arts. 1974, 2061, requiring exceptions to be taken to rulings on requested instructions. *Gulf, T. & W. Ry. Co. v. Dickey* (Sup.) 187 S. W. 184; *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

**Necessity and time for objections.**—See *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514.

**Exceptions to refusal of special charges.**—See *Moore v. Cooper Mfg. Co.* (Civ. App.) 171 S. W. 1034; *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504; also, notes under art. 2061.

**Art. 1973. [1319] [1319] Parties may ask instructions; time for examination and objection.**

Cited, *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925; *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514; *Heath v. Huffhines* (Civ. App.) 168 S. W. 974; *Cleburne St. Ry. Co. v. Barnes* (Civ. App.) 168 S. W. 991; *Taylor v. Butler* (Civ. App.) 168 S. W. 1004; *Moore v. Cooper Mfg. Co.* (Civ. App.) 171 S. W. 1034; *Texas Midland R. R. v. Fogleman* (Civ. App.) 172 S. W. 558; *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504; *Rabinowitz v. Smith Co.* (Civ. App.) 190 S. W. 197; *Terrell v. Middleton* (Sup.) 191 S. W. 1138; *Terrell v. Middleton* (Sup.) [in dissenting opinion] 193 S. W. 139.

1. **Necessity and propriety of requests in general.**—Mere omissions in the charge cannot be made a ground of complaint, where no special charges to cure the defects were requested. *Eryning v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 167 S. W. 826; *Gillett v. Holligan* (Civ. App.) 162 S. W. 367; *McIndoo v. Wood* (Civ. App.) 162 S. W. 488; *Scarborough v. Wheeler* (Civ. App.) 172 S. W. 196; *Green v. Hoppe* (Civ. App.) 175 S. W. 1117; *Heard v. Bowen* (Civ. App.) 184 S. W. 234; *St. Louis Southwestern Ry. Co. of Texas v. Kerr* (Civ. App.) 184 S. W. 1058; *Padgett v. Hines* (Civ. App.) 192 S. W. 1122.

Assignments of error based on the refusal to give a peremptory instruction must be overruled in the absence of anything in the record to show that such instruction was ever asked or acted on. *Houston Oil Co. of Texas v. Jones* (Civ. App.) 161 S. W. 92.

An error of omission in the court's general charge should be supplied by a request for a correct special charge. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

Under this article, the refusal of a special charge cannot be reviewed on appeal, unless the complaining party shows by bill of exceptions that the particular charge was requested and refused, and that the court's action was excepted to at the time. *St. Louis Southwestern Ry. Co. of Texas v. Wadsack* (Civ. App.) 166 S. W. 42.

Where the record does not show any requested peremptory instructions for appellant, an assignment of error to the refusal to give a requested peremptory instruction must be overruled. *Chicago, R. I. & G. Ry. Co. v. Howell* (Civ. App.) 166 S. W. 81.

Where the record showed that appellant requested only one instruction that was refused, his assignment of error complaining of the refusal of several requested instructions cannot be reviewed. *International & G. N. Ry. Co. v. Owens* (Civ. App.) 166 S. W. 412.

Art. 2061, embodied in chapter 19, tit. 37, and amended by Acts 33d Leg. c. 59, refers to the articles of the chapter relating to bills of exceptions, and not to the foregoing articles of the amendatory law, amending articles 1970, 1971, 1973, 1974, of chapter 13 relating to instructions and objections; and the articles as amended govern the exceptions to instructions and refusal of instructions. *Heath v. Huffhines* (Civ. App.) 168 S. W. 974.

Error in a charge cannot be relied on upon appeal where no special charge was requested. *Powell v. Powell* (Civ. App.) 170 S. W. 111.

Where the record did not show whether a party complaining of refusal of peremptory instruction had previously requested instructions submitting issues, the refusal was not reviewable. *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974.

The refusal to give requested charges will not be reviewed, where the bills of exception fail to show that the charges were requested and refused and the refusal excepted to before the charge was read to the jury, as required by Acts 33d Leg. c. 59. *McCullough v. Hurt* (Civ. App.) 175 S. W. 781.

Error in submitting question to jury held not reviewable on appeal, in the absence of any request for submission in proper form. *Foster v. Bennett* (Civ. App.) 178 S. W. 1001.

An appellant who did not prepare and ask a special charge cannot take advantage of error in the charge given. *Benham v. Tipton* (Civ. App.) 181 S. W. 510.

Where defendant failed to request that an issue be submitted to the jury, the presumption on appeal is that he consented to the court's finding the fact with reference to the issue. *Tofland v. Greenwood* (Civ. App.) 181 S. W. 517.

Where an instruction is erroneous, appellant need not request a correct charge, but under the statutes the party aggrieved need only except, pointing out the defects and reserve objection by proper bill of exceptions. *Kansas City, M. & O. Ry. Co. v. Russell* (Civ. App.) 184 S. W. 299.

Objections to a charge as defective or incomplete cannot be considered on appeal, unless request was made on the trial for a special charge correcting the alleged errors. *Tarrant County Traction Co. v. Bradshaw* (Civ. App.) 185 S. W. 951.

Notwithstanding Acts 33d Leg. c. 59, requiring all objections to the court's charge to be presented in writing to the opposing counsel and the court before the jury is instructed, it is still necessary to request a special instruction to supply an alleged omission in a charge. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 723.

**2. Issues or theories of case.**—Where an instruction did not cover all the issues, the appellant could not complain thereof, in the absence of a request for a further instruction. *Texas Cent. R. Co. v. Claybrook* (Civ. App.) 178 S. W. 580; *Houston Transp. Co. v. San Jacinto Rice Co.* (Civ. App.) 163 S. W. 1023.

Where the court fails to submit a defensive matter to the jury, defendant must request a charge thereon, or he cannot complain on appeal. *Houston & T. C. R. Co. v. Coleman* (Civ. App.) 166 S. W. 635.

An assignment complaining of the submission of the question of limitation could not be considered, where there was no special charge requested embodying the applicable law. *Irvin v. Johnson* (Civ. App.) 170 S. W. 1059.

It was defendant's duty, if it thought a charge too restrictive, to tender a charge from which unduly restrictive terms were eliminated, and on its failure to do so, its objection to the charge would be waived. *McLean v. Breen* (Civ. App.) 183 S. W. 394.

Where defendant neither objected to the lack of, nor requested, an instruction submitting the question of market value to the jury, as required by statute, objection to the court's action will be considered waived. *San Antonio & A. P. Ry. Co. v. Schwethelm* (Civ. App.) 186 S. W. 414.

A judgment will not be reversed for failure to submit an issue where no charge embodying the issue is requested. *O'Neal v. Bush & Tillar* (Sup.) 191 S. W. 1133.

**3. Evidence and matters of fact in general.**—An instruction as to the presumed knowledge of obvious defects in a ladder held to be unnecessary, in the absence of a specific request therefor. *Bee Candy Mfg. Co. v. Maibaum* (Civ. App.) 158 S. W. 575.

Where a charge correct in law directs a verdict for defendant on the finding of certain facts, its defect in embracing more facts than were necessary to support the defense held an omission unavailable in the absence of a requested charge. *St. Louis Southwestern Ry. Co. of Texas v. Martin* (Civ. App.) 161 S. W. 405.

In an elevator company's action against a carrier to recover an alleged shortage in a shipment of wheat, an instruction requiring plaintiff to show, by a preponderance of the evidence, that there was a shortage, if not sufficiently definite upon the burden of proof, held not ground for a reversal, where no special charge thereon was requested. *Gulf, C. & S. F. Ry. Co. v. Justin Mill & Elevator Co.* (Civ. App.) 168 S. W. 411.

Where the court's charge does not place the burden of proof on either party, a party desiring an instruction on the burden of proof must request it. *McKee v. Garner* (Civ. App.) 168 S. W. 1031.

Plaintiff, if desiring a charge that the burden is on her to make out her case, to also state defendant has the burden as to contributory negligence, should request it. *Franklin v. International & G. N. Ry. Co.* (Civ. App.) 174 S. W. 333.

In an action for partnership accounting, wherein defendant denied the existence of the partnership and set up special partnerships in respect to which he asked an accounting, held, that failure to instruct that the burden was on defendant to establish matters in respect to which he asked affirmative relief was not error, in the absence of a request. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

In action for destruction of property from fire communicated from boarding cars on defendant's siding, defendant, if it desired a charge on burden of proof should have requested it. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

Plaintiff's failure to request peremptory charge does not preclude consideration of assignments of error that undisputed evidence conclusively shows state of facts entitling him to recover. *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.

**4. Purpose and effect of evidence.**—Error cannot be assigned for failure to instruct as to the effect of letters introduced in evidence, where no request for such an instruction was made. *McFarland v. Lynch* (Civ. App.) 159 S. W. 303.

Where declarations of one of several defendants in a suit to set aside certain conveyances for fraud were admissible against him, it was not error to omit to limit their effect,

in the absence of a request by the other defendants. *Payne v. Snyder* (Civ. App.) 160 S. W. 1153.

Defendants could not complain of a failure to limit certain evidence, in the absence of a request by them for such an instruction. *Carver v. Power State Bank* (Civ. App.) 164 S. W. 892.

Where evidence was admissible against part of plaintiff's claim, he cannot complain of its general admission, there being no request to limit its effect to that part of his claim. *Francis v. Cornelius* (Civ. App.) 173 S. W. 947.

In action against promoters of railroad for services in surveying, held that, if declaration of a defendant should have been limited to two of the defendants, the third defendant should have made a proper request therefor. *Vaughn v. Morris* (Civ. App.) 180 S. W. 954.

In an action to try title, receiving evidence admissible on the question of appellees' care in not discovering an unrecorded deed to appellant, but inadmissible on the question whether such deed was a mortgage, is not reversible error when no request was made to limit its effect. *Alexander v. Conley* (Civ. App.) 187 S. W. 254.

If defendant desired court to limit evidence as to plaintiffs' property to purpose for which it was admissible, it should have presented a special charge. *Southwestern Portland Cement Co. v. Presbitero* (Civ. App.) 190 S. W. 776.

Where evidence admissible only against the garnishee was admitted at the consolidated trial of the garnishment proceedings and the main action, it was the duty of defendants to have requested a special charge limiting the effect of the evidence if they did not wish it considered against them. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

If undated and unsigned statement identified to be that of witness containing statements contrary to his testimony is desired to be limited to impeach him, request to that effect should be made. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

**7. Nature of action or issue in general.**—In an action against an irrigation company, where there was nothing to indicate that the plaintiff requested direction of verdict for damages and for a decree holding the water contract valid, error cannot be predicated upon the failure to so direct. *Hodge v. Toyah Valley Irr. Co.* (Civ. App.) 174 S. W. 334.

It is the duty of plaintiff, objecting to the charge submitting the issue of implied or apparent authority of their adult daughter to consent to an operation on her minor sister because it did not specifically state that the authority must be based on plaintiff's acts, to supply that omission by a special charge. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

**8. Actions relating to property in general.**—In trespass to try title, where the liability of plaintiff to return the purchase money paid by defendant under a void sheriff's deed was not called to the attention of the court during the trial, and where no charge on the question was requested by defendant, it must be presumed that the right to the return of the money was not adjudicated. *Lafferty v. Wilson* (Civ. App.) 162 S. W. 379.

Error in failing to charge that plaintiffs could not recover for wrongful attachment if either ground of attachment set out in the affidavit were true held waived by failing to request a special charge. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

In trespass to try title, held, that party desiring issue submitted, or desiring its theory of the case presented, should have requested proper charges. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

It is not error of omission, requiring a request for a special charge, but one of affirmative misdirection, for an instruction, contrary to the law, to make continuance of defendant's homestead right depend on his occupancy, which had admittedly ceased. *Edwards v. Clemmons* (Civ. App.) 181 S. W. 840.

**10. Actions for negligence in general.**—Burden is on railroad company to present a special charge as to its defense that it was landowner's duty to maintain gate through which cattle went on its tracks, or that the open condition of the gate was due to some other agency. *Ft. Worth & D. C. Ry. Co. v. Scheer* (Civ. App.) 169 S. W. 1069.

Defendant desiring a charge on contributory negligence should request it. *Andrews v. Viraldo* (Civ. App.) 176 S. W. 737.

**11. Actions for personal injuries.**—Where plaintiffs, in an action against a light company for the death of their son from contact with a live wire, pleaded that the persons in charge of defendant's plant were incompetent, but requested no charge on such issue, they could not, on appeal, complain of the court's failure to submit such issue. *Bowman v. Farmersville Mill & Light Co.* (Civ. App.) 158 S. W. 200.

A corporation, when sued for negligent death, must request a correct charge distinguishing between its representatives, for whose negligence it is liable, and those for whom it is not, and it cannot complain of the failure of the court to frame correct instructions in lieu of improper requested ones. *American Express Co. v. Parcarello* (Civ. App.) 162 S. W. 926.

In a personal injury action plaintiff cannot complain that the court's charge did not apply the law of proximate cause to the facts of the case, where no specific charge on that point was requested. *Guerra v. San Antonio Sewer Pipe Co.* (Civ. App.) 163 S. W. 669.

In employé's action for injuries, where the evidence showed that there was no constructive notice to the employé that the employer was a subscriber to the Workmen's Compensation Act, if the employer desired submission of issue of actual notice, he should have requested it. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

**12. Contracts and actions relating thereto.**—Where defendant sought to rescind a contract sued on, on the ground of insanity, while plaintiff replied, alleging ratification, the failure to charge on ratification was not error, where no instruction was requested. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

A plaintiff cannot be deprived of the right to attack an insufficient verdict in an action to enforce vendor's lien notes, where defendant set up a failure of consideration, on the theory that he should have requested a special charge excluding that defense, which was not presented by the general charge. *Willingham v. Brown* (Civ. App.) 163 S. W. 107.

Where defendant denied sale of stock to it, but claimed to be trustee, failure to charge without request on theory that payment was to be made only out of collections held not erroneous. *Alamo Trust Co. v. Prudential Life Ins. Co. of Texas* (Civ. App.) 183 S. W. 787.

In action for recovery of price of automobile and rescission of contract, issue whether purchaser waived his right by making subsequent agreement should have been raised by request for submission thereof to the jury, and could not, on appeal, be urged under assignment of waiver by delay. *J. I. Case Threshing Mach. Co. v. Rachal* (Civ. App.) 194 S. W. 418.

**13. Definition or explanation of terms.**—The failure of the court to define phrases in its instructions is not error, in the absence of a requested definition. *Ellerd v. Campfield* (Civ. App.) 161 S. W. 392.

If defendant desired a definition of "ordinary care," it should have requested an instruction thereon. *San Antonio & A. P. Ry. Co. v. Batte* (Civ. App.) 163 S. W. 630.

Failure to define the terms "sufficient" and "secure" as applied to handholds on railroad car held an error of omission, as to which a special charge should have been requested. *Galveston, H. & S. A. Ry. Co. v. Enderle* (Civ. App.) 170 S. W. 276.

Error in an instruction submitting adverse possession without defining it is one of omission, and a party failing to ask a special charge may not complain. *Ratliff v. Wakefield Iron & Coal Land Improvement Co.* (Civ. App.) 172 S. W. 198.

Where court failed to define "secure" as applied to handholds on railway cars, held that, if defendant wanted it defined, it should have offered a special charge. *Galveston, H. & S. A. Ry. Co. v. Roemer* (Civ. App.) 173 S. W. 229.

Where damages were claimed for unreasonable delay in installing irrigating machinery and the seller desired the court to define the term "unreasonable delay," it must, to predicate error on the failure, request a proper charge. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

In a broker's action for commission, if defendant desired definition of "efficient and procuring cause" he should have requested it. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

**14. Damages and amount of recovery.**—Any error in not limiting the recovery for loss of time to the sum alleged in the petition to have been lost because of personal injuries was one of omission of which defendant cannot complain, where he did not ask a special charge correcting such omission. *Trinity & B. V. Ry. Co. v. Blackshear* (Civ. App.) 161 S. W. 395.

Defendant, after objecting to failure of instruction to exclude improper elements of damages, held not required to prepare and request a special instruction curing the omission. *Houston & T. C. R. Co. v. Gant* (Civ. App.) 175 S. W. 745.

In an action for breach of warranty, the failure to submit the issue of the value of the roof as constructed held not error in the absence of a request. *Phillip-Carey Co. v. Manes* (Civ. App.) 177 S. W. 158.

The plaintiff could not complain of the court's error in defining the measure of damages where he did not make a request for a special charge. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 183 S. W. 829.

In an action on a fire policy covering household goods, charge directing the jury to ascertain the value of the goods, instead of the actual cash value, as provided in the policy, was not error, in the absence of a request for a special charge. *Commonwealth Ins. Co. of New York v. Finegold* (Civ. App.) 183 S. W. 833.

In an action for personal injuries defendant cannot complain of the defendant's omission to instruct the jury as to the measure of damages, where he made no request for such an instruction. *Andrews v. York* (Civ. App.) 192 S. W. 338.

Where defendants failed to ask for submission of issue as to amount of damages, on appeal they cannot complain of the given charge. *Cameron v. First Nat. Bank* (Civ. App.) 194 S. W. 469.

**16. Further or more specific instructions.**—Where a charge was correct as far as it went, the failure to request more specific instructions prevented the question of its sufficiency coming up on appeal. *Lone Star Canal Co. v. Broussard* (Civ. App.) 176 S. W. 649; *Houston Belt & Terminal Ry. Co. v. Hardin Lumber Co.* (Civ. App.) 189 S. W. 518; *Shaller v. Johnson-McQuiddy Cattle Co.* (Civ. App.) 189 S. W. 553.

Where the charge is not affirmatively erroneous, the defeated party cannot complain, unless he offered and requested a more ample charge. *McCarthy v. Blackwell* (Civ. App.) 162 S. W. 1163; *Missouri, K. & T. Ry. Co. of Texas v. Ward* (Civ. App.) 164 S. W. 922.

A party, if desiring a more complete charge, should request it. *Galveston, H. & S. A. Ry. Co. v. Dickens* (Civ. App.) 170 S. W. 835; *Liverpool & London & Globe Ins. Co. v. Lester* (Civ. App.) 176 S. W. 602.

If an instruction is merely defective in not being complete, the party complaining must have requested an instruction supplying such omission in order to complain thereof on appeal. *Missouri, K. & T. Ry. Co. of Texas v. Beasley* (Civ. App.) 162 S. W. 950; *Missouri, K. & T. Ry. Co. of Texas v. Barber* (Civ. App.) 163 S. W. 116.

It is the duty of a party not satisfied with an instruction to present a special charge incorporating his view of the case, and on failure to do so he cannot complain. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639.

Where a party thinks it necessary that the jury be instructed more particularly, he should request a special charge to that effect, and cannot complain on appeal if he does not. *Grand Lodge, F. & A. M. of Texas v. Dillard* (Civ. App.) 162 S. W. 1173.

Where the court does not cover all the issues satisfactorily to a party, he should request special charges that do cover them. *Schramm v. P. J. Owens Lumber Co.* (Civ. App.) 163 S. W. 1016.

Where any error in the charge was one of omission and not of commission, a charge correcting the omission should have been requested. *Good v. Texas & P. Ry. Co.* (Civ. App.) 166 S. W. 670.

If a more complete instruction than that given by the court was desired by a party, it should have prepared and requested a special instruction covering that phase of the case. *Galveston, H. & S. A. Ry. Co. v. Itule* (Civ. App.) 172 S. W. 1123.

Where an instruction is lacking in fullness, the complaining party should request appropriate additional instructions. *Paris & G. N. Ry. Co. v. Atkins* (Civ. App.) 185 S. W. 306.

A party desiring a more explicit or comprehensive presentation of an issue by the court should request it by appropriate instructions. *Missouri, K. & T. Ry. Co. of Texas v. Robertson* (Civ. App.) 189 S. W. 284.

Where the charge given correctly states the law on an issue, but does not apply it to the evidence, either party is entitled to prepare a charge applying law to evidence, and refusal of such a charge is not justifiable. *Andrew v. Mace* (Civ. App.) 194 S. W. 598.

If defendant desired a fuller presentation of issues than covered by charge, requests should have been submitted. *First Nat. Bank v. Mangum* (Civ. App.) 194 S. W. 647.

17. — **Erroneous or misleading instructions.**—Where no correct charge was requested, the giving of a confusing charge is not reversible error. *International & G. N. Ry. Co. v. Kruger* (Civ. App.) 163 S. W. 677.

In general, if a party desires to have inaccuracies in instructions given cured, it is his duty to ask properly prepared special instructions for that purpose. *La Grange & Lockhart Compress Co. v. Hart* (Civ. App.) 169 S. W. 373.

18. — **Issues or theories of case.**—Where no charge was requested to cure alleged error in an instruction because not applicable to the pleadings, and no exception was taken to the pleadings, they will be deemed sufficient to permit evidence upon which the instructions as a whole were predicated. *Houston & T. C. R. Co. v. Loofs* (Civ. App.) 160 S. W. 300.

Where the court fails to give an instruction applying the law to a party's theory of the facts as disclosed by the evidence, the party has a right to prepare and have given a special charge supplying the omission in the general charge. *Pullman Co. v. Moise* (Civ. App.) 187 S. W. 249.

It is not, generally speaking, such affirmative error for the court to fail to state the issues as will require reversal, since if either party is not satisfied with the charge, as not being sufficiently explicit, it is his duty to request an additional charge. *Adams & Washam v. Southern Traction Co.* (Civ. App.) 188 S. W. 275.

A failure to summarize the pleadings on the issues to be determined is not reversible error, unless the complaining party requests an instruction covering the omission in the general charge; as it is merely an omission, and not an error of commission. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

19. — **Evidence and matters of fact in general.**—In the absence of request for special charge on the subject, an instruction is not erroneous, to the effect that ordinarily negligence is never presumed, and the burden is on the plaintiff, but when the property is injured while in the exclusive custody of the bailee, it is his burden to show that he was not negligent. *Mecom v. Vinton* (Civ. App.) 191 S. W. 763.

21. — **Nature of action or issue in general.**—On judgment creditor's motion for judgment against constable and his sureties for failure to levy execution, if constable desired to have issues with reference to each execution submitted separately, a special charge should have been asked to that effect. *Sharp v. Morgan* (Civ. App.) 192 S. W. 599.

23. — **Actions for torts in general.**—In an action for the destruction of crops by overflow caused by defendant's failure to construct proper culverts, a charge on plaintiff's right to recover the value of crops lost held sufficient so far as it went, so that defendant was required to request a further charge, if one was desired. *Stephenville N. & S. T. Ry. Co. v. Walton* (Civ. App.) 160 S. W. 651.

Where court correctly states law under art. 6484, on authority of railroad company to cut down trees on land of another, defendant, in the absence of request, cannot complain that such instruction does not also embody law of articles 6505, 6530, requiring consent of owner. *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

24. — **Actions for negligence in general.**—In action for death of plaintiffs' minor intestate employed by defendant, charge held to sufficiently define degree of care required of defendant, in absence of a request for a special charge. *Southwestern Portland Cement Co. v. Presbitero* (Civ. App.) 190 S. W. 776.

25. — **Actions for personal injuries.**—An instruction in an action for injuries to an employé that, if a coemployé had no authority to control or superintend the employé and hire and discharge him, the employer was not liable for the coemployé's negligence was not affirmatively erroneous, and the failure to submit the issues disjunctively was not erroneous in the absence of a requested charge. *Kirby Lumber Co. v. Williams* (Civ. App.) 159 S. W. 309.

Any error in an instruction in a personal injury action to find for plaintiff if the jury found that he received "any injuries as alleged in his petition," in that it did not limit plaintiff's right to recover to the injury specifically alleged, was not an error of omission, and defendant cannot complain thereof, in absence of a requested instruction calling the court's attention to the matter. *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145.

Any error of an instruction that deceased did not assume any risk arising from any negligence of defendant in not adding "unless he knew of such negligence, \* \* \* or unless the negligence \* \* \* was so patent as to be readily observed by him," was one of omission, requiring a request for such further instruction. *Missouri, K. & T. Ry. Co. of Texas v. Perryman* (Civ. App.) 160 S. W. 406.

Where the instruction on assumption of risk in a railroad employé's action for injuries properly presents assumption of ordinary risks, but does not take into consideration the fact that the particular risk was extrahazardous, defendant should request a charge specifically covering the matter. *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426.

Where an instruction in an action against a corporation for negligent death predicated liability on the negligence of the corporation, but did not define the relationship of a vice principal, as distinguished from a mere agent or employé, the corporation,

desiring a more complete instruction, must request one or it cannot complain on appeal. *American Express Co. v. Parcarello* (Civ. App.) 162 S. W. 926.

In an action for a servant's death, where a question submitted for plaintiff as to the proximate cause of injury was correct as far as it went, held that if defendant desired a more specific question as to proximate cause, it should have requested it. *Selden-Breck Const. Co. v. Kelley* (Civ. App.) 168 S. W. 985.

In a personal injury action by a servant, defendant held not entitled to complain of a charge, which was a correct statement of law, for it could request amplifying charges if desired. *Planters' Oil Co. v. Keebler* (Civ. App.) 170 S. W. 120.

Where the court instructed that if employé knew duties were dangerous, and if he was negligent, etc., defendant should have requested the submission of these issues disjunctively, if they should have been so submitted. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

Where correct charge was given on contributory negligence in personal injury suit, question of its direct application to the facts will not be determined, in absence of request by defendant for more elaborate charge. *Wells Fargo & Co. v. Benjamin* (Sup.) 179 S. W. 513.

In the absence of request, it is not reversible error to fail to instruct that plaintiff must show absence of contributory negligence, where plaintiff's pleading and evidence does not disclose contributory negligence, and where defendant's requested charge on contributory negligence is given. *Northern Texas Traction Co. v. Nicholson* (Civ. App.) 188 S. W. 1028.

27. — **Definition or explanation of terms.**—Where instructions defining terms were correct, it was the duty of accused, if he desired more full and ample definitions, to request that they be given. *Brown v. State*, 71 Cr. R. 353, 162 S. W. 339.

28. — **Damages and amount of recovery.**—In an action for wrongful garnishment, an instruction, authorizing the jury to allow damages for such actual loss as was the natural, direct, and proximate result of the service of the writs, held not objectionable as failing to give to the jury any rule for measuring the actual damages; it being incumbent on defendants to request further instruction if they desired it. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

Defendant cannot complain that an instruction as to damages in a personal injury action was defective, where it did not request a special charge supplying such omission. *Missouri, K. & T. Ry. Co. of Texas v. Beasley* (Civ. App.) 162 S. W. 950.

An instruction that, if plaintiff was entitled to recover for failure to deliver a telegram, he should be allowed such damages as were the proximate result of defendant's default as alleged held proper and sufficient, in the absence of a request for a more specific instruction. *Western Union Telegraph Co. v. Erwin* (Civ. App.) 164 S. W. 908.

In broker's action, instruction authorizing recovery if more than \$20,000 was obtained for property held improperly refused; the main charge allowing recovery only if \$27,000 was obtained. *Crass v. Adams* (Civ. App.) 175 S. W. 510.

29. **Time for asking instructions.**—Under this article, and in view of arts. 1971 and 2061, held, that a bill of exceptions not affirmatively showing that the special charge had been presented to the court and to opposing counsel within a reasonable time after they had the court's general charge could not be considered. *W. R. Case & Sons Cutlery Co. v. Folsom* (Civ. App.) 170 S. W. 1066.

The refusal of special charges will not be reviewed, where the bill of exceptions fails to show that they were requested before the main charge was read to the jury. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

A bill of exceptions complaining of the refusal of a requested charge which fails to show that the charge was presented at the proper time, and that the refusal was excepted to at the time, is not sufficient. *Connor v. Uvalde Nat. Bank* (Civ. App.) 172 S. W. 175.

Under this article and arts. 1954, 1970, 1971, 1974, 1984a, 2061, a bill of exceptions complaining of the refusal of a requested charge must show that it was presented in time. *Ratliff v. Wakefield Iron & Coal Land Improvement Co.* (Civ. App.) 172 S. W. 198.

Under this article, assignments of error based on refusal to give requested instructions will not be considered, where the bills of exception showed that such charges were presented to the court after the main charge was read to the jury. *Reed v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 174 S. W. 956.

Where the bill of exceptions does not enable the appellate court to say that the trial court had an opportunity before reading his general charge to consider a requested charge, the court's refusal thereof cannot be reviewed. *American Nat. Ins. Co. v. Burnside* (Civ. App.) 175 S. W. 169.

30. **Form and requisites of requests in general.**—A special charge should direct the attention of the court and jury to the particular phase of the case sought to be presented. *Missouri, K. & T. Ry. Co. of Texas v. Dellmon* (Civ. App.) 171 S. W. 799.

Objections to a charge, in an action against a carrier for value of a passenger's jewelry, stolen by or lost through negligence of employés of the carrier, held not a request for a peremptory instruction. *Chicago, B. & Q. R. Co. v. Wilson* (Civ. App.) 176 S. W. 619.

Where party requesting charge desires it given only in event more favorable requested charges are refused, a conditional request for its submission should be made. *Gestean v. Bishop* (Civ. App.) 181 S. W. 696.

Refusal of a requested peremptory instruction will be reviewed only on the ground on which it was requested. *St. Louis Southwestern Ry. Co. of Texas v. Thompson* (Civ. App.) 192 S. W. 1095.

32. — **Signing.**—It is not error to refuse requested instructions, which are signed neither by the party nor by his counsel. *First Nat. Bank of Snyder v. Patterson* (Civ. App.) 185 S. W. 1018.

33. **Instructions already given.**—It is not error to refuse instructions covered by instructions given. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62; *Underwood v. Jordan* (Civ. App.) 166 S. W. 88; *Larrabee v. Porter* (Civ. App.) 166 S. W. 395; *Good v. Texas & P.*

Ry. Co. (Civ. App.) 166 S. W. 670; Western Union Telegraph Co. v. Cathey (Civ. App.) 166 S. W. 714; Trinity & B. V. Ry. Co. v. Dood (Civ. App.) 167 S. W. 238; Gorman v. Brazelton (Civ. App.) 168 S. W. 434; McSpadden v. Vannerson (Civ. App.) 169 S. W. 1079; Chicago, R. I. & G. Ry. Co. v. Pemberton (Civ. App.) 170 S. W. 108; Planters' Oil Co. v. Keebler (Civ. App.) 170 S. W. 120; J. H. W. Steel Co. v. Dover (Civ. App.) 170 S. W. 809; Irvin v. Johnson (Civ. App.) 170 S. W. 1059; Miller v. Campbell (Civ. App.) 171 S. W. 251; J. D. Fields & Co. v. Allison (Civ. App.) 171 S. W. 274; Beard v. International & G. N. Ry. Co. (Civ. App.) 171 S. W. 553; Missouri, K. & T. Ry. Co. of Texas v. Dellmon (Civ. App.) 171 S. W. 799; Bulloch v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 171 S. W. 808; Prince v. Taylor (Civ. App.) 171 S. W. 826; Galveston, H. & S. A. Ry. Co. v. Bibb (Civ. App.) 172 S. W. 178; Galveston, H. & S. A. Ry. Co. v. Harris (Civ. App.) 172 S. W. 1129; Kansas City Southern Ry. Co. v. Coomber (Civ. App.) 173 S. W. 544; Gulf, T. & W. Ry. Co. v. Dickey (Civ. App.) 173 S. W. 967; Southwestern Portland Cement Co. v. Kezer (Civ. App.) 174 S. W. 661; Hermann v. Bailey (Civ. App.) 174 S. W. 865; Kansas City, M. & O. Ry. Co. v. Cave (Civ. App.) 174 S. W. 872; Western Union Telegraph Co. v. Gorman & Wilson (Civ. App.) 174 S. W. 925; Brunson v. Dawson State Bank (Civ. App.) 175 S. W. 438; Texas & P. Ry. Co. v. Key (Civ. App.) 175 S. W. 492; Coleman Vitrified Brick Co. v. Smith (Civ. App.) 175 S. W. 860; World's Special Films Corporation v. Pichtenberg (Civ. App.) 176 S. W. 733; Texas & P. Ry. Co. v. De Long (Civ. App.) 176 S. W. 874; International & G. N. Ry. Co. v. Bartek (Civ. App.) 177 S. W. 137; Phillip-Carey Co. v. Manes (Civ. App.) 177 S. W. 158; Pecos & N. T. Ry. Co. v. Holmes (Civ. App.) 177 S. W. 505; Decatur Cotton Seed Oil Co. v. Belew (Civ. App.) 178 S. W. 607; W. P. Carmichael Co. v. Miller (Civ. App.) 178 S. W. 976; Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin (Civ. App.) 179 S. W. 541; Buchanan v. Houston & T. C. R. Co. (Civ. App.) 180 S. W. 625; Eastern Ry. Co. of New Mexico v. Littlefield (Sup.) 154 S. W. 543, affirming judgment (Civ. App.) 135 S. W. 1086; King v. State, 68 Cr. R. 553, 152 S. W. 629; Texas Midland R. R. v. Simmons (Civ. App.) 152 S. W. 1106; Texas & N. O. R. Co. v. Murray (Civ. App.) 156 S. W. 594; Beckwith v. Powers (Civ. App.) 157 S. W. 177; El Paso Electric Ry. Co. v. Davidson (Civ. App.) 162 S. W. 937; Peden Iron & Steel Co. v. Jaimes (Civ. App.) 162 S. W. 965; Galveston, H. & S. A. Ry. Co. v. Bell (Civ. App.) 165 S. W. 1; Bowman v. Farmersville Mill & Light Co. (Civ. App.) 158 S. W. 200; Brewer v. A. M. Blythe & Co. (Civ. App.) 158 S. W. 786; Missouri, K. & T. Ry. Co. of Texas v. Pitkin (Civ. App.) 158 S. W. 1035; Order of United Commercial Travelers of America v. Roth (Civ. App.) 159 S. W. 176; Fred A. Jones Co. v. Drake (Civ. App.) 159 S. W. 441; Pyle v. Pyle (Civ. App.) 159 S. W. 483; T. B. Allen & Co. v. Shook (Civ. App.) 160 S. W. 1091; Benton v. Kuykendall (Civ. App.) 160 S. W. 438; St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84; Missouri, K. & T. Ry. Co. of Texas v. Leabo (Civ. App.) 161 S. W. 382; Adams v. Wm. Cameron & Co. (Civ. App.) 161 S. W. 417; Hammel v. Benton (Civ. App.) 162 S. W. 34; Southwestern Telegraph & Telephone Co. v. Coffey (Civ. App.) 163 S. W. 112; Missouri, K. & T. Ry. Co. of Texas v. Barber (Civ. App.) 163 S. W. 116; Texas Co. v. Earles (Civ. App.) 164 S. W. 25; St. Louis Southwestern Ry. Co. of Texas v. Martin (Civ. App.) 161 S. W. 405; Glover v. Houston Belt & Terminal Ry. Co. (Civ. App.) 163 S. W. 1063; Henson v. Baxter (Civ. App.) 166 S. W. 460; Cleburne St. Ry. Co. v. Barnes (Civ. App.) 168 S. W. 991; Magnolia Paper Co. v. Duffy (Civ. App.) 176 S. W. 89; Pecos & N. T. Ry. Co. v. Winkler (Civ. App.) 179 S. W. 691; Cooper & Jones v. Hall (Civ. App.) 168 S. W. 465; Smith v. Webb (Civ. App.) 181 S. W. 814; St. Louis, B. & M. Ry. Co. v. Jenkins (Civ. App.) 182 S. W. 1159; Missouri, K. & T. Ry. Co. of Texas v. Norris (Civ. App.) 184 S. W. 261; Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 184 S. W. 1070; Orange Lumber Co. v. Toole (Civ. App.) 181 S. W. 823; Chicago, R. I. & G. Ry. Co. v. Cosio (Civ. App.) 182 S. W. 83; Turner v. McKinney (Civ. App.) 182 S. W. 431; Kansas City, M. & O. Ry. Co. of Texas v. Finke (Civ. App.) 190 S. W. 1143; Galveston, H. & S. A. Ry. Co. v. Miller (Civ. App.) 191 S. W. 374; McIntosh v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 192 S. W. 285; Southwestern Telegraph & Telephone Co. v. Clark (Civ. App.) 192 S. W. 1077; Texas City Transp. Co. v. Winters (Civ. App.) 193 S. W. 366; Panhandle & S. F. Ry. Co. v. Harp (Civ. App.) 193 S. W. 438.

It is not error to refuse requested charges embodied as far as correct in the instructions given. McIndoo v. Wood (Civ. App.) 162 S. W. 488; Johnson v. Ft. Worth Driving Club (Civ. App.) 164 S. W. 875; San Antonio, U. & G. R. Co. v. Hagen (Civ. App.) 188 S. W. 954.

Where the charge of the court as supplemented by instructions given at defendant's request sufficiently guarded his rights, defendant cannot complain of the refusal of other requested instructions. Houston & T. C. R. Co. v. Ellis (Civ. App.) 160 S. W. 607.

Requested instructions were properly refused where correct special charges relating to the same issue were given by the court. Sullivan v. Fant (Civ. App.) 160 S. W. 612.

The refusal of charges covered by those given is not error, particularly where the charge refused imposed a greater burden on the requesting party than the ones given. Houston & T. C. R. Co. v. Menefee (Civ. App.) 162 S. W. 1038.

Where the instructions given fairly submitted the case, a requested charge, which would have been but a repetition, was properly refused. Gulf, C. & S. F. Ry. Co. v. Justin Mill & Elevator Co. (Civ. App.) 163 S. W. 411.

Error could not be predicated on the refusal of a requested instruction, where one was given on the same point more favorable to the objecting party. Lone Star Canal Co. v. Broussard (Civ. App.) 176 S. W. 649.

The refusal of a requested instruction applied to the facts for the finding of a substantive issue when not presented in the main charge is error. Higginbotham v. Weaver (Civ. App.) 177 S. W. 532.

A requested instruction fully covered in one given was properly refused, especially where the one given came nearer being the law than the one refused. Galveston, H. & S. A. Ry. Co. v. Moses (Civ. App.) 184 S. W. 327.

A requested special charge need not be given; its substance being embraced in the general charge and in another special requested charge given. Missouri, K. & T. Ry. Co. of Texas v. Whitsett (Civ. App.) 185 S. W. 406.

Charges in no way necessary to the elucidation of the issues raised by the pleadings



and proof, after they had been covered by the court's general charge, were properly refused. *Beaumont, S. L. & W. Ry. Co. v. Manning* (Civ. App.) 186 S. W. 387.

It is not error to refuse a requested instruction, the law of which is covered in the court's charge. *Stephenville North & S. T. Ry. Co. v. Stewart* (Civ. App.) 186 S. W. 863.

Where given charges contain all the issues required, refusal of court to give special charges is not error. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

Where phase of case is sufficiently covered by court's charge, refusal of requested special charge on matter is not erroneous. *Tyler v. McChesney* (Civ. App.) 190 S. W. 1115.

It is not error to refuse additions to an instruction the only effect of which would be to satisfy the party's preference of an expression. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

The refusal of a specific charge is not error, where the issues submitted and the charge given in connection therewith were sufficient to present the issues so as not to be misunderstood by the jury. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

34. — **Issues in general.**—Defendant may demand a special charge grouping the specific facts on which he relies, though the court has made a general and abstractly correct presentation of such issues. *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809.

Where the evidence almost conclusively established a case against defendant, refusal of a special charge presenting the defense, where a general charge had been given, was not prejudicial. *Atchison, T. & S. F. Ry. Co. v. Hill* (Civ. App.) 171 S. W. 1028.

35. — **Evidence and matters of fact.**—In suit to rescind an exchange of lands as having been procured by fraud, where the burden of proof was charged upon, there was no error in refusing a special charge that fraud is never presumed. *Benham v. Tipton* (Civ. App.) 181 S. W. 510.

In a servant's action for injuries, where the court, in its main charge, instructed on the burden of proof, the refusal to give a special charge on the subject was not erroneous. *Texas & P. Ry. Co. v. Griffin* (Civ. App.) 184 S. W. 305.

In action against a newspaper because an employé threw a folded paper against plaintiff, various requested charges by defendant on the burden of proof held sufficiently covered by the main charge. *Houston Chronicle Pub. Co. v. Lemmon* (Civ. App.) 193 S. W. 347.

37. — **Affirmative and negative of issues.**—Refusal of a requested instruction may not be complained of; the matter being substantially covered, both in affirmative and negative form, by another requested instruction, which was given, and by the general charge. *Lattimore v. Puckett & Wear* (Civ. App.) 161 S. W. 951.

There was no error in refusing a special charge requested, submitting in a negative way the question of proximate cause in a personal action, where the court's main charge substantially instructed thereon. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 162 S. W. 457.

Where it was in issue, in a passenger's action for injuries in alighting, whether the train stopped long enough to allow plaintiff to safely alight, and whether the trainmen announced in plaintiff's car the part of the train from which the passengers should alight, and such issues were submitted negatively for plaintiff, they should on request have been submitted affirmatively for the company. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

A special charge presenting in detail the elements of an affirmative defense should not be denied, though a general charge presents in a general manner the same defense. *Atchison, T. & S. F. Ry. Co. v. Hill* (Civ. App.) 171 S. W. 1028.

Refusal to give defendant's specially requested charge, stating the converse of abstract propositions submitted in the main charge, held not erroneous. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 178 S. W. 574.

On the evidence in a passenger's action for personal injury, refusal of defendant's instruction framed to affirmatively present facts constituting a defense held not error, in view of an instruction given. *Texas Cent. R. Co. v. Claybrook* (Civ. App.) 178 S. W. 580.

38. — **Nature of action or issue in general.**—In trespass to try title against holder of title bond, which plaintiff claimed had been surrendered, refusal of instruction that the bond could be canceled by delivering it with the intention of canceling the trade if correct held properly refused; the instruction given sufficiently grouping the facts upon which plaintiff's right to recover depended. *Wofford v. Strickland* (Civ. App.) 160 S. W. 623.

Where defendant requested two special charges on the issue as to whether plaintiff's grantor had ever claimed a definite tract, the giving of one of the special charges was sufficient, and defendant cannot complain of the refusal of the other. *Houston Oil Co. of Texas v. Lambert* (Civ. App.) 161 S. W. 6.

In trespass to try title to school lands between two applicants, refusal of instruction that if plaintiff was an actual settler when he made his application, but thereafter left and remained away through a well-grounded fear of death or serious bodily harm, held not error, where the court charged that, if he was an actual settler at the time of his application, it did not matter whether he continued to reside on the land or not. *Patrick v. Barnes* (Civ. App.) 163 S. W. 408.

In a boundary suit, a requested charge on the issue of limitations held properly refused, in view of given charges sufficiently stating the law. *Hermann v. Schroeder* (Civ. App.) 175 S. W. 788.

A requested charge as to the effect of the finding of original monuments held not covered by a special issue as to whether the true corner of the tract was established by running certain lines in the manner contended by defendant. *Higginbotham v. Weaver* (Civ. App.) 177 S. W. 532.

In action to try title defended on title by limitation, requested charge as to continuous possession held properly refused, as it was covered by the general charge. *City of El Paso v. Wiley* (Civ. App.) 180 S. W. 661.

40. — **Actions for torts in general.**—In action for conversion of automobile, an instruction, directing jury to find whether defendant in taking possession believed that security of its notes against automobile had become insecure sufficiently presented defense under terms of mortgage for taking automobile, and any further instruction was properly refused. *Magnolia Motor Sales Corp. v. Chaffee* (Civ. App.) 192 S. W. 562.

41. — **Actions for negligence in general.**—In action against a railroad negligently failing to construct culverts in an embankment which was washed, with Johnson grass thereon, onto plaintiff's land, refusal of a charge held not erroneous in view of the instructions given. *Missouri, K. & T. Ry. Co. of Texas v. Evans* (Civ. App.) 183 S. W. 93.

42. — **Personal injuries in general.**—In a personal injury action, where the court fully charged on proximate cause, the refusal of a special charge on that issue, which also defined remote cause, was not error. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1033.

In an action against a light company and a city for personal injury from an electric shock, defendant company's requested charges on active negligence and its liability in case of accident held properly refused, where the general charge submitted the facts included in the requested charges. *McKinney Ice, Light & Coal Co. v. Montgomery* (Civ. App.) 176 S. W. 767.

43. — **Injuries in operation of railroads in general.**—Where, in an action for damages from a crossing accident, the court instructed that the presence of standing cars so as to obstruct the view could be considered only as a circumstance bearing on defendant's negligence, a requested instruction that the presence of the cars could not be considered as an independent ground of negligence was properly refused. *Missouri, K. & T. Ry. Co. of Texas v. Burnett* (Civ. App.) 162 S. W. 458.

In action for injuries from being struck by a truck on an unlighted station platform, it was not error to refuse a requested charge covered by another given. *St. Louis Southwestern Ry. Co. of Texas v. McMichael* (Civ. App.) 191 S. W. 186.

44. — **Injuries to passengers.**—In an action for injuries from sudden jerk of car on which section foreman was working, instructions to find for defendant, if the train was moving slowly when the jerk occurred, held, in effect, given in an instruction to find for defendant, unless the train stopped, and was started suddenly. *St. Louis S. W. Ry. Co. of Texas v. Brown* (Civ. App.) 163 S. W. 383.

In action for injuries to person riding with car of cattle, instruction to find for defendant if its servants operated the train as men of ordinary caution and prudence would have done held sufficiently embraced by the main charge. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

In a personal injury action by one hurt on entering a train, a requested charge held covered by one given, so that its refusal was not erroneous. *St. Louis Southwestern Ry. Co. of Texas v. Hassell* (Civ. App.) 177 S. W. 518.

45. — **Injuries to employés.**—In a servant's action for injuries from a wagon driven by another servant, where the court sustained an exception to defendant's plea that they were fellow servants, and expressly instructed that defendant was chargeable with the driver's negligence, if any, it was not necessary to instruct that they were not fellow servants. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

In an action for an injury to an employé caused by his attempting to step from the engine to the tender, defendant's request that, if it was the custom to move the tender without notifying other employés, it would not be liable, held covered by the court's main charge, and a sufficiently affirmative presentation of the facts. *St. Louis, S. F. & T. Ry. Co. v. Overturf* (Civ. App.) 163 S. W. 639.

In an action by a servant injured by the fall of a scaffold, where the general charge required the jury, in order to find for plaintiff, to find that the proximate cause of the fall of the scaffold was the failure of the master to furnish suitable materials, the refusal of special charges that the master was not liable if the fall of the scaffold was due to the fault of other servants was not error. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

In a miner's action for injuries from a falling roof, refusal of defendant's special requests held not erroneous; the matter being fully covered by instructions given. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

In servant's action for injury, refusal of defendant's requested charges held not error, being covered by the court's main charge. *Southwestern Portland Cement Co. v. Moreno* (Civ. App.) 181 S. W. 221.

Requested instruction for defendant in action for death of railway engineer, killed when his engine left the track, held properly refused, where it could have added nothing to the charge given and which covered the issue proper to be submitted. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 182 S. W. 1159.

In a servant's action for injuries, where the court failed to submit certain states of fact as a basis of liability in his main charge, the refusal of special charges directing that they could not find for plaintiffs upon such states of fact was proper. *Texas & P. Ry. Co. v. Griffin* (Civ. App.) 184 S. W. 305.

In lineman's action for personal injury, defendant's requested charges were properly refused, where the court had charged generally upon the phases of negligence covered thereby. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

In a servant's action for injuries from pulley detached by tightening of belt around line shaft, due to negligent use of wedge to tighten pulley on line shaft, given instruction on negligence as used in special issue held as comprehensive as refused requested instruction; hence refusal was not error. *Rhome Milling Co. v. Glasgow* (Civ. App.) 194 S. W. 686.

46. — **Contributory negligence and assumption of risk.**—Where the charges given fully covered the issue of contributory negligence, it was not error to refuse a requested charge on that question. *Tarrant County Traction Co. v. Bradshaw* (Civ. App.) 185 S. W. 951; *La Grange & Lockhart Compress Co. v. Hart* (Civ. App.) 169 S. W. 373; *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488; *Galveston, H. & S. A. Ry. Co. v. Templeton* (Civ. App.) 175 S. W. 504.

A requested instruction as to assumption of risk need not be given where that issue is fairly submitted by the court's charge. *Wichita Falls Motor Co. v. Bridge* (Civ. App.) 158 S. W. 1161.

In an action for the wrongful death of a boy who had placed himself in a dangerous position beneath a turntable revolved by his companions, defendant's requested instruction on contributory negligence held sufficiently covered by an instruction given. *Stephenville, N. & S. T. Ry. Co. v. Voss* (Civ. App.) 159 S. W. 64.

In an action for the death of one killed at a crossing, error in the refusal of a requested charge of contributory negligence held harmless, where the court had submitted defendant's alleged negligence and a charge that, even though defendant was negligent in the respects charged, there could be no recovery if deceased was guilty of contributory negligence. *Texas & N. O. R. Co. v. Cunningham* (Civ. App.) 168 S. W. 428.

In an action for injuries to a passenger, while intoxicated, by falling out of the open vestibule of a railroad coach, an instruction given as to the care required from plaintiff held to sufficiently cover a request to charge that he was negligent if he went on the platform to drink liquor, or drank liquor there, based on a statute prohibiting the drinking of liquor on railroad trains. *St. Louis Southwestern Ry. Co. of Texas v. Christian* (Civ. App.) 169 S. W. 1102.

A requested instruction as to contributory negligence in a railroad crossing collision held a presentation of a substantive defense, within the rule of right to a special instruction applying the law, stated generally in the general charge, to specific facts relied on. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

In railroad servant's action for injuries, refusal of requested instruction on assumption of risk held not error, in view of the court's charge thereon. *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

The refusal of a charge requested by defendant on contributory negligence is not error, where no exception or complaint is made to the court's general charge on that issue. *Missouri, K. & T. Ry. Co. of Texas v. Cardwell* (Civ. App.) 187 S. W. 1073.

47. — **Discovered peril.**—Where the court charged on discovered peril but a requested charge on the same subject was fuller and more accurately expressed the law with reference to the facts, it was error not to give it. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

In an action for injuries from being run over by train at a depot, held, that it was not error to refuse an instruction on discovered peril where it was substantially covered by one given. *St. Louis Southwestern Ry. Co. of Texas v. Aston* (Civ. App.) 179 S. W. 1128.

48. — **Contracts and actions relating thereto.**—Where, in an action by a broker for commissions, the court charged that verdict should be for defendant unless the sale was on the very terms authorized, or unless the terms were changed to deprive plaintiffs of commissions, it was not error to refuse defendant's request presenting the issue of the owner's right to sell. *Webb v. Harding* (Civ. App.) 159 S. W. 1029.

In an action on a warranty of soundness of a mule, an omission to instruct that for a verdict for plaintiff there should be a finding that defendant made the alleged representations was cured by defendant's special instruction that the jury could not render the judgment for plaintiff unless it found that defendant, at the time of the sale, made "a direct, positive, and unqualified statement to plaintiff that the mule was sound." *Slover v. Goode* (Civ. App.) 163 S. W. 333.

There was no error in refusing an instruction that a broker is not entitled to a commission, where the purchaser bought on his own information after negotiating with the owner, without being influenced by the broker, though the broker made efforts to sell to such purchaser, where the court instructed that the brokers must have been the efficient and procuring cause of the sale, nor was there error in refusing an instruction that, though a broker brings the parties together, he is not entitled to a commission, in the absence of a contract of agency, where the same defense was substantially represented in the court's main charge. *McKinney v. Thedford* (Civ. App.) 166 S. W. 443.

A general charge by the court, that if the jury should find that the horse sold to defendant was registered plaintiff could recover, held not to justify the refusal of a requested charge as to the effect of error in the certificate of registration. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 177 S. W. 528.

Where, in action in which there was a dispute as to whether there was a sale of stock, the court defined the term "sale," held, that another abstract definition was unnecessary. *Alamo Trust Co. v. Prudential Life Ins. Co. of Texas* (Civ. App.) 183 S. W. 787.

In an action by broker for commissions, submission of an issue held not to justify refusal to submit defense that sale was to one of the owner's old customers, and that contract did not contemplate commissions for such sale. *Shaller v. Johnson-McQuiddy Cattle Co.* (Civ. App.) 189 S. W. 553.

In a broker's action for commissions, requested charge as to good faith required of broker held improperly refused, not being covered by the charges given. *Andrew v. Mace* (Civ. App.) 194 S. W. 598.

49. — **Contracts of carriage or for telegraphic or telephonic service.**—In an action against connecting carriers for injuries to cattle, a request to charge that the carrier was not an insurer of such freight, but was only required to exercise ordinary care to give the cattle prompt and safe transportation, held covered by instructions given. *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427.

In an action against a terminal carrier for delay and rough handling of cattle, a requested charge held properly refused because covered by charge given. *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708.

In action for damages to shipment of live stock where court gave specially requested instructions covering the issues sought by another requested instruction, the refusal of the last instruction was proper. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

51. — **Amount of recovery.**—In an action to recover the cost of feeding cattle after their pasture had been negligently burned, a requested instruction as to the amount of

recovery held properly refused as covered by an instruction already given. *Chicago, R. I. & G. Ry. Co. v. Word* (Civ. App.) 158 S. W. 561.

The refusal of a special charge as to the measure of damages was not error, where that issue was fully covered by the general charge. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

A request to charge, in a personal injury action, not to allow plaintiff any damages for permanent injury unless the jury found that he was probably permanently injured was properly refused, though the charge given did not refer to "permanent" injuries, where it did submit all of the proper elements of damage, nor was it error, where the court charged all of the recoverable elements of damages, to refuse a requested charge that, in estimating the injury to plaintiff by his diminished capacity to labor and earn money in the future, the jury should consider his age at the time he was injured, which was 56 years. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

A requested charge, in an action for injury to land by the construction of railroad terminal yards adjacent thereto, held not defective for not charging that the jury could consider those uses which might in reasonable probability occur in the future as well as present uses; the main charge having so instructed. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 165 S. W. 560.

In an action by a tenant on shares for damages resulting from his eviction, a charge requested by the landlord as to the duty to minimize damages held covered by the charge of the court. *Bost v. McCrea* (Civ. App.) 172 S. W. 561.

In an action against a telephone company for failure to transmit a sick message, defendant's requested charge on damages held properly refused, as covered by the charge given. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 178 S. W. 574.

Defendant's requested instruction as to recovery of damages, the direct result of plaintiff's wrongful and negligent conduct, held, under the evidence, sufficiently covered by its requested instruction given. *St. Louis Southwestern Ry. Co. of Texas v. Huddleston* (Civ. App.) 178 S. W. 704.

In an action for libel, defendant's requested charge on the issue of exemplary damages was properly refused, where the court's main charge thereon was sufficiently full and fair to protect the defendant in all its rights. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

In action for ejection from train defendant railroad was entitled to requested charge grouping facts depended on in mitigation of damages by plaintiff's offensive language, though general charge might lay down general rule of law applicable. *Texas & N. O. R. Co. v. McAllister* (Civ. App.) 183 S. W. 82.

An instruction is not objectionable for failing to discuss an element of damage covered in other portions of the charge. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

In a suit for delay in delivery of telegrams announcing death of plaintiff's mother, refusal of an instruction that plaintiff could not recover for grief occasioned by death of his mother held not reversible error, where court charged as to recoverable damages. *Western Union Telegraph Co. v. Wilson* (Sup.) 194 S. W. 385.

**52. Erroneous requests.**—Where an instruction is partially bad, it may be entirely refused. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

The court need not submit an issue specially requested where the definition accompanying the issue was incorrect. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

Instructions requested en masse should be refused if any one of them is improper or has been substantially given in main charge. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

On pleading and evidence on cross-bill for damages from personal injury from negligence of one furnished by plaintiff to instruct in operation of automobile, a requested special charge as to expenditures for doctors and drugs, though erroneous, held to require the submission of instruction on material issue as to such expenditures. *Roberts v. Houston Motor Car Co.* (Civ. App.) 188 S. W. 257.

In action for damages to plaintiff's crop from overflow alleged to have been caused by improper construction of railway company's bridge, refusal of instruction on extent of injury and damages, though containing a clerical error, held reversible error. *Ft. Worth & D. C. Ry. Co. v. Anderson* (Civ. App.) 194 S. W. 847.

**53. — On issue omitted from charge as given.**—Though a request to charge on a particular issue is subject to criticism, it may nevertheless be sufficient to call the court's attention to the necessity of a charge on the issue so that a failure to give a correct charge will be available error. *Stirling v. Bettis Mfg. Co.* (Civ. App.) 159 S. W. 915.

The request for an incorrect instruction is sufficient to call the court's attention to its failure to charge on a material issue. *Olds Motor Works v. Churchill* (Civ. App.) 175 S. W. 785.

**54. Inconsistent requests.**—A requested instruction, not mentioning plaintiff's right to recover for future pain, is properly refused, especially where it contradicts an instruction, given at appellant's request, authorizing recovery for such pain. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 191 S. W. 374.

**55. Presentation in general.**—Under Acts 33d Leg. c. 59, a bill of exceptions complaining of the refusal of a charge which fails to show that it was requested in time and submitted to opposing counsel is insufficient. *Floegge v. Meyer* (Civ. App.) 172 S. W. 194.

Assignments of error complaining of the refusal and giving of special instructions not appearing in the record will be overruled under Acts 33d Leg. c. 59. *Fuller v. El Paso Live Stock Commission Co.* (Civ. App.) 174 S. W. 930.

The refusal of a special charge cannot be overruled, where no bill of exceptions was preserved showing presentation of the charge and exception to the refusal. *Houston B. & T. Ry. Co. v. Lewis* (Civ. App.) 176 S. W. 68.

If appellant desired that a certain numbered charge should be given instead of another numbered charge, it ought not to have requested the latter. *Panhandle & S. F. Ry. Co. v. Morrison* (Civ. App.) 191 S. W. 138.

**58. Examination and inspection of requested instructions.**—Under this article, it is for the court, and not the party making the request, to submit them to opposing counsel,

and it will be presumed that the court performed its duty. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Refusal of requested charges will not be reviewed where the bills of exceptions do not show that the charges were presented to the court and submitted to opposing counsel as required by Acts 33d Leg. c. 59. *Atchison, T. & S. F. Ry. Co. v. Hargrave* (Civ. App.) 177 S. W. 509.

Bills of exceptions to refusal of requested special charges must disclose that such charges were submitted to opposing counsel for examination and objection, as required by this article. *J. B. Farthing Lumber Co. v. Illig* (Civ. App.) 179 S. W. 1092.

60. **Allowance of part of charges requested.**—Where the charge given did not clearly present the defense, the denial of two special charges, either of which would have supplied the omission, is erroneous, though only one of them need have been given. *Ft. Worth & R. G. Ry. Co. v. Jonas* (Civ. App.) 166 S. W. 415.

Where a requested omnibus special charge contains several paragraphs, part of which it would be proper to submit, and part not proper, the court need not select those paragraphs which it would be proper to submit. *Hermann v. Bailey* (Civ. App.) 174 S. W. 865.

When several charges are requested, covering the same phases of the case and questions of law, differing only in wording, the court may give one and refuse the others. *Fidelity Phenix Fire Ins. Co. v. Sadau* (Civ. App.) 178 S. W. 559.

Where a party requests two special instructions on the same issue, and the court selects and gives one, the party cannot complain of the refusal of the other. *St. Louis Southwestern Ry. Co. of Texas v. Aston* (Civ. App.) 179 S. W. 1128.

Error cannot be assigned to the failure to give portions of special charges. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

62. **Refusal of requests.**—Where appellees' charge No. 12 was indorsed by the judge as given, while the indorsement on No. 13 recited that it was refused after charge No. 12 was refused, held that any alleged error in No. 12 would not be reviewed. *Good v. Texas & P. Ry. Co.* (Civ. App.) 166 S. W. 670.

Under this article and arts. 1971 and 2061, held refusal of a requested instruction was not waived, though objection, other than by the request, was not made to the general charge. *Ft. Worth & D. C. Ry. Co. v. Alcorn* (Civ. App.) 178 S. W. 833.

Where defendants gave three separate notes, two of which were renewal notes, and the court could not determine from the general verdict upon which note it was based, whether the failure to give charges with reference to the rights of plaintiff under each note was error could not be determined. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

Where the master asked and was refused peremptory instruction, and then requested submission of issue of negligence by qualified motion reciting refusal of peremptory instruction, he could assert on appeal that there was no evidence raising the issue of its negligence. *Missouri, K. & T. Ry. Co. v. Masqueda* (Civ. App.) 189 S. W. 328.

63. **Objections and exceptions.**—See arts. 1971, 1972, 1974, 2061, and notes thereunder.

**Art. 1974. [1320] [1320] Endorsement by judge on special instructions refused; as bill of exceptions; presumption on appeal; endorsement when instruction given or modified.**—When a special instruction is requested and the provisions of this law have been complied with and the trial judge refuses the same, he shall endorse thereon; "Refused," and sign the same officially, and such charge, when so endorsed, shall constitute a bill of exceptions and it shall be conclusively presumed on appeal that the party asking said charge presented the same at the proper time and excepted to its refusal, and that all of the requirements of law have been observed, and the same shall entitle the party requesting such charge to have the action of the trial judge in refusing the same reviewed on appeal without preparing a formal bill of exceptions."

If the trial judge modify such special charge, he shall endorse on said charge: "Modified as follows: (stating in what particular he has modified the charge) and given, and exception allowed plaintiff (or defendant as the case may be)" and sign the same officially. Such charge when so endorsed shall constitute a bill of exceptions and it shall be conclusively presumed that the party asking said charge presented the same at the proper time, excepted to the modification thereof, and that all of the requirements of law have been observed, and the same shall entitle the party requesting such charge to have the action of the trial judge in modifying the same reviewed without preparing a formal bill of exceptions." [Act May 13, 1846, p. 363, § 100, P. D. 216; Acts 1913, p. 113, § 3; Act April 2, 1917, ch. 177, § 1.]

**Explanatory.**—The act amends art. 1974, Rev. Civ. St. 1911, as amended by sec. 3, ch. 59, page 113, of general laws, 33rd Leg. regular session. Took effect 90 days after March 21, 1917, date of adjournment.

Cited, *Crow v. Childress* (Civ. App.) 169 S. W. 927; *Hill v. Staats* (Civ. App.) 187 S. W. 1039; *Rabinowitz v. Smith Co.* (Civ. App.) 190 S. W. 197; *Terrell v. Middleton* (Sup.) 191 S. W. 1138; *Terrell v. Middleton* (Sup.) (in dissenting opinion) 193 S. W. 139.

**Decisions prior to amendment of April 2, 1917.**—A notation on an instruction following the signature of plaintiff's attorneys "requested after the reading of the main charge

and after the court's refusal of plaintiff's request to charge a peremptory instruction in its favor, and given," was not calculated to mislead the jury to defendant's prejudice. *Allison v. Arlington Heights Realty Co.* (Civ. App.) 164 S. W. 1033.

Under the substantially direct provisions of this article and art. 2061, in absence of exceptions in the appellate record to the refusal of instructions, the trial court's action thereon is deemed approved. *Mutual Life Ins. Ass'n of Donley County v. Rhoderick* (Civ. App.) 164 S. W. 1067.

Though this article provides that, when a request is given, the court shall note the same, subscribe his name thereto, and it shall be filed with the clerk and constitute a part of the record of the cause, yet, under the express provisions of article 2061, it must be excepted to, or it will be regarded as approved. *Quanah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 165 S. W. 546.

Under Acts 33d Leg. c. 59, § 3, amending this article and arts. 1970, 1971, 1973, the ruling of the trial court in refusing a request will not be reviewed on appeal, where the record does not show any exception thereto at the trial. *Id.*

Under this article and arts. 1970, 1971, 1972, 1973, 2061, rulings on the giving and refusal of instructions are not reviewable, unless the bills of exceptions show that objections to the general charge and special charges refused were presented before the general charge was read. *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514.

Art. 2061, embodied in chapter 19, tit. 37, and amended by Acts 33d Leg. c. 59, refers to the articles of the chapter relating to bills of exceptions, and not to the foregoing articles of the amendatory law, amending articles 1970, 1971, 1973, 1974, of chapter 13, relating to instructions and objections; and the articles as amended govern the exceptions to instructions and refusal of instructions. *Heath v. Huffhines* (Civ. App.) 168 S. W. 974.

Where defendant's requested instructions were refused, but no objection to the charge was made before it was given, under this article and arts. 1971, 1973, 2061, it is to be regarded as approved and as requested by defendant, as regards his right to complain of refusal of the instructions, within the rule that if one requests two different instructions, on the same issue, and one of them is given, he cannot complain of the refusal of the other. *Cleburne St. Ry. Co. v. Barnes* (Civ. App.) 168 S. W. 991.

Where a refused instruction was not excepted to, as provided by this article, it would be presumed to have been approved under section 2061, as amended, and it was not sufficient that the refusal was assigned for error in defendant's motion for a new trial, and that the denial of such motion was duly excepted to. *Missouri, O. & G. Ry. Co. of Texas v. Love* (Civ. App.) 169 S. W. 922.

Under this article and art. 2061, and despite article 2062, the refusal of instructions cannot be reviewed on appeal, unless duly excepted to. *Gulf, C. & S. F. Ry. Co. v. Battle* (Civ. App.) 169 S. W. 1048.

Under Rev. St. 1911, art. 2059, a bill of exceptions which referred to charges requested by the defendant by number, which request was marked "Refused" by the judge and filed with the clerk so as to become a part of the record under this article, is sufficient. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Under this article and 2061, refusal to give special charges cannot be reviewed, in the absence of exception reserved to the refusal. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188; *Scarborough v. Wheeler* (Civ. App.) 172 S. W. 196; *Houston E. & W. T. Ry. Co. v. Houston Packing Co.* (Civ. App.) 176 S. W. 749.

Under Rev. St. 1911, arts. 1972, 2058-2060, and Practice Act 1913, amending articles 1971, 1974, 2061, giving and refusal of instructions held not reviewable, where exception was not reserved. *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504.

Art. 1972, providing that the charge, after presentation of objections, shall constitute part of record and be regarded as excepted to and subject to revision without necessity of bill of exceptions, was not repealed by implication by Acts 33d Leg. c. 59, amending this article and art. 2061. *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 187 S. W. 184.

### Art. 1975. [1321] [1321] Jury may carry charge, etc., with them.

See arts. 1957, 1962, and notes.

**Additional charge.**—Under this article the court can answer a written question as to the law propounded by the jury after they had retired to consider their verdict. *Hermann v. Schroeder* (Civ. App.) 175 S. W. 788.

Statute requiring submission of special issues does not repeal statute authorizing the judge on request to give additional instructions, and a party may not complain of an additional instruction, which conforms to correct instructions originally given. *Coleman Vitrified Brick Co. v. Smith* (Civ. App.) 175 S. W. 860.

## CHAPTER FOURTEEN

### THE VERDICT

Art.	Art.
1977. Must be in writing and signed.	1988. Verdict to comprehend whole issue or all issues submitted.
1979. Jury may be polled.	1989. Judge, on request to state conclusions of fact and law separately, statement to be filed.
1980. Defective or mistaken verdict.	1990. Court to render judgment on special verdict or conclusions, unless set aside, etc.
1981. Not responsive to the issues.	1991. Exceptions to conclusions or judgment noted in judgment; appeal, etc.; transcript.
1984. Special verdict defined.	1992. No submission of special issues unless requested.
1984a. Submission of special issues.	
1985. Special verdict, requisites of; failure to submit issue not reversible error unless request, etc.	
1986. Special verdict conclusive.	
1987. Jury to render general or special verdict as directed.	

**Article 1977. [1323] [1323] Must be in writing and signed.**

**Signature.**—This article does not apply to jury trials in county court. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 853.

Where a jury of 11 is agreed upon, it is not necessary that each of the 11 sign the verdict, but the signature of the foreman alone is sufficient. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Where all the members of the jury in open court acknowledged that the verdict returned was their verdict, signature by all of them was unnecessary. *Id.*

Where special interrogatories were submitted to jury, who on its return was questioned by the judge whether answers were severally answers of each juror to the questions, to which they replied in affirmative, the mere fact that after discharge it was discovered that foreman had not signed immediately below questions and answers, did not present reversible error. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

Statutory requirement that 11 jurors sign verdict when jury is reduced to that number is directory only. *Barker v. Ash* (Civ. App.) 194 S. W. 465.

Objection because verdict was signed only by foreman and not by other jurors is waived, where appellant knew facts when verdict was returned, but made no objection till motion for new trial was presented. *Id.*

Where a party failed, on rendition of a verdict by 11 jurors, to object to their failure to sign the verdict, it could not, for the first time on appeal, complain thereof, if it was error. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Where no exception was made to verdict signed by foreman alone until after jury was discharged, an objection that verdict was not signed by all jurors came too late. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 853.

Where special findings signed by foreman authorized judgment for plaintiff, held that failure of foreman to sign other findings did not require setting aside of findings. *City of Henderson v. Fields* (Civ. App.) 194 S. W. 1003.

**Art. 1979. [1325] [1325] Jury may be polled.**

**Questioning jury after verdict.**—It is not error for the trial court to refuse to summon jurors before it, after the verdict, to interrogate them as to whether they correctly understood the instructions. *Hermann v. Schroeder* (Civ. App.) 175 S. W. 788.

**Art. 1980. [1326] [1326] Defective or mistaken verdict.**

Cited, *Myers v. Grantham* (Civ. App.) 187 S. W. 532.

**Defective or informal verdicts in general.**—A verdict allowing punitive damages without also allowing actual damages is contrary to law. *Dees v. Thompson* (Civ. App.) 166 S. W. 56.

**Certainty in general.**—In construing a verdict, the appellate court cannot look to the evidence to determine upon what theory it was rendered. *Browne v. Fechner* (Civ. App.) 159 S. W. 461.

Any facts arising by necessary implication from facts found by the jury will be considered as found by them so as to aid the verdict. *Id.*

While a verdict should be given a liberal construction, the courts should be careful not to usurp the functions of the jury. *Id.*

The charge may be looked to in order to ascertain the meaning of the verdict. *Id.*

A verdict is not so uncertain that it will not support the judgment where any uncertainty in its terms is made clear by a reference to the rest of the record. *Hammel v. Benton* (Civ. App.) 162 S. W. 34.

The court cannot look to the evidence to aid the verdict. *Waco Cement Stone Works v. Smith* (Civ. App.) 162 S. W. 1158.

When a verdict is too uncertain to support a judgment, the court cannot enter judgment thereon, since to do so would be to make the verdict for the jury. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

A verdict specifically locating the disputed lines in respect to the lands in controversy held not void for uncertainty. *Hermann v. Bailey* (Civ. App.) 174 S. W. 865.

In action for conversion, verdict for plaintiff, construed in light of charge, held to remove objections of uncertainty and that it did not dispose of cross-action setting up indebtedness to defendant. *San Antonio, U. & G. Ry. Co. v. Yarbrough* (Civ. App.) 179 S. W. 523.

In a boundary suit, the jury is required definitely to locate the line by its verdict, and its description as being the south line of a certain survey, such south line not being otherwise located, is not such definite location as is required in a verdict. *Bonner v. Pitts* (Civ. App.) 186 S. W. 231.

In suit for dissolution of partnership and accounting, verdict for plaintiff held not insufficient as vague and indefinite. *Tyler v. McChesney* (Civ. App.) 190 S. W. 1115.

The fact that a finding of damages for depreciation in market value to cattle shipped over defendant railway did not state that delay caused cattle to become gaunt and jaded did not render verdict uncertain. *Panhandle & S. F. Ry. v. Harp* (Civ. App.) 193 S. W. 438.

**Alder by pleadings.**—The pleadings may be looked to in order to ascertain the meaning of the verdict. *Browne v. Fechner* (Civ. App.) 159 S. W. 461.

**Amount of recovery.**—In an action for a balance due on a contract to furnish stone, and for extra materials furnished, aggregating \$792, in which defendant admitted owing plaintiff \$546, but counterclaimed for damages for \$2,250, a verdict for defendant of \$1,000 held uncertain and indefinite. *Waco Cement Stone Works v. Smith* (Civ. App.) 162 S. W. 1158.

A verdict, "We, the jury, find for plaintiff damages to amount of \$1,732.26, less freight," was too uncertain to be the basis of a judgment, since reference to the evidence was required to ascertain freight. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

Where jury returned verdict against two defendants jointly, and against the third defendant for amounts specified, verdict held not ambiguous, though it stated the total

amount as less than the sum of the amounts awarded against the different defendants. *Kansas City, M. & O. Ry. Co. of Texas v. Treadwell & Wilkison* (Civ. App.) 164 S. W. 1089.

In shipper's action for damages, verdict finding for plaintiff in a specified amount, less freight charges, held insufficient as a general verdict, and not to justify a judgment for plaintiff. *St. Louis, B. & M. Ry. Co. v. McClellan* (Civ. App.) 173 S. W. 258.

Where the flooding of land rendered part utterly worthless and destroyed crops on the whole tract, the jury held not bound to return separate verdicts for each element of damage. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

The jury's finding, "We believe the plaintiff entitled to \$150," was a sufficient finding assessing the plaintiff's damages at \$150. *Abilene St. Ry. Co. v. Stevens* (Civ. App.) 185 S. W. 390.

**Designation of parties.**—In an action against two defendants for a joint trespass, a verdict reading that, "We, the jury, find against the plea of privilege of the defendant F., and in favor of the plaintiff W., in the sum of \$150.00," was a finding against both defendants for \$150. *Fairchild v. Wilson* (Civ. App.) 168 S. W. 409.

In action for slander against a company and its general manager, held, that a verdict for the manager exonerated him, and also the company. *Cummer Mfg. Co. of Texas v. Butcher* (Civ. App.) 176 S. W. 82.

A verdict for a defendant, silent as to the other defendant, was sufficient to sustain judgment for both defendants. *White v. Barrow* (Civ. App.) 182 S. W. 1154.

**Apportionment of amount of recovery.**—In an action against railroads and the receiver of one, where damages were properly assessable against the receiver as accruing since the appointment, a verdict against the road, including the amount of damages that should have been rendered against the receiver, was erroneous. *San Antonio & A. P. Ry. Co. v. McCammon* (Civ. App.) 181 S. W. 541; see, also, notes under art. 4704.

**Amendment or correction.**—Under this article the court had a right, with the jury's consent, to amend a verdict so as to find for the foreclosure of a lien pursuant to a peremptory instruction. *Malcolm v. Sims-Thompson Motor Car Co.* (Civ. App.) 164 S. W. 924.

Where the whole amount stated in the verdict was less than the sum of the amounts awarded against the different defendants, the court properly recalled the jurors after they had left the courtroom, and directed them to correct the verdict, and received it. *Kansas City, M. & O. Ry. Co. of Texas v. Treadwell & Wilkison* (Civ. App.) 164 S. W. 1089.

Where, as the result of a mistake in computation, the jury's verdict was too high, the court was not required to set the verdict aside or render judgment for the amount returned; the correct amount being ascertainable from the agreed facts. *St. Louis, S. F. & T. Ry. Co. v. Wall* (Civ. App.) 165 S. W. 527.

Under this article held that, after verdict for plaintiff and a poll of the jury showing that they had found against defendant on his cross-action, the court properly amended the verdict by showing such finding on the cross-action. *W. R. Case & Sons Cutlery Co. v. Folsom* (Civ. App.) 170 S. W. 1066.

Action of court in directing that jury return to jury room and correct their verdict so as to include an item which they had overlooked and which the undisputed evidence showed defendant to be entitled to held not error. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

Sending jury back to correct special verdict without informing counsel, who is present in open court, of contents will not be available as error in absence of objection or exception thereto at time. *Texas City Transp. Co. v. Winters* (Civ. App.) 193 S. W. 366.

### Art. 1981. [1327] [1327] Not responsive to the issues.

Cited, *Myers v. Grantham* (Civ. App.) 187 S. W. 532; *Texas City Transp. Co. v. Winters* (Civ. App.) 193 S. W. 366.

**Responsiveness in general.**—The verdict must be responsive to the issues. *Waco Cement Stone Works v. Smith* (Civ. App.) 162 S. W. 1158.

Failure to find a material issue is ground for reversal. *Id.*

Where answers to previous interrogatories plainly stated that there was a written contract between the parties, an answer to an interrogatory whether there was a written contract and whether it was the one introduced by defendant, that "there was a contract considered for transportation," was not fatally defective as unresponsive. *St. Louis, S. F. & T. Ry. Co. v. Wall* (Civ. App.) 165 S. W. 527.

In trespass to try title, involving a right to damages for pasturing cattle, verdict finding defendants guilty, and assessing the damages, held not insufficient as failing to find as to the ownership, where the petition alleged ownership and an ouster, thereby damaging plaintiff. *Wolf v. Lane* (Civ. App.) 166 S. W. 72.

In action for damages to shipment of stock, a finding allowing recovery of feed bill incurred because of delay was proper, if sustained by pleadings and proof, although not covered by the charge. *Panhandle & S. F. Ry. v. Harp* (Civ. App.) 193 S. W. 438.

**Several counts or issues.**—In an action for conversion, where defendant pleaded an offset, a verdict reciting that the jury found for plaintiff in a given sum, but that the offset cannot be construed as a denial of defendant's offset, and was not considered as charged by defendant, should not be received, being manifestly insufficient because not disposing of all the issues. *Pitts v. Cypress Shingle & Lumber Co.* (Civ. App.) 153 S. W. 799.

Where, in an action for injuries against two defendants, both filed cross-pleas to recover over against its codefendant in case of a judgment for plaintiff, a verdict for plaintiff against both defendants but failing to dispose of the cross-pleas was unsustainable. *Ft. Worth Belt Ry. Co. v. Perryman* (Civ. App.) 158 S. W. 1181.

In an action upon a note, where defendant set up payment to the members of the firm to which the note had been given, the failure of the jury to dispose of his cross-complaint against the members of the firm held to render the verdict insufficient to support the judgment, the failure to find not being an implied finding against defendant's contention. *Browne v. Fechner* (Civ. App.) 159 S. W. 461.

The two counts setting up the same cause of action, but one alleging a specific act



of negligence, and the other making a general allegation of negligence, the verdict finding plaintiff entitled to recover under the two counts is sufficient. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545.

In an action by the heirs for injuries before death and for the death, where defendant contended that the death resulted from the injuries, and thereby obtained a remittitur in the Court of Civil Appeals, it cannot in the Supreme Court object to the verdict for not finding that fact. *Houston & T. C. R. Co. v. Walker* (Sup.) 173 S. W. 203, reversing judgment (Civ. App.) 167 S. W. 199. Motion to retax costs granted (Sup.) 177 S. W. 954.

In a suit on a note and to foreclose a chattel mortgage on a pumping plant, verdict and judgment which did not pass upon plaintiff's cause of action nor defendant's cross-complaint held reversible error. *Dempster Mill Mfg. Co. v. Humphries* (Civ. App.) 189 S. W. 1110.

**Sending the jury back for further deliberation.**—Where the verdict in an action on a contract did not dispose of plaintiff's cause of action, but only found for defendant on his counterclaim, the court should send the jury back to correct it. *Waco Cement Stone Works v. Smith* (Civ. App.) 162 S. W. 1158.

#### Art. 1984. [1330] [1330] Special verdict defined.

Judgment notwithstanding verdict, see notes to art. 1990.

Cited, *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439; *Higginbotham v. Weaver* (Civ. App.) 177 S. W. 532.

#### Art. 1984a. Submission of special issues.

Cited, *Wood v. J. M. Radford Grocery Co.* (Civ. App.) 164 S. W. 1070; *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439; *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504; *Terrell v. Middleton* (Sup.) 191 S. W. 1138; *Texas City Transp. Co. v. Winters* (Civ. App.) 193 S. W. 366.

**Constitutionality and construction in general.**—This article held mandatory in a cause capable of being determined on special issues. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 168 S. W. 439.

This article gives to a party the right to have a case submitted on special issues, the charge to be drawn by the court, and any omissions supplied as provided by article 1985. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

The only exception to this article, which is a mandatory act, is where the nature of the suit is such that it cannot be so submitted. *Shaw v. Garrison* (Civ. App.) 174 S. W. 942.

Statute requiring submission of special issues does not repeal statute authorizing the judge on request to give additional instructions. *Coleman Vitrified Brick Co. v. Smith* (Civ. App.) 175 S. W. 860.

Submitting or refusing to submit special issues of fact raised by the evidence is not the giving or refusing of special charges, and so not controlled by the rules applicable thereto. *Kansas City, M. & O. Ry. Co. of Texas v. Odom* (Civ. App.) 185 S. W. 626.

Legislature was authorized to enact law permitting judges of district courts to submit questions to jury on special issue, without being requested to do so. *Padgett v. Hines* (Civ. App.) 192 S. W. 1122.

Under this article the refusal of the court to submit a case upon special issues as requested is reversible error. *Klyce v. Gundlach* (Civ. App.) 193 S. W. 1092.

**When special issues should be submitted.**—Employer's action for injuries caused by falling from a ladder in which defendant pleaded contributory negligence, assumed risk, and a settlement, and plaintiff alleged a lack of mental capacity to execute the contract of settlement to which defendant alleged ratification, held a cause which could be determined on special issues. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 168 S. W. 439.

The trial court is not justified in refusing to submit on special issues because at the same time requests were made for the giving of special charges. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

It was not a valid reason for refusing to submit a case on special issues that, when the case was so submitted on a previous trial, the jury had disagreed, owing to the involved character of the issues. *Id.*

Under this article refusal to submit special issues to the jury held to be error. *Shaw v. Garrison* (Civ. App.) 174 S. W. 942.

Where the court would have been justified in peremptorily instructing to find for the plaintiff, there was no error in refusing defendant's request to submit the case on special issues. *Banks v. Mixon* (Civ. App.) 179 S. W. 690.

**Submitting special issues separately.**—The special issue submitted to the jury, "If J. had gotten in telephone connection with \* \* \* W., \* \* \* could he and would he have attended the funeral?" embodies two questions, which should be submitted separately. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

Where, in a case involving capacity of a party executing a contract and a deed and notes 30 days thereafter, it appears that if insane, mental capacity was intermittent, special issues relating thereto should be submitted disjunctively. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

In a personal injury case, a special issue whether plaintiff was knocked down and run over and injured was not objectionable as combining two issues. *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17.

In an action for misrepresentations in effecting a sale of lands, the submission to the jury as to what purpose and to what extent water was guaranteed by the vendor in a single special issue held not erroneous. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 184 S. W. 523.

In servant's action for injuries from strain when carrying timber, submission of special issue requesting finding whether plaintiff was required to carry timber with

rubbish on ground held not error as submitting two questions of fact in the same issue. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

A submitted special issue, "If the defendant or his foreman did make the requirements or order inquired about in the third special issue, was it negligence of the defendant to do so?" was not objectionable as intermingling one issue with another. *Id.*

In action for malpractice in leaving a gauze pack in abdomen of plaintiff's wife after operation, a submitted special issue held not subject to objections that it submitted separate and distinct issues of fact, or that the issues were not separately submitted. *Miles v. Harris* (Civ. App.) 194 S. W. 839.

Special issue as to whether defendant was guilty of negligence as alleged, which proximately caused gauze pack to remain in abdomen of plaintiff's wife longer than it should have remained after operation, held not violation of this article. *Id.*

**Explanations and definitions.**—The giving, preliminary to the statement of the special issues, of a general charge on the material issues should be avoided, as tending to confuse the jury; but this does not apply to definitions entirely proper in connection with the special issues submitted. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

In servant's action for injury, where the court submitting the case on special issues propounded questions as to whether plaintiff was in law a vice principal, the refusal of the defendant's requested charge defining a vice principal was not error. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

Where case was submitted on special issues, a party desiring instructions defining the terms used must request such instructions, or he cannot complain of failure of the court to give them. *Kansas City, M. & O. Ry. Co. of Texas v. Oates* (Civ. App.) 185 S. W. 1014.

No instruction is required as to an issue fully presented in questions propounded by the court, to which no objection is made. *Qualls v. Fowler* (Civ. App.) 186 S. W. 256.

In action for death of plaintiffs' minor intestate employed by defendant, where explanatory portion of charge defined negligence, proximate cause and ordinary care, submission of question, "Do you find that it was negligence to permit said collar to be in such condition?" held not error. *Southwestern Portland Cement Co. v. Presbitero* (Civ. App.) 190 S. W. 776.

When a case is submitted on special issues, the court can give such explanations as in its judgment may be necessary, but it is error to explain them so that the jury can judge of the effect of their findings. *Hovey v. See* (Civ. App.) 191 S. W. 606.

A portion of the charge accompanying special issues as to assumption of risk, held not objectionable as misleading, or as an incorrect statement of the law applicable to the facts in the case. *Atchison, T. & S. F. Ry. Co. v. Ayers* (Civ. App.) 192 S. W. 310.

**Charges in cases submitted on special issues.**—Where the case is submitted upon special issues, it is improper to submit a special charge calling for a general verdict. *Worden v. Kroeger* (Civ. App.) 184 S. W. 583; *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488; *International & G. N. Ry. Co. v. Reek* (Civ. App.) 179 S. W. 699; *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224; *Crosby v. Stevens* (Civ. App.) 184 S. W. 705; *Eureka Ice Co. v. Buckaloo* (Civ. App.) 188 S. W. 510; *La Grone v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 189 S. W. 99.

In a suit against a railroad for a death, where the case was submitted on special issues, the refusal of a charge, embodying a declaration of law which could only be applied by the court to the facts found, and could have been of no material aid to the jury in determining the questions of fact submitted, was proper. *Missouri, K. & T. Ry. Co. of Texas v. Norris* (Civ. App.) 184 S. W. 261.

Special charge, which merely stated law which would follow finding of certain facts submitted to jury, and which would not have aided jury in answering proper issues, was properly refused. *Colgrove v. Falfurrias State Bank* (Civ. App.) 192 S. W. 580.

In a suit to set aside a conveyance of land as fraudulent, an instruction that, if property was homestead of such maker at time of conveyance, it could not have been a fraudulent conveyance, was a proposition of law which was not essential to aid jury in answering issues of fact, and hence was properly refused. *Id.*

In freight conductor's action for injuries, requested instruction that, if plaintiff stumbled over a stake in the yards while at work, that alone would not warrant affirmative answer to a special interrogatory, was properly refused as invasion of the jury's province. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 192 S. W. 593.

In action wherein defendants set up homestead exemptions and the cause was submitted on special interrogatories, requested instruction as to notice to plaintiff of homestead rights, held properly refused. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

In action on note secured by trust deed, defendant's right to homestead being submitted on special issues, refusal of instruction on abandonment of homestead, held not error. *Id.*

Where the case was submitted on special issues as to whether a master had used due care as to the condition of the roof of a mine, refusal to instruct that the employer was not an insurer, and only under duty to use ordinary care, held not erroneous, though the charges were correct as to the law. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

The giving of a special charge requested by defendant held erroneous, where the case was submitted on special issues. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

In a servant's action for injury, the submission of two special issues as to defendant's negligence sufficiently presented the question suggested by a special charge, and in a form more in accordance with this article. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 182 S. W. 444.

Where a servant's action for personal injury was submitted to the jury on special issues, instructions informing the jury of the facts required to be found to entitle plaintiff to recover, were not erroneous. *Id.*

Where the case was submitted on special interrogatories, the giving of charges which told the jury what facts had to be found to enable plaintiff to recover held not error. *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729.

Even where a case is submitted on special issues, the court if requested, should charge the jury with reference to the rules of law applicable to such issues, including a charge on the burden of proof. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

**Interrogation of jury.**—Court may interrogate jury when it reports as to its answer to special issue in open court and in presence of counsel for both parties. *Myers v. Grantham* (Civ. App.) 187 S. W. 532.

**Construction of special findings.**—See notes under art. 1985.

**What special issues should be submitted.**—See notes under art. 1985.

**Construction and operation of special issues.**—See notes under art. 1985.

**Review by Appellate Court.**—See notes under art. 1985.

**Art. 1985. [1331] [1331] Special verdict, requisites of; failure to submit issue not reversible error unless request, etc.**

Judgment notwithstanding verdict, see notes to art. 1990.

Cited, *Hanby v. First Nat. Bank of Hereford* (Civ. App.) 163 S. W. 415; *Bennett v. Sovereign Camp, Woodmen of the World* (Civ. App.) 168 S. W. 1023; *Shaw v. Garrison* (Civ. App.) 174 S. W. 942; *Hamilton v. Fireman's Fund Ins. Co.* (Civ. App.) 177 S. W. 173; *Gesteau v. Bishop* (Civ. App.) [in dissenting opinion] 181 S. W. 480; *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504; *San Antonio & A. P. Ry. Co. v. Jackson & Allen* (Civ. App.) 187 S. W. 488; *Galveston-Houston Interurban Land Co. v. Dow* (Civ. App.) 193 S. W. 353.

**Construction and application in general.**—See notes under Art. 1984a.

**Questions or issues to be submitted.**—Issues which are on the weight of the testimony in singling out portions thereof are properly refused. *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17.

In an action tried on special issues, the refusal of a special issue, which was on the weight of the evidence, and was immaterial, was not error. *Kansas City, M. & O. Ry. Co. of Texas v. Oates* (Civ. App.) 185 S. W. 1014.

In action on policy of mutual benefit association, whose secretary was required to notify by postal card all members liable to assessment, submission of special issue whether the secretary did notify the insured by postal card held proper. *Home Benefit Ass'n of Angelina County v. Jordan* (Civ. App.) 191 S. W. 725.

Submission of special issue whether insured received such notice of assessment at any time before his death held proper. *Id.*

In a railroad employe's action for personal injuries under Employers' Liability Act, it is the better practice to have the jury find whether plaintiff was negligent, and, if so, find the damages sustained by him and the extent his damages are diminished because of his own negligence. *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

In an action for injuries to a car repairer by metal flying off the chisel and hammer used in cutting bolts, the court held required to submit the issues whether the employe's chose the method of work and whether the injury was the result of an accident. *Missouri, K. & T. Ry. Co. of Texas v. Denahy* (Civ. App.) 165 S. W. 529.

Where a buyer, sued for price, counterclaimed for breach of contract to furnish all oil required for six months, held, that the court should have submitted the issue whether plaintiff knew that its agent had made such a contract when the oil was shipped. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

In an action for injuries to horses during shipment, the submission to the jury of the question whether contracts limiting liability were valid held proper. *Southern Pac. Co. v. W. T. Meadors & Co.* (Civ. App.) 176 S. W. 882.

Where the court submitted issues on which the evidence was conflicting, and issues not supported by evidence, a general verdict must be set aside. *Davis v. Cox* (Civ. App.) 176 S. W. 931.

In action for breach of warranty of materials for silo, defendant held entitled to submission of issue as to value of use of the silo and value of the materials. *Texas-Kalamazoo Silo Co. v. Alley* (Civ. App.) 180 S. W. 621.

Where property, after being sold by defendant, was replevied, held that, where there was nothing to show defendant's insolvency, the submission of the issue of special damages was proper. *Taylor v. Jackson* (Civ. App.) 180 S. W. 1142.

In an action for injury to a servant from the slipping of a ladder, a special issue submitting to the jury the question whether plaintiff, before the injury, knew that the ladder was not fastened, is proper. *Smith v. Webb* (Civ. App.) 181 S. W. 814.

In an action by a servant injured while mounting a ladder to a fuel oil tank, held, that the question whether the fact that the ladder was unfastened was obvious and should have been discovered was properly submitted. *Id.*

In a servant's action, held that, the evidence being conflicting, it was proper to submit to the jury the question who was bound to fasten the ladder used by the servant. *Id.*

Where plaintiff's title depended on whether an early grant included the land claimed, and the boundary of the grant was the north bank of a river, it was not error to submit to the jury the special issue whether, at the time of the grant, the land claimed by plaintiffs was on that side of the river, either in whole or in part. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

In an action by a buyer for nondelivery, he claiming that he was not obliged to pay until after delivery, and the seller claiming that payment was to be made by demand draft before delivery, held error to refuse to submit special issues as to the terms of the contract in this respect and whether the buyer complied therewith. *Wolfe City Milling Co. v. Ward* (Civ. App.) 185 S. W. 663.

In action on notes given for an engine sold for defendants' cotton gin, held, on the pleadings and evidence, that submission of issue as to whether a subsequent test was

merely a demonstration in an effort to settle the differences of the parties was proper. *Feagins v. Texas Machinery & Supply Co.* (Civ. App.) 185 S. W. 961.

In action under alleged oral agreement to finish as gas well an oil well bored under written agreement, issue directing jury to find whether defendant directed way in which work should be done after abandonment of oil well was proper. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

In wife's suit to set aside decree of divorce fraudulently obtained by husband, requested special issue as to whether the decree would have been rendered if the clerk had received the jury fee held speculative and immaterial. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

On cross-bill for damages for personal injury from the negligence of plaintiff's agent furnished to instruct defendant in operation of automobile, held on the evidence that requested special issue as to expenses for drugs, etc., was properly refused. *Roberts v. Houston Motor Car Co.* (Civ. App.) 188 S. W. 257.

In action for death of plaintiffs' minor intestate employed by defendant, submission of special issue as to whether deceased was, at time of his death, acting in course of employment as miller in defendant's building held not error. *Southwestern Portland Cement Co. v. Presbitero* (Civ. App.) 190 S. W. 776.

Issue calling for finding whether at time deeds were made deceased had mental capacity sufficient to understand that she was conveying land to defendants held proper. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

When, on trial of a cause, each issue raised by pleadings and evidence is submitted in plain and intelligent questions, which cannot be misunderstood, and, when necessary, appropriate instructions are given to guide jury in determining answers, it is not error to refuse to submit questions to test good faith of jury. *Kirby Lumber Co. v. Youngblood* (Civ. App.) 192 S. W. 1106.

Refusal to require jury to specify which of several injuries plaintiff suffered is not erroneous. *Andrews v. Wilding* (Civ. App.) 193 S. W. 192.

In action on a note given for purchase of land where a secret agreement between purchaser's agents and misrepresentations were claimed, submission of special issues to jury held not erroneous. *Yarn v. Gonzales* (Civ. App.) 193 S. W. 1132.

Refusal of special issue whether defendant followed trade custom in building cotton gin held not error, where it could have been safely built. *Scott v. Shine* (Civ. App.) 194 S. W. 964.

Special issues as to whether plaintiff by exercising ordinary care could have seen a train by keeping a lookout, and whether her failure caused or contributed to the injury, held properly submitted. *St. Louis Southwestern Ry. Co. of Texas v. Harrell* (Civ. App.) 194 S. W. 971.

— **Evidentiary or ultimate facts.**—There need not be submitted to the jury a special issue on a matter which is not an ultimate or controlling fact, but merely a minor or evidentiary fact. *Houston Belt & Terminal Ry. Co. v. Barger* (Civ. App.) 176 S. W. 870; *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 172 S. W. 984; *King County v. Martin* (Civ. App.) 173 S. W. 960, judgment affirmed on rehearing, 173 S. W. 1200; *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17; *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 184 S. W. 1075.

In submitting cases upon special issues, the court should submit the ultimate issue, and not issues evidentiary thereto. *Frigid Fluid Co. v. Sid Westheimer Co.* (Civ. App.) 189 S. W. 334; *Texas City Transp. Co. v. Winters* (Civ. App.) 193 S. W. 366.

In an action for an injury to an employé of a gin company, caused by a defective lever, where the court submitted defendant's negligence in furnishing the gin stand with the lever, it was improper to submit defendant's failure to warn of the defect, that the employé's work had been negligently changed with the assurance that the machinery would be repaired, and that defendant failed to employ a mechanic to keep it in repair; such issues being included in the main issue. *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439.

Where proof of a fact submitted, though evidentiary, is equivalent to proof of the ultimate fact, and carries with it the same legal consequences, there is no objection to its submission. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

Under this article and art. 1984a, an interrogatory should be framed so as to evoke a finding upon fact issues, and a finding of merely evidential facts is improper. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 168 S. W. 439.

In an action for a servant's death from a piece of iron falling in an elevator shaft, where there was no evidence as to how or why it fell, defendant's request to submit special issues as to how it fell, whether negligently or unintentionally, held properly refused, as seeking to elicit the evidence by which the facts were established. *Selden-Breck Const. Co. v. Kelley* (Civ. App.) 168 S. W. 985.

Special issues, which the court refused to submit to the jury, held to relate to evidentiary matters and to be covered by the issues submitted. *King County v. Martin* (Civ. App.) 173 S. W. 960, judgment affirmed on rehearing, 173 S. W. 1200.

The court properly refused to submit special issues calling for mere details not controlling the disposition of the case, on the answer to which no judgment could have been predicated. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

In a manufacturer's action against his agent for losses caused by false reports as to the standing of specified purchasers, held not necessary to submit special questions as to the truth of each report and the loss thereby caused. *Cooper v. Golding* (Civ. App.) 176 S. W. 92.

Special issues which related to merely evidentiary matters, most of which were undisputed and some of which were admitted by the pleadings, should not have been submitted to the jury. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

A special issue as to whether a certain corner of adjoining land not directly affecting the line in controversy was a true corner is an issue for a finding of evidence contrary to this article. *Higginbotham v. Weaver* (Civ. App.) 177 S. W. 532.

Submitting numerous issues on evidentiary facts merely going to prove a real issue

is improper practice. *Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County* (Civ. App.) 182 S. W. 386.

A special issue as to whether a street car ran into a cart or whether the cart backed into the car, being an evidentiary question bearing on the ultimate fact of negligence, was not material. *Abilene St. Ry. Co. v. Stevens* (Civ. App.) 185 S. W. 390.

The submission of special issues, in an action for delay in transportation, held properly of the ultimate fact of negligent delay, and not of evidentiary and inconclusive facts. *Kansas City, M. & O. Ry. Co. of Texas v. Odom* (Civ. App.) 185 S. W. 626.

Under this article instruction requiring jury to state specifically upon what evidence it based its findings should be refused. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

In action for injuries at railroad crossing, defendant's special issue as to the distance from the crossing to caboose on passing track, was properly refused as being an evidentiary fact. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

In action on accident policy, the issue being whether nail in insured's foot caused death, held proper to refuse an issue whether deceased's sticking a nail in his foot was the sole cause of death, and to submit issue whether death was "caused solely through external, violent and accidental means." *Commonwealth Bonding & Casualty Ins. Co. v. Hendricks* (Civ. App.) 187 S. W. 698.

The complexity and seriousness of the questions involved in the proceedings are matters of evidence as to the value of attorney's fees which the jury should not be required by special issue to find. *Branham v. Hallam* (Civ. App.) 191 S. W. 158.

Special issues, which defendant requested to have submitted to the jury, were properly refused, where they sought to establish special facts included in the ultimate fact to be found. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

In action to recover damages from act of doctor in leaving gauze pack in abdomen of plaintiff's wife after operation, questions concerning various acts of defendant held not issues in themselves, but evidence of main fact to be proven, and hence it was not necessary to submit them as special issues. *Miles v. Harris* (Civ. App.) 194 S. W. 839.

In action under Rev. St. 1911, arts. 6592-6594, against a railroad to recover penalties for failure to maintain sanitary closets at stations, defendant is not entitled to special findings specifying what particular weeks it violated law, where evidence supports findings as to total number of weeks. *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 194 S. W. 959.

— **All issues to be submitted.**—Where there was a question whether the power of an engine sold with guaranty was to be developed at the drawbar or belt, the submission of an issue whether it was to be at the drawbar was sufficient. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

Where the issue as to the power of an engine sold with guaranty was submitted, the seller held entitled to an answer whether the workmanship and material were as guaranteed, and whether it had refused to furnish new parts. *Id.*

In trespass to try title involving boundary dispute, held that court, in addition to submitting issue as to whether fence was on boundary line, should have submitted issue as to the location of the boundary if not at the fence. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

When a cause is submitted on special issues, every controverted issue must be submitted, except such as the court is authorized to pass upon under this article. *Gardenhire v. Gardenhire* (Civ. App.) 172 S. W. 726.

In a broker's suit for commission, where the demand was based on the value of the defendant's lands, the submission of the issue of the value of the lands for which defendant's were exchanged, while failing to submit the issue of the value of defendant's lands, was erroneous. *Hicks v. Hunter* (Civ. App.) 183 S. W. 792.

In action for injuries to land by water from defendants' embankment, jury should be required to answer as to condition of land at the time of trial or before that time. *Indiana Co-op. Canal Co. v. Gray* (Civ. App.) 184 S. W. 242.

In action on a renewal note, held, that the single issue submitted did not embrace the defense made both by the pleading and proof, and that the failure to do so was reversible error. *Wilson v. Thompson* (Civ. App.) 186 S. W. 773.

Evidence held to require submission of special issue whether a very prudent person under the circumstances would have foreseen the plaintiff's act in leaving a train halted at a distance from station and her injury; the carrier's liability depending on whether by the highest degree of care it could have been anticipated. *Texas Cent. R. Co. v. Driver* (Civ. App.) 187 S. W. 981.

In wife's action to vacate decree of divorce fraudulently obtained by husband, failure to submit the issue of fraud or to require a finding thereof held immaterial where it was a necessary inference from the facts actually submitted and found. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

— **Issues not material under record or evidence.**—Special issues, not supported by evidence, should not be submitted to jury. *Texas City Transp. Co. v. Winters* (Civ. App.) 193 S. W. 366; *Rowan v. Hodges* (Civ. App.) 175 S. W. 847; *Bender v. Bender* (Civ. App.) 187 S. W. 735.

The submission of a requested special issue in trespass to try title, as whether all the taxes on all the land was paid by F. for five consecutive years, was properly refused, where the evidence showed that another, whose title F. held, had also paid taxes for a number of years. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

Where the question in issue was whether a fence was on the boundary line and there was no dispute as to the existence of such fence or how long it had been there, the court properly refused to submit issues as to these matters. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

In an action for breach of warranty of a roof, the refusal to submit special issues requested by defendant as to whether the roof could be repaired and made water tight held proper under the terms of the warranty. *Phillip-Carey Co. v. Manes* (Civ. App.) 177 S. W. 158.

In an action by a partnership for a debt, where undisputed evidence showed that a decedent had owned a half interest in the firm, the refusal to submit a requested special issue as to what interest such person had owned in the firm was not error. *M. Alexander & Co. v. Fletcher & Whitfield* (Civ. App.) 177 S. W. 514.

Special issues not made by the pleadings are properly refused. *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17.

Special issues as to damages, findings under which would be of no practical benefit on the question of whether the verdict is excessive, are properly refused. *Id.*

In action by former partner for share of commissions on deal completed after dissolution, issue as to whether deal was pending at time of dissolution and definition of "pending" held sustained by the petition. *Daniel v. Lane* (Civ. App.) 179 S. W. 906.

Special issues which were not put in controversy by the evidence were properly refused. *Id.*

It is not error to refuse to submit special questions to the jury, where the evidence on those questions is undisputed. *American Mfg. Co. v. O. C. Frey Hardware Co.* (Civ. App.) 180 S. W. 956.

In a coal miner's action for injuries, where the evidence was insufficient to justify a finding that plaintiff's leg was paralyzed or he was otherwise injured as a result of disease, the refusal to submit the issue whether his injuries were the direct result of any cause other than the fall of coal on his back was proper. *Consumers' Lignite Co. v. Giant* (Civ. App.) 181 S. W. 202.

Defendant may not have submitted to the jury the question of the oil sold by him being according to sample in broker's possession, where sale is proved to have been of a certain grade, and not according to sample. *People's Ice & Mfg. Co. v. Interstate Cotton Oil Refining Co.* (Civ. App.) 182 S. W. 1163.

The court in submitting to the jury the issue of negligence must limit the questions to the allegations of the petition and the evidence in support thereof. *Kansas City, M. & O. Ry. Co. v. Cole* (Civ. App.) 183 S. W. 137.

In a suit against a railroad for a death, the refusal of an issue as to which neither an affirmative nor a negative answer would have relieved the road from liability was proper. *Missouri, K. & T. Ry. Co. of Texas v. Norris* (Civ. App.) 184 S. W. 261.

In salesman's action for compensation under oral contract, where defendant pleaded his employment under a written contract refusal to submit defendant's requested special issue as to whether defendant mailed a contract to plaintiff, which was immaterial, was not error, though its material special issue as to acceptance of such contract should have been submitted. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

A special issue, not supported by the record, should not have been submitted to the jury. *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (Civ. App.) 185 S. W. 382.

In an action for damages for conversion of eight bales of cotton, defendant not having established an alleged gift of two bales, a special interrogatory to the jury assuming conversion of eight bales, if any, and a refusal to submit defendant's requested special interrogatory as to the number converted, if any, were not improper. *Grayson v. Boyd* (Civ. App.) 185 S. W. 651.

In an action on alleged oral agreement to change an oil well into a gas well, the only issue being the existence of the contract, and the price agreed on, which had been submitted, a requested instruction submitting issue whether or not F. S., as president of defendant, employed plaintiff to make gas well and promised to pay him \$50 per day, was properly refused. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

In action on alleged oral agreement, where the only issue of fact was the existence of an agreement, neglect of court to require finding that plaintiff did particular work alleged in his petition was not error. *Id.*

In lineman's action for injury from shock from electric light wire in contact with guy wire attached to pole, request that jury say whether contact of wires was due to lowering of guy wire or raising of electric light wire was properly refused, as the issue was immaterial. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

In action by seller of embalming fluid for purchase price, defended on the ground of breach of warranty, refusal of special issue whether such fluid would produce satisfactory results on remains of mulattos was not error, where the fluid was sold for general use. *Frigid Fluid Co. v. Sid Westheimer Co.* (Civ. App.) 189 S. W. 334.

In an action for attorney's fees, a special issue requested by defendant as to an employment not included within the services for which the court allowed a recovery held properly refused. *Branham v. Hallam* (Civ. App.) 191 S. W. 158.

In an action for attorney's fees, a special issue requested by defendant as to an employment admitted by her held properly refused. *Id.*

Refusal to require jury finding regarding which of plaintiff's injuries were the result of hysteria is not erroneous, especially where the hysterical conditions were traceable back to the physical injuries. *Andrews v. Wilding* (Civ. App.) 193 S. W. 192.

Refusal of court to submit special issue unsupported by evidence or pleadings is not error. *Dermott Townsite Co. v. Wooten* (Civ. App.) 193 S. W. 214.

Where a case was submitted on special issues, if court thought evidence not sufficient on an issue it should not submit the issue, and submission should be so worded as not to cover entire issue. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

**Requests for special findings.**—A request to submit on special issues may not be properly denied because of the party's failure to formulate and request the issues he desired submitted. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

There was no error in informing the jury which party had requested that the cause be submitted on special issues. *International & G. N. Ry. Co. v. Reek* (Civ. App.) 179 S. W. 699.

A request to submit an issue should be clear and specific, made before or at the time the issues are submitted, and not confused as an objection to the entry of judgment or to the charge. *Foster v. Atir* (Civ. App.) 181 S. W. 520.

In servant's action for injury from falling from a ladder on an oil derrick, defendant's requested submission of its negligence in the construction and maintenance of the steps was an invitation to submit issues as to its negligence in fastening a step and in allowing it to become loose and unsafe. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 182 S. W. 444.

The trial court is not required to select from a number of special issues those which are proper to be given and those which are not. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

Where a request to submit a special issue contained two propositions, one of which was submitted to the jury, the failure to submit the other is not reversible error, in the absence of a separate request to do so. *Jenkins v. Morgan* (Civ. App.) 187 S. W. 1091.

Trial court's allowance of an hour or an hour and a half for counsel to prepare and file objections to the special issues submitted and special issues which it desired to have submitted held not an abuse of its discretion. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

Request to submit special issues to jury, is properly refused, where made after court had prepared general charge and time had been given for counsel to prepare special charges. *Fred Mercer Dry Goods Co. v. Filkes* (Civ. App.) 191 S. W. 1178.

It was not reversible error to refuse to submit special issues where the questions were submitted to the trial court in such shape the trial court could not submit one without submitting all of them, and part of the questions were submitted in the main charge. *Messimer v. Echols* (Civ. App.) 194 S. W. 1171.

— **Requests for issues covered by issues given.**—Refusal to submit special requested issues sufficiently covered by submitted issues held not erroneous. *Rice v. Garrett* (Civ. App.) 194 S. W. 667; *Sullivan v. Fant* (Civ. App.) 160 S. W. 612; *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17; *Daniel v. Lane* (Civ. App.) 179 S. W. 906; *San Antonio & A. P. Ry. Co. v. Jaramilla* (Civ. App.) 180 S. W. 1126; *Benham v. Tipton* (Civ. App.) 181 S. W. 510; *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 182 S. W. 444; *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100; *Pecos & N. T. Ry. Co. v. McMeans* (Civ. App.) 188 S. W. 692; *State v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

In view of the special issue submitted and defendant's failure to make complaint of finding thereon, held, that the refusal of the court to submit a special issue was not error. *Richardson v. Wilson* (Civ. App.) 178 S. W. 566.

In action for death of railway engineer, refusal of defendant's requested issue as to whether deceased was exercising ordinary care to run his engine at a safe rate of speed, held proper in view of the other issues submitted. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 182 S. W. 1159.

In salesman's action for compensation under an oral contract, refusal to submit defendant's requested special issue as to the contract under which plaintiff was employed held not error, where such issue was covered by an interrogatory. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

Where some of the requested issues were substantially covered by the main charge, it would have been improper to repeat such issues. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

In servant's action for injury, refusal to submit defendant's special issue on assumption of risk held not error, where the issue was sufficiently submitted by a special issue in the general charge. *Eureka Ice Co. v. Buckloo* (Civ. App.) 188 S. W. 510.

In servant's action for injuries, special issue submitting defense of contributory negligence being a fair presentation of question, there was no error in refusing issue requested by defendant. *Rhome Milling Co. v. Glasgow* (Civ. App.) 194 S. W. 636.

In an action for damages in leaving gauze pack in abdomen of plaintiff's wife after operation, refusal to submit requested special issues substantially embodied in issues submitted held not prejudicial error. *Miles v. Harris* (Civ. App.) 194 S. W. 839.

**Combining two issues in one.**—See notes under art. 1984a.

**Preparation, form and construction of Interrogatories or findings.**—A special interrogatory in an action of trespass to try title brought by S., "Did S. purchase the land in controversy in this suit from G. for S. & Co. or for D., answer 'yes' or 'no,'" was not leading. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

A special issue as to whether an insured had failed to pay his lodge dues and assessments when due submits to the jury only the question whether the payments were made, not whether they were due. *Sovereign Camp Woodmen of the World v. Wagon* (Civ. App.) 164 S. W. 1082.

A requested special issue, calling for all the information given to the agent of defendant telephone company when W. attempted to get in communication with plaintiff, is too general; the only material fact sought being whether the agent was notified that W. expected to tell plaintiff that his sister was at the point of death. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

In an action to rescind a contract of sale held, that the submission of but a single issue was erroneous. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

In a suit to compel the school board to receive children without the vaccination which was required by the rules, a special issue submitting the question whether small-pox constituted a menace to the public health in the vicinity was not misleading. *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840.

An issue submitted to the jury in a personal injury case held to include a consideration of diminished earning capacity in the future. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

A special issue, in trespass to try title, whether a wife had abandoned the homestead, held not to cover the issue whether she had separated from her husband. *Gardenhire v. Gardenhire* (Civ. App.) 172 S. W. 726.

A submission of an issue "Was defendant indebted to plaintiff in the sum of \$875 when said attachment was sued out?" held improper as involving a mixed question of law and fact. *Watson v. Patrick* (Civ. App.) 174 S. W. 632.

Argumentative issues are properly refused. *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17; *Kansas City, M. & O. Ry. Co. of Texas v. Oates* (Civ. App.) 185 S. W. 1014.

In an action by one hurt attempting to elevate part of a railroad bridge with a track jack, a special question held not erroneous in assuming that the jack gave way or fell. *Missouri, O. & G. Ry. Co. of Texas v. Webb* (Civ. App.) 178 S. W. 728.

Where the court had informed the jury that the issues in a passenger's action for injuries in alighting were to be submitted as raised by the pleadings, the form of the question submitting defendant's negligence to the jury held not objectionable. *Aransas Harbor Terminal Ry. v. Sims* (Civ. App.) 179 S. W. 895.

In a suit to enjoin a city from removing structures in the bed of a river, where the evidence was sufficient to support a finding that the true bed extended further than a survey line of 1891, but the city only sought to open the river to such line, it was proper for the court in submitting a special issue to mention such survey line to identify the disputed strip. *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224.

In an action to recover for a deficiency in property received in exchange, an interrogatory held not improper as stating a conclusion of fact by the court as to the actual value of defendants' ranch and other properties exchanged for plaintiffs' land. *Foster v. Atllir* (Civ. App.) 181 S. W. 520.

In a servant's action tried on special issues, held, charges in connection with the issue of assumed risk, in view of the other charges correctly submit the question of "assumption of risk." *Smith v. Webb* (Civ. App.) 181 S. W. 814.

In suit against railroad for killing mules, defendant's requested issue as to ownership held properly refused, as assuming a sale by plaintiff. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 182 S. W. 357.

In action for railway engineer's death, submission of issue as to whether the unsafe track, if it was unsafe, or the unsafe locomotive, if it was unsafe, or both, were the proximate cause of the accident, held not injurious to defendant, as no intelligent jury could have been misled thereby. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 182 S. W. 1159.

The court need not submit all the questions involved in one issue. *Kansas City, M. & O. Ry. Co. v. Cole* (Civ. App.) 183 S. W. 137.

Special issues submitted to the jury though they be leading questions are not improper, where they do not in any manner suggest the answer expected, but merely call for an unequivocal answer. *International & G. N. Ry. Co. v. Logan* (Civ. App.) 184 S. W. 301.

In salesman's action for compensation under alleged oral contract, where defendant pleaded employment under a written contract, formal presentation of issues reciting the terms of the oral contract and omitting the terms of the written contract held not confusing or misleading. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

Defendants' plea of privilege being the single issue of fact, the charge, general in form, which involved only such single issue of fact, was sufficient as a submission of the case on special issues, and the jury's verdict for plaintiff determined such single issue for defendants. *Texas Grain & Elevator Co. v. Dyer* (Civ. App.) 184 S. W. 1049.

A special verdict must directly, fairly, and fully submit to the jury material issues, and be sufficiently certain to stand as a final decision of the special matters with which it deals. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

In action on alleged oral agreement for converting oil well into gas well, a special issue submitting the existence of an agreement to jury, together with an issue to require them to find rate per day agreed upon, held sufficient to cover issues raised by testimony. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

An issue, "Did defendants fail to 'have a competent man stationed at the crossing to give warning?'" sufficiently presented question of whether there was a competent flagman at crossing. *Pecos & N. T. Ry. Co. v. McMeans* (Civ. App.) 188 S. W. 692.

In an action for injuries to a roadmaster who ran his motorcar into an open switch, special issues as to rule of a custom to leave the switch open held not to submit issue of assumption of risk under either the Texas or federal court rules. *Kansas City, M. & O. Ry. Co. of Texas v. Finke* (Civ. App.) 190 S. W. 1143.

In an action to determine the ownership of corporate stock, a special issue held not objectionable as placing on plaintiffs the burden of proving affirmatively that stock originally issued to their ancestor had not been sold by him. *Green v. Galveston City Co.* (Civ. App.) 191 S. W. 182.

On judgment creditor's motion for judgment against constable and sureties for failure to levy execution, submission of issues whether either of executions were delivered to and received by the constable, and whether the judgment debtor had any property in the county subject to execution, was simply a submission of the different theories urged by the respective parties. *Sharp v. Morgan* (Civ. App.) 192 S. W. 599.

A question to jury as to exemplary damages held not to assume plaintiff entitled to exemplary damages. *St. Louis Southwestern Ry. Co. of Texas v. Thompson* (Civ. App.) 192 S. W. 1095.

In an action by the beneficiary of an accident insurance policy, a special issue submitted to the jury and the charge given in connection therewith held sufficiently to submit the issue of the cause of death. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

In suit to enjoin enforcement of an order of Railroad Commission requiring plaintiff to build a station at a designated place on issue as to whether or not plaintiff had designated such place as a depot, it was error to submit two special issues as to whether or not plaintiff had designated depot, naming different place in each, as one question as to designation of such depot should have been propounded, and no answer should have been received except "Yes" or "No." *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

In a servant's action for injuries from strain when carrying timber, special issue submitted, whether plaintiff sustained the injuries or any of them alleged in the petition, held not erroneous in that it does not limit time or place where injuries occurred. *Rice v. Garrett* (Civ. App.) 194 S. W. 667.

In action for malpractice in leaving a gauze pack in abdomen of plaintiff's wife after operation, a submitted special issue held not subject to objections that it submitted a question of law or a mixed question of law and fact. *Miles v. Harris* (Civ. App.) 194 S. W. 839.

In action for injuries to railroad passenger when alighting, questions eliciting jury's findings held not confusing and misleading or on weight of evidence in assuming exist-



ence of controverted facts. *St. Louis Southwestern Ry. Co. of Texas v. Preston* (Civ. App.) 194 S. W. 1128.

**Sufficiency of verdict or findings in general.**—The form of answers to special issues is immaterial if the jury's meaning is clear. *Penn. v. Briscoe County* (Civ. App.) 162 S. W. 916.

Buyer, counterclaiming for breach of contract to furnish all the fuel oil required for six months, held not entitled to judgment for profits lost while its plant was closed due to the breach, where the special issues submitted did not call for sufficient information; *Sayles' Ann. Civ. St. 1897, art. 1331*, having no application. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

A verdict finding that \$7,000 would fairly compensate plaintiff for his injuries, that his earning capacity was decreased by his injuries \$5,000, and that the first amount should be diminished two-fifths on account of his contributory negligence, is sufficiently certain to sustain a judgment. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

Where the jury disagreed as to one special question, though answering another question which in different terms submitted the same matter, the answer will not support a judgment. *Denison v. Brown* (Civ. App.) 172 S. W. 725.

In action for damages to shipment, special finding as to its value, with no finding as to unpaid freight charges, held insufficient to support a judgment for plaintiff. *St. Louis, B. & M. Ry. Co. v. McClellan* (Civ. App.) 173 S. W. 258.

Where the findings made were conflicting and on certain material issues the jury were unable to agree, they did not authorize a judgment. *Wright v. Chandler* (Civ. App.) 173 S. W. 1173.

In action for breach of contract to buy cattle, entry of judgment upon verdict, without a finding on the issue of whether the seller had assented to a rescission, held erroneous. *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

Special issue submitted by the court held to substantially present the contentions of the parties, and the jury's answer was sufficiently certain to support the judgment. *Wedgworth v. Smith* (Civ. App.) 178 S. W. 641.

A judgment based partly on the verdict and partly on court's conclusions from the evidence is permitted under this article. *Foster v. Bennett* (Civ. App.) 178 S. W. 1001.

In action for breach of irrigation contract, the jury's answer, "B. and H." to a submitted issue as to making of contract for defendant company by B. and H., held not objectionable for B.'s want of authority, where H. had authority. *Orange County Irr. Co. v. Sandefur* (Civ. App.) 181 S. W. 777.

In a servant's action for injury, findings that defendant's negligence in the construction of a ladder was the proximate cause of plaintiff's injury, would support a judgment for plaintiff. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 182 S. W. 444.

In action for injuries to land by water seeping through defendants' embankment, where court submitted issue as to value of land after acts complained of, the answer, "No immediate market value for agricultural purposes," will not sustain judgment on theory that its value was entirely destroyed. *Indiana Co-op. Canal Co. v. Gray* (Civ. App.) 184 S. W. 242.

A special verdict in a servant's action for injuries, defended on the ground of contributory negligence awarding him \$17,500 where the demand was \$50,000, was too indefinite to stand. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

Findings on special issues held a sufficient finding of negligence, as to safe place to work, in leaving a plank projecting into a doorway, through which a night watchman had to go. *Texas Glass & Paint Co. v. Reese* (Civ. App.) 187 S. W. 721.

If jury's special findings, when considered with the facts established by the undisputed evidence, foreclose plaintiff's right to recover upon the case made by the pleadings, judgment is properly rendered for defendant, although the special findings do not dispose of all the issues. *Fleck v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 191 S. W. 386.

In action on note secured by deed of trust, which recited that maker's homestead was outside a certain city, and their answer pleaded homestead rights within such city, jury's findings that at execution of note and trust deed the premises were not their home, and they did not reside thereon, were sufficient, without request for other findings, to sustain judgment denying the homestead right. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

Where jury specially found that plaintiff's negligence contributed to injury, without finding that it was proximate cause, held, that judgment for plaintiff could not be upheld on presumption that court found such negligence not proximate cause. *St. Louis Southwestern Ry. Co. of Texas v. Harrell* (Civ. App.) 194 S. W. 971.

**Failure to answer interrogatories or make findings.**—See notes under art. 1988.

**Inconsistent findings.**—Answers to special questions in an action against a railroad company for damages for the maintenance of tracks in the street upon which plaintiff's property abutted held not conflicting, and sufficient to support a judgment for plaintiff. *Houston Belt & Terminal Ry. Co. v. Ashe* (Civ. App.) 158 S. W. 205.

Answers to special interrogatories that defendant agreed to pay plaintiff half the commissions derived by defendant from the sale of any land to persons sent from plaintiffs to defendant held to conflict with answers that the agreement for compensation was merely to make a fair division of the profits. *Trice & Ludolph v. Cone* (Civ. App.) 163 S. W. 587.

A finding that an employer used ordinary care to adopt reasonably safe methods, and a finding that the employer was negligent in failing to use ordinary care to adopt a reasonably safe method to do the work, did not justify a judgment for the employé. *Missouri, K. & T. Ry. Co. of Texas v. Denahy* (Civ. App.) 165 S. W. 529.

In action for the death of railway engineer, killed when his engine left the track, special findings as to the condition of the track and the cause of the accident held conflicting, and a judgment thereon could not be sustained. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 172 S. W. 984.

A special verdict in an action for the price of goods held too contradictory and uncertain to support a judgment. *Goldstein v. Heflin* (Civ. App.) 174 S. W. 891.

Special findings that plaintiff was suffering from neurasthenia, and that she was not

so suffering before or at the time of the injury, held not contradictory. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

In trespass to try title against defendant, special verdicts held conflicting, so as not to support a judgment for the tenant for damages caused by his dispossession under writ of sequestration. *Potka v. Carter* (Civ. App.) 175 S. W. 812.

Where there is an irreconcilable conflict between two special findings, the case must be resubmitted. *Royal Ins. Co. v. Okasaki* (Civ. App.) 177 S. W. 200.

Action of court in directing the jury to again consider a special verdict because the findings were contradictory held not improper. *Denison Cotton Mill Co. v. McAmis* (Civ. App.) 176 S. W. 621.

Where the jury first returned answers to special issues which were inconsistent, it was not error for the court to call their attention to the inconsistency and require them to return to their room and answer both issues alike. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

It is the duty of the court, if it can reasonably be done, to reconcile the special findings of the jury. *Krenz v. Strohmeir* (Civ. App.) 177 S. W. 178.

In an action against defendant as trustee for the payment of his son's debt, special findings that certain land was deeded to him to pay the son's debts, and was kept by defendant for the purpose and with the understanding that plaintiff's debt was to be paid therefrom, held not inconsistent. *Bell v. Swim* (Civ. App.) 178 S. W. 850.

Finding in passenger's action for injuries by derailment that a hidden defect in the first rail giving way was not discoverable by the highest care held not in conflict with another finding that defendant had not used a high degree of care to have the rails in a reasonably safe condition. *International & G. N. Ry. Co. v. Berthea* (Civ. App.) 179 S. W. 1087.

In an action to recover for a deficiency in property received in exchange, findings that an agreed value was placed on one property and that no such value was placed on the other were not so inconsistent as to prevent entry of judgment. *Foster v. Atllir* (Civ. App.) 181 S. W. 520.

Findings, in action by employé against railroad, that plaintiff's duties required use of footboard on tender, and that proper attention to duties would not inform him of defective condition, held not necessarily contradictory. *Texas & P. Ry. Co. v. Conway* (Civ. App.) 182 S. W. 52.

A finding that an uptown office of wholesale grain dealers was used as an auxiliary to and in connection with the plant which they claimed exempt from a trust deed as their business homestead, is not inconsistent with a finding that the uptown office was their principal place of business as wholesale grain dealers. *Bowman v. Stark* (Civ. App.) 185 S. W. 921.

Error cannot be predicated on the alleged conflict in the verdict which found the mother entitled to a divorce and custody of two girls, but not a fit and proper person to have custody of a boy; no actual conflict necessarily following from such findings. *Hunter v. Hunter* (Civ. App.) 187 S. W. 1049.

That a jury, by finding on a special issue that plaintiff's injury was not directly caused by the fall which was claimed due to defendant's negligence, made their verdict one for the defendant, did not make it conflicting and inconsistent because of a later finding as to the amount of damages suffered. *Goodson v. Houston & T. C. R. Co.* (Civ. App.) 189 S. W. 82.

A special finding by the jury that a wife signed a deed upon condition that she was to have the value of the land does not conflict with a finding that the note therefor was not given to her. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

Special findings that the flood was unprecedented, that it was the proximate cause of the injury, but that railroad could have reasonably anticipated the flood, were in conflict, and no judgment could be rendered thereon. *San Antonio & A. P. Ry. Co. v. Milam County* (Civ. App.) 191 S. W. 571.

Jury findings that plaintiff's agent told defendant a tractor would do certain plowing, and that such representation was true, but that the engine failed on plowing, are not fatally inconsistent, where the first two findings were in response to a lengthy and involved question. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

In action for damages to goods shipped, evidence that the carrier sold the goods for \$145 did not conflict with a special finding of the jury that the goods, when received, had no market value at destination, where evidence of such sale was offered for limited purpose of showing that carrier performed its statutory duty as to goods refused. *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804.

In suit to enjoin enforcement of order of Railroad Commission requiring plaintiff railroad to build a station at designated place, answers to special issues held so ambiguous and contradictory as to require reversal of judgment for defendant, since to support a judgment a verdict as a whole must be plain in meaning and not inconsistent in findings upon material facts. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

In action on a note given for purchase of land where a secret agreement between purchaser's agents and vendor's agents and misrepresentations were claimed, findings on special issues held not inconsistent. *Varn v. Gonzales* (Civ. App.) 193 S. W. 1132.

**Amendment of verdict.**—After a jury was discharged, its verdict could not be reformed by changing the answer to a special issue from "no" to "yes" although the jury appeared and asked the court in writing to make such change. *Goodson v. Houston & T. C. R. Co.* (Civ. App.) 189 S. W. 82.

**Construction and operation.**—An answer to special issues submitted to try title involving the location of a road with reference to plaintiff's land held to be a finding for defendant on the special issues submitted to the effect that the land could not be located by a certain survey, and against plaintiff on the issue of the county's estoppel to define the location of the road. *Penn v. Eriscoe County* (Civ. App.) 162 S. W. 916.

Where special findings by the jury as to whether the insured had paid his lodge assessments might be construed as conflicting, but the undisputed evidence and other findings support the finding that the payments were not made, the jury will be held to have

intended such finding. *Sovereign Camp Woodmen of the World v. Wagnon* (Civ. App.) 164 S. W. 1082.

Where the jury found on one issue that certain assessments were not made by the insured or by any one for him, the finding on another issue as to whether he failed to make such payments when due, reading, "No, no April dues on May 1st, 1912," is a finding that no dues were due on that date. *Id.*

Where the jury, in response to the question whether a husband gave to his wife a note as a gift or to reimburse her for money of hers that had been used, found that it was to reimburse her for her money and land used, the finding was a direct finding that the entire note was turned over to her to reimburse her, and not that she was to have only the amount needed to pay her for her property used. *Larrabee v. Porter* (Civ. App.) 166 S. W. 395.

Jury's answer to question as to whether oil was shipped under a verbal agreement or to supply the immediate demands of the buyer in the belief that the buyer would execute a written contract, reading, "One car on verbal contract, two cars on written contract," held not to mean that the last two cars were shipped in acceptance of a written contract which the seller never executed. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

In an action for personal injury by the servant of a railroad construction company operating a railroad, alleging the company's negligence in giving signals for letting down rails, held, that the findings amounted to a finding of such negligence, and that a judgment for defendant thereon was properly refused. *Texas Bldg. Co. v. Reed* (Civ. App.) 169 S. W. 211.

In a railroad servant's action for injury from falling from a car load of lumber he was trying to straighten, findings that he knew the danger of attempting to do the work without help and with a dangerous pinch bar held to establish the common-law defense of assumption of risk, even though he was inexperienced and had not been warned. *Houston & T. C. R. Co. v. Smallwood* (Civ. App.) 171 S. W. 292.

Where, under issues submitted, the jury find the whole amount of plaintiff's damages from his injury to be \$7,000, and the amount of his damages from diminished earning capacity to be \$5,000, the latter being included in the former, only the \$7,000 can be considered in rendering judgment. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

A street car passenger, injured while alighting, held not entitled to recover on a finding that there was no discovered peril, and that he was guilty of contributory negligence. *Darden v. Southern Traction Co.* (Civ. App.) 172 S. W. 200.

Under this article and arts. 1986 and 1990, held that, on special verdict entitling one of parties to judgment, the trial court must either set aside verdict and grant new trial, or render judgment in conformity with verdict. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

A special verdict, in an action for injuries to an employé, held not to show contributory negligence. *Denison Cotton Mill Co. v. McAmis* (Civ. App.) 176 S. W. 621.

A special verdict in an action for injuries to an employé held a finding that he understood and appreciated the danger and assumed the risk. *Missouri, O. & G. Ry. Co. of Texas v. Black* (Civ. App.) 176 S. W. 755.

In an action by riparian owners against a city for injunction and damages in the abatement of structures obstructing the stream, the jury's finding that the river was of an average width of 30 feet had the same effect as a finding that it was navigable, so far as the title to riparian lands was concerned. *Petty v. City of San Antonio* (Civ. App.) 181 S. W. 224.

Under Const. art. 1, § 15, art. 5, § 10, and Vernon's Sayles' Ann. Civ. St. 1914, arts. 1984a, 1986, 4633, the court, where jury has found by special verdict that necessary facts constituting legal grounds for divorce are wanting, may not disregard its verdict and grant a divorce to either party. *Grisham v. Grisham* (Civ. App.) 185 S. W. 959.

In a suit for converting mortgaged property, held, that answers to special issues were not overturned by the general verdict, and judgment should be for plaintiff. *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922.

Every reasonable presumption must be indulged in favor of the judgment rendered, and a special verdict should be liberally construed in order to sustain it. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

Answers to special issues may be construed to include matters resulting by necessary implication from facts expressly found. *Penn v. Briscoe County* (Civ. App.) 162 S. W. 916.

Where a special verdict is ambiguous, the court may look to the record to interpret it. *Gibson v. Dickson* (Civ. App.) 178 S. W. 44.

Refusal of court to render judgment for defendants on special finding that, if plaintiff had stopped, looked, and listened before using a railroad crossing he would not have been injured, held proper, in view of other findings. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

In action for rescission of contract of sale of horse, special findings in answer to special questions held to compel a judgment for plaintiff. *Hubbs v. Marshall* (Civ. App.) 175 S. W. 716.

In an action on an award a finding that defendant suffered no damage from loss of rentals due to plaintiff's delays meant only that the loss was due to delays for which plaintiff would not be liable. *Slaughter v. Crisman & Nesbit* (Civ. App.) 178 S. W. 1.

A special verdict that defendant was the natural daughter of decedent held, in view of the pleadings and evidence, a finding that defendant was a legitimate child of decedent. *Gibson v. Dickson* (Civ. App.) 178 S. W. 44.

Where plaintiff secured a general verdict in his action for breach of contract, defendant could not defeat recovery for plaintiff's admitted nonperformance; the verdict being tantamount to a finding that the defendant himself prevented performance. *Meads v. Meads* (Civ. App.) 178 S. W. 781.

Finding that plaintiff was injured "in the manner named," held not a finding that she was thrown from a train by a sudden jerk, as alleged, in view of other findings. *Bullock v. Galveston, H. & H. R. Co.* (Civ. App.) 178 S. W. 826.

In a passenger's action for injuries by derailment, a finding that a defect, in that one of two broken rails which first gave way, could not have been discovered by the highest care, held not to require a judgment for defendant. *International & G. N. Ry. Co. v. Berthea* (Civ. App.) 179 S. W. 1087.

A finding upon a special issue submitted to the jury becomes immaterial when other facts have the legal effect to eliminate the issue embodied in such finding. *Id.*

In trespass to try title affirmative answer to first special issue as to location of block on base line, and as to location of corner of survey, held to make immaterial any issue as to whether officers of the state and grantee intended that surveys in a block should lie adjacent to another block. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

In an action for rescission of an exchange of lands as having been induced by misrepresentations, the jury's answer to a special issue held not insufficient to support judgment for plaintiff, in that it could not be ascertained whether the representations considered by the jury were matters of opinion or those supporting an action for fraud. *Benham v. Tipton* (Civ. App.) 181 S. W. 510.

Where specific acts of contributory negligence were pleaded, and jury found plaintiff not guilty thereof, general finding of failure to exercise care held immaterial. *Fink v. Brown* (Civ. App.) 183 S. W. 46.

In an action to foreclose a chattel mortgage, an erroneous special finding of the particular consideration for an alleged release held to control a general finding of consideration, and rendered it a mere legal conclusion. *Lee v. Clay, Robinson & Co.* (Civ. App.) 185 S. W. 1061.

In action against railroad for injuries, jury properly answered "Yes" to special issues reading "Was or was not" plaintiff in peril? "Did or did not" the engineer discover his peril? etc.; jury's intention to state affirmative finding to each question being evident. *La Grone v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 189 S. W. 99.

In action against initial carrier for entire damage to interstate shipment, where plaintiff proved his damages, and jury found that damages caused by defendant and connecting carriers were \$817.88, it was court's duty to enter judgment for plaintiff for \$800 sued for, and other special issues submitted were immaterial. *Texas-Mexican Ry. Co. v. Sutherland* (Civ. App.) 189 S. W. 983.

In action against initial carrier for entire damages to interstate shipment, where court submitted special issues which sought to apportion damage to each connecting carrier, such issues and answers could not destroy specific finding, as to total damage, supported by evidence. *Id.*

Special findings by the jury in an action in which defendant's wife claimed a note as the proceeds of the homestead, held sufficiently clear and to determine the issue of homestead adversely to the wife. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

A judgment that the seller's fraud invalidated a tractor sales contract is not demanded by a special verdict that the tractor was represented to plow more than it did, especially where it could be profitably used for other purposes, and the loss occasioned defendant by its defects was undetermined. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

An affirmative answer to special issue submitted, whether plaintiff's contributory negligence "caused or contributed to cause" injury, bars plaintiff's recovery, although such special issue did not use the word "proximately." *Behymer v. Mosher Mfg. Co.* (Civ. App.) 192 S. W. 1148.

Where railroad company which was real party in interest might claim lands under contract for their conveyance, even though not intended for townsite purposes, finding in action on bond for conveyance to effect that company did not intend to use lands for townsite, is immaterial. *Dermott Townsite Co. v. Wooten* (Civ. App.) 193 S. W. 214.

Any duty of the court to determine proximate cause was performed when, on jury's special findings of negligence of each defendant being a proximate cause, it rendered judgment against both. *Galveston, H. & S. A. Ry. Co. v. Packard* (Civ. App.) 193 S. W. 397.

In an action to set aside a decree of divorce or to set aside division of property therein, where cause of action to set aside the divorce is barred by limitation, a jury finding that plaintiff was not properly served therein held immaterial. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

In action on a note given for purchase of land where a secret agreement between purchaser's agents and vendor's agents and misrepresentations were claimed, judgment for plaintiff held sustained by special findings. *Varn v. Gonzales* (Civ. App.) 193 S. W. 1132.

Finding that by exercise of ordinary care plaintiff would have seen approaching train in time to stop before colliding therewith, if she had been keeping a lookout, held a finding of negligence. *St. Louis Southwestern Ry. Co. of Texas v. Harrell* (Civ. App.) 194 S. W. 971.

Review by appellate court in general—Submission or refusal to submit findings.—Plaintiff's failure to except and assign error to the refusal to submit other issues does not prevent a reversal of a decree which fails to give the relief to which he was legally entitled under undisputed facts. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991.

The law, requiring reservation of exceptions to the charge and to the giving or refusing of charges, does not apply to the action of the court in submitting, or refusing to submit, special issues of fact to the jury. *Tomson v. Simmons* (Civ. App.) 180 S. W. 1141.

Error cannot be predicated on the refusal of the court to submit requested issues, not made subject to proper assignment of error, nor accompanied by proper bills of exception, showing timely and proper application to the court for the submission of the requested issues. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Assignments of error to the manner in which the cause was submitted to the jury on special issues cannot be considered, where there are no bills of exception or statement of facts in the record and no showing of fundamental error. *Baugh v. Baugh* (Civ. App.) 175 S. W. 725.

Under the statute of 1913 the erroneous submission of special issues cannot be reviewed on appeal, where no bill of exceptions was reserved below. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

The action of the trial court in refusing to submit a case upon special issues will not be reviewed on appeal, unless such ruling is excepted to and a bill of exceptions taken. *Quannah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 165 S. W. 546.

Where appellant did not except to the court's failure to submit material questions to the jury, those matters cannot be complained of on appeal. *Taylor v. Jackson* (Civ. App.) 180 S. W. 1142.

Unless preserved in bill of exceptions in accordance with Rev. St. 1911, art. 2053, the denial of special interrogatories to the jury will not be reviewed. *Texarkana & Ft. S. Ry. Co. v. Casey* (Civ. App.) 172 S. W. 729.

Error cannot be assigned to the refusal to submit special issues to the jury, where no bill of exceptions was taken to the charge or such refusal. *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Civ. App.) 171 S. W. 517.

Where no exceptions were taken as required by statute to refusal of trial court to submit special issues, refusal need not be considered on appeal. *Renfroe v. Bruton* (Civ. App.) 194 S. W. 1134.

Where the objection urged to the submission of an issue was too general, an assignment of error in its submission would be overruled. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

An objection that the charge was not a submission of the case to the jury on special issues as requested held too general to be considered. *Missouri, O. & G. Ry. Co. of Texas v. Webb* (Civ. App.) 178 S. W. 728.

A bill of exceptions to the refusal of the court to submit the case on special issues should show at what point in the trial the request was made. *Banks v. Mixon* (Civ. App.) 179 S. W. 690.

Assignment complaining of refusal of special issues requested, with others substantially given, held not to be considered, where exception was taken to the refusal of all the requested issues. *Morris v. McSpadden* (Civ. App.) 179 S. W. 554.

A general exception to the refusal to give special charges en masse will be overruled, where part of them were embraced in the main charge as given. *Morris v. McSpadden* (Civ. App.) 179 S. W. 554.

Assignment complaining of refusal to submit special issues not shown to have been submitted to opposing counsel held not reviewable. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

**Sufficiency of evidence to support findings.**—Where no exception was taken to the special verdict, the court on appeal may not consider the sufficiency of the evidence to support it. *Weinstein v. Acme Laundry* (Civ. App.) 166 S. W. 126.

Where no exception was directed to a special verdict, the appellate court need not refer to the statement of facts to determine whether the evidence was sufficient to support it. *West Texas Supply Co. v. Duniavan* (Civ. App.) 182 S. W. 425.

Where jury found injured workman guilty of contributory negligence generally, but that such negligence was not proximate cause, latter finding held not unwarranted. *Fink v. Brown* (Civ. App.) 183 S. W. 46.

Where appellants did not attack the special findings of the jury constituting the verdict, the Court of Appeals is precluded from considering the sufficiency of the evidence to support the verdict. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

When a special verdict is returned and no attack is made thereon, a motion for peremptory instructions cannot be held to challenge the sufficiency of the evidence to support the verdict and judgment so as to require the Court of Appeals to examine the statement of facts in detail to determine the question. *Id.*

Where the trial court found a fact was proved by undisputed evidence, and so instructed, and the party to whom the finding was addressed did not except or assign error, the Court of Appeals cannot look into the statement of facts to ascertain what facts were brought forward upon the issue. *Commonwealth Ins. Co. of New York v. Finegold* (Civ. App.) 183 S. W. 833.

To predicate error on the refusal to set aside a finding of the jury, there must be a motion to set aside. *Houston, E. & W. T. Ry. Co. v. Hooper* (Civ. App.) 184 S. W. 347.

In the absence of a motion to set aside the jury's findings, an assignment of error based on the insufficiency of the evidence to support them will not be considered. *Texas & N. O. R. Co. v. Weems* (Civ. App.) 184 S. W. 1103.

Where appellant failed to object to the submission of an issue, the sufficiency of evidence to raise the issue could not be considered on appeal. *Riedel v. Wenzel* (Civ. App.) 186 S. W. 386.

Where no objection was made to the submission of a special issue to the jury, nor any motion to set aside the finding thereon, the objection that such finding was not supported by the evidence could not be considered on appeal. *Burnett v. Continental State Bank of Alto* (Civ. App.) 191 S. W. 172.

In an action for injuries to a car inspector, special findings by the jury negating assumption of risk, held not contrary to the evidence showing violation of a rule, but also showing that plaintiff had been instructed not to observe the rule under the circumstances. *Atchison, T. & S. F. Ry. Co. v. Ayers* (Civ. App.) 192 S. W. 310.

In action for malpractice, evidence held to sustain a verdict for defendant and answers to special issues upon which verdict was based. *Miles v. Harris* (Civ. App.) 194 S. W. 839.

Appellant cannot complain of findings of the jury where he filed no motion to set aside the findings. *Messimer v. Echols* (Civ. App.) 194 S. W. 1171.

**Issues not submitted found or deemed found by trial court.**—Under this article where a transferee of a school land entryman was married to A., and they lived together as man and wife for many years until the husband's death in 1908, and he recognized children born to A. as his own, it would be presumed in support of the title derived from the heirs that the transferee's prior marriage to another woman had been set aside. *Chambers v. Rawls* (Civ. App.) 158 S. W. 208.

Where there was no complaint of the refusal of the court to submit an issue, and

the judgment for defendant was supported by the evidence, the presumption was that the court properly found on that issue. *Paschal v. Hudson* (Civ. App.) 169 S. W. 911.

The presumption created by this article does not apply where the pleadings of the successful party do not contain allegations which are necessary to support the judgment. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Where the evidence on an issue not submitted was practically undisputed, the facts in support of the judgment will be deemed found by the trial court. *Bergman Produce Co. v. Brown* (Civ. App.) 172 S. W. 554.

A judgment based on a special verdict insufficient in itself will be reversed, unless there is evidence in the statement of facts to complete the verdict. *Terrell, Atkins & Harvin v. Proctor* (Civ. App.) 172 S. W. 996.

Under this article issues not submitted held presumptively found in favor of the judgment. *Grove v. Keeling* (Civ. App.) 176 S. W. 822.

The court must presume that the trial court made findings which will support the judgment. *Ford v. Warner* (Civ. App.) 176 S. W. 885.

Where defendant did not request the submission of an issue to the jury, it must, in support of the judgment, be presumed that the trial court decided such issue in favor of plaintiff, for whom it rendered judgment. *Hamilton v. Fireman's Fund Ins. Co.* (Civ. App.) 177 S. W. 173.

Where plaintiffs requested the submission of proper issues as to contributory negligence, which were refused, no presumption on that issue will be indulged in aid of a judgment for the defendant. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

It is not necessary for plaintiff to request the submission of special issues as to matters of defense to escape the presumption of a finding adverse to him on such issues in support of a judgment for defendant. *Id.*

Upon defendant's appeal, facts not found by the jury will, when authorized by plaintiff's evidence, be found in aid of the verdict. *International & G. N. Ry. Co. v. Penney* (Civ. App.) 178 S. W. 970.

Where there was testimony authorizing the court to make such additional findings as were necessary to support the judgment, it will not be reversed because the facts found by the jury were insufficient. *Perrow v. San Antonio & A. P. Ry. Co.* (Civ. App.) 178 S. W. 973, rehearing denied 181 S. W. 496.

In an action for delay in the shipment of live stock an assignment of error that the verdict was insufficient in failing to find weight and market value, or what the cattle sold for, will be overruled, where the issue was not requested and the market value was sufficiently proven. *Quannah, A. & P. Ry. Co. v. Collier* (Civ. App.) 179 S. W. 96.

Under this article assignment that court erred in decreeing foreclosure of lien because jury made no finding on that issue held to be overruled. *King v. Collins* (Civ. App.) 179 S. W. 899.

When a special answer does not find all the facts necessary to form the basis of a judgment, but does answer all the questions submitted, the court is presumed to have found the omitted facts necessary to support the judgment. *International & G. N. Ry. Co. v. Berthea* (Civ. App.) 179 S. W. 1087.

Where the issues in an equitable suit are submitted to the jury by special interrogatories, and other issues are waived, the appellate court cannot presume that the court found other issues for the purpose of sustaining the judgment. *Capps v. Edwards* (Civ. App.) 180 S. W. 137.

Under this article absent request by appellants for the submission of an issue as to the value of personality, material in the suit, the Court of Civil Appeals will presume, to support the judgment below, that the trial court estimated the reasonable value of the personality; that being possible under the evidence. *Foster v. Atir* (Civ. App.) 181 S. W. 520.

When a special verdict, not finding all facts necessary to judgment, but answering all questions submitted, is entered, the presumption is that the court found from the evidence the omitted facts necessary to support the judgment, if the evidence authorizes the presumed finding. *Hicks v. Hunter* (Civ. App.) 183 S. W. 792.

Under this article, where the case is submitted on special issues, an issue, not submitted and not requested by a party, must be deemed to have been found so as to support the judgment, if there was evidence to sustain such a finding. *Missouri, K. & T. Ry. Co. of Texas v. Norris* (Civ. App.) 184 S. W. 261.

Where there was sufficient evidence to show the negligence relied on was the proximate cause, judgment will be upheld though jury did not so find and judgment recited it was based solely on their findings. *Postex Cotton Mill Co. v. McCamy* (Civ. App.) 184 S. W. 569.

Under this article error cannot be predicated on the insertion of findings by the court in addition to those of the jury, which were necessary to the judgment. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Under this article the trial court can determine an issue specifically excluded from the jury and not requested to be submitted. *Foos Gas Engine Co. v. Fairview Land & Cattle Co.* (Civ. App.) 185 S. W. 382.

In an action for damages for conversion of cotton, held that, there being a conflict in evidence, no issue being submitted or requested upon the bona fides of defendant's action, it will be presumed that the court resolved against the defendant on the issue of good faith. *Grayson v. Boyd* (Civ. App.) 185 S. W. 651.

Under this article the Court of Civil Appeals must presume that trial court's findings, if sustained by evidence, support the judgment, based on answers of jury to special questions. *Madden v. Shane* (Civ. App.) 185 S. W. 908.

Under this article the jury's failure in an action against a railroad company for the killing of a cow, to find that the failure of the engineer to keep a lookout was the proximate cause of the injury, is no ground for objection, where the evidence warranted the conclusion, for it will be presumed that the court so found. *Kansas City, M. & O. Ry. Co. of Texas v. Oates* (Civ. App.) 185 S. W. 1014.

Where a case is submitted upon special issues, if the facts will warrant a conclusion necessary to the judgment, Court of Civil Appeals must presume trial court so found in support thereof. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

It will be presumed the court itself determined there was no general market for such articles as plaintiff's horse and wagon at place of collision with defendant's train, where there was evidence supporting such a conclusion and the question of market value was not submitted to the jury. *San Antonio & A. P. Ry. Co. v. Schwethelm* (Civ. App.) 186 S. W. 414.

Under this article, if an issue made by pleadings is not submitted to jury, and no request therefor was made, it will be deemed to have been found by court to support the judgment. *Myers v. Grantham* (Civ. App.) 187 S. W. 532.

Where no finding is made on a certain point, but the testimony thereto is uncontradicted, a finding in accordance with the testimony will be imputed to the lower court. *Corbett v. Allman* (Civ. App.) 189 S. W. 91.

In support of judgment, the court will be presumed to have found on an issue raised by the evidence; submission to the jury not having been made or requested. *Fidelity & Deposit Co. of Maryland v. Anderson* (Civ. App.) 189 S. W. 346.

Where the issues of waiver and estoppel were pleaded, but no request was made for their submission to jury, it must be presumed, in support of the judgment for plaintiff, that court found such issues in his favor, if there was sufficient evidence to support the same. *Mechanics' & Traders' Ins. Co. v. Dalton* (Civ. App.) 189 S. W. 771.

Where a particular issue, on which a finding for plaintiff was necessary to the judgment was not requested to be submitted or submitted to the jury, held that it would be presumed on appeal that the trial court found for plaintiff on such issue. *Fidelity Trust Co. v. Rector* (Civ. App.) 190 S. W. 842.

Where the question of assumed risk was not submitted to the jury and not required by defendant, the issue will be resolved in support of a judgment for plaintiff rendered on special issues found by the jury, if there is any evidence to support such a finding. *Kansas City, M. & O. Ry. Co. of Texas v. Pinke* (Civ. App.) 190 S. W. 1143.

Under this article, upon appeal or writ of error, an issue not submitted and not requested in submission for a special verdict will be deemed found by the court in such manner as to support the judgment, providing there is evidence to sustain such finding. *Hill v. Hill* (Civ. App.) 193 S. W. 726.

In case submitted upon special issues, trial court, upon request, may file findings of fact which definitely show what facts were found by it in addition to jury's finding, and upon which judgment is based, and, though court cannot be required to make up and file such findings, due consideration can be given to them when made. *Southwestern Portland Cement Co. v. Latta & Happer* (Civ. App.) 193 S. W. 1115.

Under this article every issue in case found by trial court must be deemed to have been found so as to support judgment, where plaintiff appellants do not complain of any finding as having no evidence to support it. *Id.*

If doubt arises as to sufficiency of evidence, it must be resolved in favor of judgment, in absence of request for submission of issue affected. *J. I. Case Threshing Mach. Co. v. Rachal* (Civ. App.) 194 S. W. 418.

If any finding should be imputed to the court in the absence of requested charges submitting the issue, the finding should be in support of the judgment. *Missouri, K. & T. Ry. Co. of Texas v. Anderson* (Civ. App.) 194 S. W. 662.

**Failure to submit issue not ground for reversal, unless requested.**—In an action for an accounting between partners, the failure of the court, in submitting the issue of damages, to submit a particular item of such damage held not to constitute reversible error, under the express provisions of this article. *Ramsey v. Bird* (Civ. App.) 170 S. W. 1075.

Under this article, where the court directed the jury not to answer other issues if they found the first against the defendant, a written request for the submission of the other issues was not necessary to raise the question on appeal. *Gardenhire v. Gardenhire* (Civ. App.) 172 S. W. 726.

A special finding whether the collision would have occurred if the train had not been moving faster than six miles an hour was proper in the absence of a request for a more extended instruction. *Texas & P. Ry. Co. v. Eddleman* (Civ. App.) 175 S. W. 775.

In a shipper's action for damages for injury to stock, where there was no request to submit to the jury the issue of the amount of damages recoverable, the court had a right to find that fact from the items of damage found by the jury. *Texas & P. Ry. Co. v. Erwin* (Civ. App.) 180 S. W. 662.

Under this article, where defendants failed to plead payment of water rent sued for, or to request submission of that issue to the jury, failure to submit it was not ground for reversal. *Bennett v. Rio Grande Canal Co.* (Civ. App.) 182 S. W. 713.

In wife's action to set aside decree of divorce fraudulently obtained by husband, husband's exceptions to special issues submitted on ground of omissions will be overruled in absence of requests for such special issues embodying additional findings desired. *McConkey v. McConkey* (Civ. App.) 187 S. W. 1100.

Under this article, in absence of request in writing that issue be submitted to jury, failure to submit is not reversible error. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

Under this article a party who permits the submission of a case on issues framed by the court, without requesting the submission of additional issues, may not complain because other issues were not submitted. *Hicks v. Murphy* (Civ. App.) 162 S. W. 925.

Complaint cannot be made of failure to submit an issue to the jury, where no request was made for the submission. *Padgett v. Hines* (Civ. App.) 192 S. W. 1122.

Defendant not requesting submission of special issues other than that submitted held in no position to complain of the court's refusal to submit them. *Wedgworth v. Smith* (Civ. App.) 178 S. W. 641.

Under this article a judgment for plaintiff on special issues, which did not include assumption of risk, is not improper, where no issue on assumption of risk was submitted by defendant. *Kansas City, M. & O. Ry. Co. of Texas v. Pinke* (Civ. App.) 190 S. W. 1143.

Where neither party requested the submission of a special issue as to the right to interest, it will be presumed that both elected to leave that question to the court. *Branham v. Hallam* (Civ. App.) 191 S. W. 158.

In case submitted on special issues, if form of question is insufficient to require finding of necessary facts, counsel should request in writing finding of additional facts, and, without such request, imperfect submission will not require reversal. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

Under this article failure of the court to submit to jury issue raised by the pleadings and evidence in a divorce suit is no ground for reversal of a special verdict unless submission was requested in writing. *Hill v. Hill* (Civ. App.) 193 S. W. 726.

If a party desires special issues relied upon by him to be submitted to the jury, he must prepare, or ask the court to prepare, a special instruction submitting such issue, and, if the instruction is refused, raise the question on appeal through a bill of exceptions. *Vaky v. Phelps* (Civ. App.) 194 S. W. 601.

In the absence of request for separate findings of special damages pleaded, a requirement that the jury find the damages in the aggregate is not erroneous. *Scott v. Shine* (Civ. App.) 194 S. W. 964.

Although special issue submitted was not as full as it should have been, where it was correct as far as it went, parties cannot complain in absence of a request for fuller submission. *State v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

#### Art. 1986. [1332] [1332] Special verdict conclusive.

**Conclusiveness of verdict.**—A verdict is conclusive between the parties until set aside. *Weinstein v. Acme Laundry* (Civ. App.) 166 S. W. 126.

Under this article and arts. 1985 and 1990, held that, on special verdict entitling one of parties to judgment, the trial court must either set aside verdict and grant new trial, or render judgment in conformity with verdict. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

Under this article and art. 1990, party cannot complain of a judgment conforming to a special verdict as unsupported by evidence, where he did not assign error to refusal to set aside verdict. *Blackwell v. Vaughn* (Civ. App.) 176 S. W. 912.

Under arts. 1986, 1990, 1994, the court must conform the judgment to the special findings of the jury. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536.

Where no attack is made in the brief upon a special verdict, it is conclusive as between the parties under this article until set aside. *West Texas Supply Co. v. Dunivan* (Civ. App.) 182 S. W. 425.

By direct provision of this article a special verdict is conclusive, as between the parties, as to the facts found. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

Under Const. art. 1, § 15, art. 5, § 10, and arts. 1984a, 1986, 4633, the court, where jury has found by special verdict that necessary facts constituting legal grounds for divorce are wanting, may not disregard its verdict and grant a divorce to either party. *Grisham v. Grisham* (Civ. App.) 185 S. W. 959.

In view of this article, assignments of error complaining that special verdict was unsupported by evidence cannot be reviewed; defendant not having assigned as error denial of motion for new trial on ground that verdict was unsupported by evidence. *First Texas State Ins. Co. v. Burwick* (Civ. App.) 193 S. W. 165.

While the Court of Civil Appeals takes judicial notice of proceedings on a former appeal and the facts proven on a former trial, neither it nor the trial court is bound by the findings of the jury on the former trial. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

Notwithstanding this article and art. 1990, as to conclusiveness of special verdict on parties and court, such special findings may, in view of articles 1612, 2023, Court of Civil Appeals rule 24 (142 S. W. xii), and rule 71a for district and county courts (145 S. W. vii), be attacked on motion for new trial, and its refusal reviewed on appeal. *Hale County v. Lubbock County* (Civ. App.) 194 S. W. 678.

**Setting aside in part.**—The effect of a special verdict under the statute is such that the trial court would have no right to ignore any material portion of same in drawing judgment, although he found evidence insufficient to sustain such portion, but would have to set aside entire verdict or give effect to all of it. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

#### Art. 1987. [1333] [1333] Jury to render general or special verdict as directed.

Cited, *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 168 S. W. 439; *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

**Discretion of court.**—The court need not submit any special issue, unless it submits the case on special issues. *Pearce v. Heyman* (Civ. App.) 158 S. W. 242.

The rule of the Supreme Court for the district and county courts governing the submission of special issues is not a limitation of the power of the court, and the court may under the statute, at the request of either party or on its own motion, submit a case on special issues. *Eллерd v. Campfield* (Civ. App.) 161 S. W. 392.

It is within the discretion of the trial judge whether to submit the case on special issues, or to submit it in a general charge. *Maxey v. Franklin Life Ins. Co.* (Civ. App.) 164 S. W. 438.

Where the evidence authorizes the submission of the case to the jury, the court may submit it in a general charge or by special issues. *Scarborough v. Wheeler* (Civ. App.) 172 S. W. 196.

#### Art. 1988. [1333] [1333] Verdict to comprehend whole issue or all the issues submitted.

**Failure to answer or agree on some issues.**—Where, in a negligence case, special issues of negligence, contributory negligence, and assumption of risk were submitted, the failure of the jury to find upon the issues of contributory negligence and assumption of risk, there being evidence to support them, was in direct violation of this article, and no final judgment could be rendered on such verdict. *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439.

That some of the issues are not answered does not necessarily render a verdict void or insufficient to support the judgment, where the issues answered decide the merits of



the case and warrant and support the judgment. *Coons v. Lain* (Civ. App.) 168 S. W. 981.

Where the jury find for defendant on the issues of negligence and proximate cause, held, that they need not answer other questions relating solely to defenses pleaded. *Martinez v. Medina Valley Irr. Co.* (Civ. App.) 171 S. W. 1035.

Where no objection was made to an instruction that, if the jury answered a certain question in the negative, they need not answer questions following, error could not be predicated on failure, after returning a negative answer, to answer such questions. *Id.*

Where all material findings were in favor of plaintiff, but judgment was rendered for defendant, action of jury in failing to agree upon findings deciding anything material in favor of defendant, necessary to an adjudication in his favor, was tantamount to a mistrial. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

Verdict for plaintiff held to decide against defendant issue, submitted to the jury, on which the testimony was conflicting. *Levy v. Dunken Realty Co.* (Civ. App.) 179 S. W. 679, denying rehearing *Levy v. Duncan Realty Co.*, 178 S. W. 984.

In action by transferee of drafts for goods purchased, verdict for defendant on instruction given, held to involve findings against plaintiff's ownership, and his joinder in the seller's fraud on the defendant. *Calfee v. Bryant* (Civ. App.) 185 S. W. 323.

Where finding upon special issue is not essential to proper judgment, inability of jury to answer such issue does not invalidate judgment rendered upon answer to pertinent issue. *Reliance Life Ins. Co. v. Beaton* (Civ. App.) 187 S. W. 743.

That jury disagreed on a special issue submitted which was immaterial is not ground for reversal. *State v. City of Polytechnic* (Civ. App.) 194 S. W. 1136.

Responsiveness of general verdict.—See notes under art. 1981.

### Art. 1989. [1333] [1333] Judge, on request, to state conclusions of fact and law separately, statement to be filed.

Cited, *Newton County Bank v. Montgomery* (Civ. App.) 175 S. W. 803.

**Duty to make and file in general.**—The failure of the trial court to file conclusions of fact and law is waived by appellant agreeing to a filing of a statement of facts. *Guadalupe County v. Poth* (Civ. App.) 153 S. W. 919.

Under Rule 62a for Courts of Civil Appeals (149 S. W. x), forbidding reversal except for error calculated to cause a wrong judgment, held that unexcused refusal of the trial judge to file conclusions of fact and law, as required by this article, was reversible error, though there was in the record a statement of facts agreed to by defendant's counsel. *Kyle v. Blanchette* (Civ. App.) 158 S. W. 796.

This article does not apply where the case should have been submitted to the jury. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Findings of fact and conclusions of law made by the court without request from either party cannot be considered, particularly where it was impliedly conceded by the parties and the court that they were not full but were merely memorandum for the private use of the judge. *Sewall v. Colby* (Civ. App.) 163 S. W. 694.

Failure of the trial court to file its findings of fact and conclusions of law, when seasonably requested to do so, requires a reversal when a statement of facts is not preserved or brought up with the transcript. *Edwards v. McGuire* (Civ. App.) 165 S. W. 477.

Failure, on seasonable request, to file conclusions of fact and law is ground for reversal, where the evidence is conflicting. *Peers v. Williams* (Civ. App.) 174 S. W. 864.

This article and art. 2075, requiring the judge to file findings of fact and conclusions, apply only to trials by the court. *Schofield v. Texas Bank & Trust Co.* (Civ. App.) 175 S. W. 506.

The trial court's failure or refusal to file the statutory findings of fact and conclusions of law on seasonable request therefor by appellant, which deprives the appellant of a proper presentation of the case on appeal, is reversible error. *Gulf, C. & S. F. Ry. Co. v. Bracken* (Civ. App.) 180 S. W. 285.

A statement of facts, showing no material conflict in the evidence, takes the place of, and dispenses with the necessity of the filing of, findings of fact and law by the court. *Wardlow v. Andrews* (Civ. App.) 180 S. W. 1161.

The court properly refused to make a finding of fact when there was a jury trying the case, whose province and duty it was to pass upon such issues. *Abilene St. Ry. Co. v. Stevens* (Civ. App.) 185 S. W. 390.

In divorce case, where evidence was conflicting upon material issues, failure of court to file findings of fact and conclusions of law upon seasonable request therefor held error. *Bloch v. Bloch* (Civ. App.) 190 S. W. 528.

Where case is tried by jury, court need not file conclusions of fact and law. *Padgett v. Hines* (Civ. App.) 192 S. W. 1122.

Under this article and art. 2075, findings of fact and conclusions of law cannot be filed within ten days after subsequent term at which judgment *nunc pro tunc* was entered, so that request therefor made at trial term was seasonable, and failure to file them was reversible error. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 193 S. W. 1087.

**Facts and conclusions to be found.**—It is not error to refuse to make a requested finding which in effect is a mere conclusion. *Hollingsworth v. Wm. Cameron & Co.* (Civ. App.) 160 S. W. 644.

The trial judge is not required in finding facts to go into minute details as to damage at various times to a number of crops, as embraced in 84 submitted questions. *San Antonio & A. P. Ry. Co. v. Mullan* (Civ. App.) 186 S. W. 782.

**Requests for findings.**—Under this article where the court had an order reciting verbal request to file findings of fact and conclusions of law entered, a written request was not a condition precedent, and court's failure to file them necessitated a reversal. *Dennis v. Kendrick* (Civ. App.) 163 S. W. 693.

Plaintiff's request for the filing of conclusions of fact and law, not made until after the overruling of her motion for new trial, held waived. *Overton v. Colored Knights of Pythias* (Civ. App.) 173 S. W. 472.

In the absence of a showing to the contrary, it will be presumed that the trial court filing conclusions of fact and law did so pursuant to request. *Todd v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 173 S. W. 617.

Where defendants are dissatisfied with the court's general conclusion, they should ask for findings upon specific points. *Shaw v. Thompson Bros. Lumber Co.* (Civ. App.) 177 S. W. 574.

Where the record does not show that findings of fact and conclusions of law were not requested, it will, such findings and conclusions having been filed, be presumed that they were requested. *Broussard v. Le Blanc* (Civ. App.) 182 S. W. 78.

The refusal to make a requested finding was not error where the trial court in another finding fully stated the matter requested to be found. *Bogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

**Preparation and form in general.**—The trial judges need not adopt the conclusions of fact and law prepared by a party, so that an assignment of error that it did not do so is bad, as appellant should have attacked the findings if it claimed that the facts did not support them. *Texas-Mexican Ry. Co. v. Reed* (Civ. App.) 165 S. W. 4.

**Separate statement of facts and law.**—It is not reversible error for the court, stating conclusions of fact and law, to state in the conclusion of law a conclusion of fact. *Commercial Union Assur. Co. v. Gulf Refining Co.* (Civ. App.) 174 S. W. 874.

Though a trial court's findings of fact and conclusions of law were somewhat mixed, that is immaterial where the facts found sufficiently appear. *Robert McLane Co. v. Swernemann & Schkade* (Civ. App.) 189 S. W. 282.

**Sufficiency in general.**—Oral statements of a party prior to the execution of a written contract were merged therein, and, though received in evidence without objection, could not form the basis of a finding or judgment. *Lock v. Citizens' Nat. Bank* (Civ. App.) 165 S. W. 536.

Where the court found that a deposit was subject to the payment of checks generally, but did not find that it was understood that the giving of a check should operate as an assignment pro tanto, the findings warranted the legal conclusion that a check was not an assignment. *First Nat. Bank of Rising Star v. Texas Moline Plow Co.* (Civ. App.) 168 S. W. 420.

Where plaintiff sued certain carriers for injury to mules shipped, but the court made an unattacked finding that the mules were not injured during the trip, a judgment for defendants was properly rendered. *Dickerson v. San Antonio, U. & G. Ry. Co.* (Civ. App.) 170 S. W. 1045.

Findings, in suit against contractor and the surety on his bond to recover damages for the breach of a building contract, held to support a judgment for plaintiff. *Title Guaranty & Surety Co. v. Barnwell* (Civ. App.) 178 S. W. 694.

On trial of claim to attached property, findings as to possession, without finding on issue as to whether attachment debtor's possession was as agent for claimant, held not to support judgment against the claimant. *Clopton v. Jolly & Terry* (Civ. App.) 181 S. W. 562.

A conclusion of law on the merits must be supported by a finding of facts. *Bogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

In an action on a note and to foreclose a deed of trust, where defendants claimed a homestead, the trial court's failure to make finding of fact upon which its conclusion of defendant's abandonment could have been based, made a judgment in accordance with such conclusion erroneous, and it required reversal. *Id.*

In action for breach of contract for the joint purchase of cattle, in which defendant brought cross-action for damage, a judgment disposing of cross-action adversely to defendant and decreeing that he take nothing by his cross-action was a sufficient compliance with defendant's request for a finding of fact and conclusion of law touching cross-action. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

**Conformity to pleadings, issues and proofs.**—Where the petition alleged that the note was due October 1, 1906, a finding that it was due October 1, 1907, is not irresponsive to the pleadings, where defendant's answer alleged the later date. *Cox v. Thompson* (Civ. App.) 160 S. W. 604.

Findings of fact not responsive to any material issue in the case are immaterial, as are conclusions of law based thereon. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

A finding for a drawee of a draft, sued by the payee, who had cashed it for the drawer, that the drawer had a deposit with the payee sufficient to repay it, is unauthorized, in the absence of plea of such fact. *First Nat. Bank of Roswell, N. M., v. Browne Grain Co.* (Civ. App.) 187 S. W. 489.

A plea having been eliminated, by the sustaining of exceptions thereto, will not sustain a finding, and judgment thereon, for defendant. *Id.*

**Failure to find on particular questions.**—Judgment against debtor's fraudulent grantee for title and possession of land held not erroneous, though the evidence showed defendant's equitable ownership of the land, where no finding on this question was made or requested, and no exception taken to the failure to find. *Landers v. McCutchan* (Civ. App.) 161 S. W. 960.

**Inconsistent findings and conclusions.**—A finding that representations by an agent for an insurance company in selling stock involved future contingencies and were speculative and conjectural held not inconsistent with other findings as to what the representations were. *Cope v. Pitzer* (Civ. App.) 166 S. W. 447.

In an action to enjoin a city from claiming land for a street, a finding that the purchasers from plaintiff's ancestor were not informed of her intention that the land in controversy should not be opened for street purposes, held to conflict with a finding that plaintiff informed all such purchasers that the land was reserved. *City of Kaufman v. French* (Civ. App.) 171 S. W. 831.

**Construction and operation.**—A finding by the court that the evidence did not show that the defendants executed the note in suit is not a finding of forgery so as to bar a recovery of the original debt, under the principle that one who fraudulently alters a negotiable instrument cannot recover either on the note or the original debt. *Cox v. Thompson* (Civ. App.) 160 S. W. 604.

In a suit by the state over land which it claimed as part of the bed of a navigable stream, held that findings of fact by the trial court, in view of the findings embodied in the judgment, constituted a finding that the locus in quo was not a part of the bed of the stream at the time a patent to it was granted by the state. *State v. Macken* (Civ. App.) 162 S. W. 1160.

Where an answer set up facts showing partial payment on the note sued on, a finding that plaintiff's assignor was "indebted" to defendant, and a conclusion of law that defendant was entitled to a "set-off" as against such assignor, will be treated as a finding of a partial payment. *Rahe v. Yett* (Civ. App.) 164 S. W. 30.

A finding held not equivalent to a finding that testator agreed that his adopted daughter should share in his estate. *Masterson v. Harris* (Sup.) 174 S. W. 570, answer to certified questions conformed to (Civ. App.) 179 S. W. 284.

That defendant verbally promised to pay the debt of another to plaintiff does not appear from the record; there being mere findings of testimony given, and a conclusion of law, declaring it immaterial whether he promised. *Nalle & Co. v. Costley* (Civ. App.) 174 S. W. 625.

In an action for a broker's commission, findings held equivalent to a finding that the broker had procured a purchaser ready, willing and able to buy. *Babcock v. Glover* (Civ. App.) 174 S. W. 710.

A general finding at variance with a specific finding must be disregarded. *St. Louis S. W. Ry. Co. of Texas v. Miller & White* (Civ. App.) 176 S. W. 830.

In an action for the purchase price of potatoes, a finding held to mean that the buyer believed in good faith that the potatoes belonged to the undisclosed agent. *Hudgins Produce Co. v. J. R. Beggs & Co.* (Civ. App.) 185 S. W. 339.

In a suit to cancel deeds, findings of court held not to authorize the conclusion that plaintiff was estopped from claiming invalidity of deeds as against a bona fide purchaser from the grantee. *King v. Diffey* (Civ. App.) 192 S. W. 262.

In action against railroad for carrying plaintiff past her station, held that finding that conductor told plaintiff she would have to change cars, as train did not stop at her destination, but that plaintiff did not so understand it, should be construed as a finding that conductor told plaintiff she would have to change cars for her destination. *Texas & P. Ry. Co. v. Lathrop* (Civ. App.) 192 S. W. 1080.

**Objections, exceptions and review.**—Findings of fact and conclusions of law not filed within the time required by law cannot be considered on appeal. *Standard Paint & Wall Paper Co. v. Rowan* (Civ. App.) 158 S. W. 251.

Where findings of fact were not filed within 10 days after the adjournment of the trial term, as required by Rev. Civ. St. 1911, art. 2075, findings made thereafter are not a part of the appellate record. *Houston Oil Co. of Texas v. Ragley-McWilliams Lumber Co.* (Civ. App.) 162 S. W. 1183.

On appeal from an order denying a motion for the appointment of a clerk pro tem., an allegation in the motion that the clerk was a party to the suit held insufficient to constitute a finding of that fact of record on appeal. *Kruegel v. Williams* (Civ. App.) 158 S. W. 1052.

Findings of fact and conclusions of law, filed by the trial court at the request of a party, are properly part of the record, and will not be stricken from the transcript. *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452.

A stipulation between counsel as to certain evidence held not affected by the court's refusal to embody the facts admitted by the stipulation in the findings of fact but could be considered on appeal as an admitted fact. *Hollingsworth v. Wm. Cameron & Co.* (Civ. App.) 160 S. W. 644.

When conclusions of fact are voluntarily filed by the trial court, neither party is required to take notice, and no exception to the conclusions and no assignments of error are required of parties against whom such findings are made to entitle them to attack the judgment on the ground that it is unsupported by the evidence. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

Under this article, where facts found sustained judgment and there was no exception to any conclusion of fact or request for additional findings, and no finding was attacked for want of evidence, judgment will be affirmed. *Landers v. McCutchan* (Civ. App.) 161 S. W. 960.

If appellant, after requesting written findings of fact, agreed that they need not be filed within the statutory period, he thereby waived his right to have such findings made a part of the record. *Houston Oil Co. of Texas v. Ragley-McWilliams Lumber Co.* (Civ. App.) 162 S. W. 1183.

Where it is desired to present on appeal the refusal of the trial court to file conclusions of law and fact as requested, the matter must be presented by an appropriate bill of exceptions. *Sewall v. Colby* (Civ. App.) 163 S. W. 694.

Though the record contains a written request to the court to file its written findings of fact and conclusions of law, the court's failure to comply cannot be taken advantage of on appeal without exceptions. *Moore v. Moore* (Civ. App.) 159 S. W. 896.

In action for breach of contract for joint purchase of cattle, in which defendant filed a cross-action and plea in reconvention for damages, on state of record showing no approval of the bill of exceptions thereto, failure of court to make finding and conclusion of law in regard to plea in reconvention held not reversible error. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

Plaintiff, not availing himself of admissions in the answer, but resorting to proof of facts at variance therewith, could not complain of findings contrary to the admissions. *Commercial Union Assur. Co. v. Gulf Refining Co.* (Civ. App.) 174 S. W. 874.

Under Rev. St. 1911, art. 1991, it is not a prerequisite to perfecting an appeal that the appealing party shall move for a new trial, where the trial below is without a jury. *Craver v. Greer* (Sup.) 179 S. W. 862.

Under Rev. St. 1911, arts. 1612, 1989-1991, rules 24, 69, for Courts of Civil Appeals (142 S. W. xii, xxii), and rule 71a (145 S. W. vii), held that motion for new trial was a prerequisite to the consideration of assignments of error other than those fundamental

in character. *Craver v. Greer* (Civ. App.) 178 S. W. 699, certified questions answered (Sup.) 179 S. W. 862, answer to certified questions conformed to (Civ. App.) 182 S. W. 368.

Under Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136, and articles 1987-1991, exceptions to conclusions of law and findings of fact by the court held sufficient without motion for a new trial and bills of exceptions thereto. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

Acts 33d Leg. c. 136, making the assignments of error in the motion for a new trial the assignments on appeal, does not change the rule that no motion for a new trial need be filed in cases tried to the court, in which findings of fact and conclusions of law are filed. *Dees v. Thompson* (Civ. App.) 166 S. W. 56.

A motion for a new trial is not a prerequisite to an appeal, where the case was tried by the court and conclusions of fact and law were prepared and filed. *Moore v. Rabb* (Civ. App.) 159 S. W. 85.

Where a cause was tried to the court, and separate findings of fact and conclusions of law were filed, a motion for new trial is unnecessary to entitle the defeated party to assign errors in the court's findings. *Cooney v. Dandridge* (Civ. App.) 158 S. W. 178.

Where the judgment was proper and the conclusions of law were simply comments on the probative force of the facts found, the judgment will not be interfered with on account of errors in the conclusions. *Shields v. Perrine* (Civ. App.) 181 S. W. 232.

All reasonable intendments will be indulged on appeal to support the findings. *Bean v. Cook* (Civ. App.) 182 S. W. 1166.

Where a party desires review of the judge's conclusion, he should call attention to alleged insufficiency of evidence in a motion for new trial. *North American Ins. Co. v. Jenkins* (Civ. App.) 184 S. W. 307.

The court on appeal cannot say that the conclusion reached by the trial judge was erroneous in the absence of a statement of facts. *Id.*

A railroad having the right to fence its right of way is not bound by the finding of the trial judge that the fence was not necessary to the safe operation of its tracks and was an additional servitude on land taken by eminent domain, although it failed to except to such finding. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

A finding unexcepted to in the trial court and not challenged on appeal must be taken as conclusive for purposes of the appeal. *Texas Co. v. Charles Clarke & Co.* (Civ. App.) 182 S. W. 351.

Where appellant excepted and filed notice of appeal after the filing of findings of fact and conclusions of law, and after expiration of the term filed an objection to the same, but the matter was not brought to the attention of the trial court, appellant cannot complain of them on appeal. *Broussard v. Le Blanc* (Civ. App.) 182 S. W. 78.

Cross-assignments of error filed by appellees, attacking findings of the trial court to which they did not except in the court below, could not be considered. *Bridgewater v. Hooks* (Civ. App.) 159 S. W. 1004.

A finding of fact not excepted to is conclusive upon appeal. *Bancroft v. Emerson-Brantingham Improvement Co.* (Civ. App.) 194 S. W. 991.

**Presumptions in aid of judgment.**—In suit against debtor's fraudulent grantee, finding against his claim of equitable ownership, based on his claim that he furnished the consideration for the debtor's purchase, held to be implied from the judgment against him. *Landers v. McCutchan* (Civ. App.) 161 S. W. 960.

Where the trial court found that a life insurance company was ready to issue stock, forming a part of an increase of the capital stock of the company to a subscriber upon his paying the note given for the purchase price thereof, it must be presumed, in aid of the judgment against the subscriber, that the company had complied, or was ready to comply, with the statutory requirements for increasing its capital stock. *Cope v. Pitzer* (Civ. App.) 166 S. W. 447.

In an action against a carrier for injuries to goods, that the court gave judgment for their value and awarded the goods in their injured condition to the carrier did not imply a finding that the injured goods were of any special value. *Chicago, R. I. & G. Ry. Co. v. Bell* (Civ. App.) 168 S. W. 396.

Where the court filed no findings of fact or conclusions of law, the court on appeal must indulge every reasonable presumption in support of the judgment. *First State Bank of Amarillo v. Jones* (Civ. App.) 171 S. W. 1057, judgment reversed (Sup.) 183 S. W. 874.

Where no findings of fact were filed in trial court, appellate court must assume that all issues of fact were resolved in favor of appellee. *Corbin v. Booker* (Civ. App.) 184 S. W. 696.

Where there is no statement of facts in the record, the court on appeal will presume the facts necessary to the judgment and susceptible of proof on the pleadings to have been proved; but the rule does not apply where the record contains findings of fact and conclusions of law therefrom. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614.

To support a judgment for the insured, it will be presumed that the court found that the insurance company waived the requirement of proof of loss where there was evidence to support such finding. *St. Paul Fire & Marine Ins. Co. v. Huff* (Civ. App.) 172 S. W. 755.

In a suit tried to the court, where there was competent evidence, it must be assumed that the court based its finding thereon, and not on incompetent evidence. *United States Fidelity & Guaranty Co. v. Hall* (Civ. App.) 173 S. W. 892.

Where court on plea of privilege erroneously found that guaranty amounted to fraudulent representation, finding as to plaintiff's belief held not to be presumed in the absence of evidence. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

Where a case was tried to the court which did not file any conclusions of fact or law, but rendered general judgment, the appellate court will impute to the trial court findings in support of the judgment if there is any evidence to support them. *Southern Wells Sales Co. v. Eastham* (Civ. App.) 181 S. W. 698.

Where the evidence warranted a finding of facts sufficient to support the judgment, but such a finding was not included in the court's written findings, it will be presum-

ed that such facts were found. *National Live Stock Ins. Co. v. Warren* (Civ. App.) 181 S. W. 790.

Though, in an action tried to the court, incompetent evidence was received, it will be presumed that the trial judge was not affected by such evidence. *Broussard v. Le Blanc* (Civ. App.) 182 S. W. 78.

Where the evidence is sufficient to warrant finding by the trial court of a fact justifying the judgment rendered, the Court of Civil Appeals will presume in support of the judgment below that the trial court so found. *Wilson v. Avery Co. of Texas* (Civ. App.) 182 S. W. 884.

### Art. 1990. [1333] [1333] Court to render judgment on special verdict or conclusions, unless set aside, etc.

Cited, *Posey v. Adam Schaaf Co.* (Civ. App.) 189 S. W. 977.

**Judgment notwithstanding verdict.**—See notes under art. 1994, note 59.

**Rendering judgment or setting aside verdict.**—In view of this article, the findings of the trial judge cannot be contradicted or affected by oral declarations of the judge, though such declarations are embodied in a bill of exceptions. *Long v. Smith* (Civ. App.) 162 S. W. 25.

Under this article and arts. 1985, 1986, held that, on special verdict entitling one of parties to judgment, the trial court must either set aside verdict and grant new trial, or render judgment in conformity with verdict. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

The court had no power to render judgment in disregard of the jury's findings; its power being limited to setting aside the verdict and granting new trial. *Postal Telegraph Cable Co. of Texas v. De Krekko* (Civ. App.) 179 S. W. 525.

Under arts. 1986, 1990, 1994, the court must conform the judgment to the special findings of the jury. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536.

It was error for the court on facts found by the jury in favor of the defendant to render judgment for the plaintiff. *Hayes v. G. A. Stowers Furniture Co.* (Civ. App.) 180 S. W. 149.

In an action for destruction of 10¼ acres of growing spinach, where the jury specially found that only 5 and a fraction acres had been destroyed, it is improper for the court to assess damages on the basis of the destruction of the entire crop. *Houston & T. C. R. Co. v. Walsh* (Civ. App.) 183 S. W. 18.

Under this article the trial court cannot disregard the findings of the jury upon special issues involving material facts. *Essex v. Mitchell* (Civ. App.) 183 S. W. 399.

The court, in a divorce suit, may set aside the verdict of the jury before judgment. *Grisham v. Grisham* (Civ. App.) 185 S. W. 959.

The court, trying a divorce suit, may grant new trial after judgment entered upon the jury's verdict. *Id.*

Under this article the court could not enter judgment for defendant, notwithstanding the jury's verdict for the plaintiff. *Fireman's Ins. Co. v. Jesse French Piano & Organ Co.* (Civ. App.) 187 S. W. 691.

Where jury found that proposed will has been revoked court could not admit will to probate. *Palmer v. Logan* (Civ. App.) 189 S. W. 761.

Where verdict on special issues is unambiguous, judgment must be entered thereon or new trial granted. *First Texas State Ins. Co. v. Burwick* (Civ. App.) 193 S. W. 165.

Under the statute the court must enter judgment in accordance with the jury's findings, whether or not they be correct. *Ketchum v. Boggs* (Civ. App.) 194 S. W. 201.

**Review.**—Under this article, where facts found sustained judgment and there was no exception to any conclusion of fact or request for additional findings, and no finding was attacked for want of evidence, judgment will be affirmed. *Landers v. McCutchan* (Civ. App.) 161 S. W. 960.

Under this article, where facts found by the court sustained judgment, and there was no exception to any finding or request for additional finding, the judgment will not be disturbed for insufficiency of evidence to support findings. *Seedig v. First Nat. Bank of Clifton* (Civ. App.) 168 S. W. 445.

Under this article and art. 1986, party cannot complain of a judgment conforming to a special verdict as unsupported by evidence, where he did not assign error to refusal to set aside verdict. *Blackwell v. Vaughn* (Civ. App.) 176 S. W. 912.

Under Rev. St. 1911, arts. 1612, 1989-1991, rules 24, 69, for Courts of Civil Appeals (142 S. W. xii, xxii), and rule 71a (145 S. W. vii), held that motion for new trial was a prerequisite to the consideration of assignments of error other than those fundamental in character. *Craver v. Greer* (Civ. App.) 178 S. W. 699, certified questions answered (Sup.) 179 S. W. 862, answer to certified questions conformed to (Civ. App.) 182 S. W. 368.

Notwithstanding this article and art. 1991, requiring judgment to be rendered on separate conclusions of fact by the judge, where there is no statement of facts and there are findings of fact, such findings will support the judgment, although not stating affirmatively every fact necessary to support. *Producers' Oil Co. v. Snyder* (Civ. App.) 190 S. W. 514.

Under this article and art. 1991, authorizing appeals without a statement of facts upon noting exceptions on the record in the judgment entry, and Supreme Court rule 71a (145 S. W. vii), requiring motions for new trial except where not required by statute, a motion for new trial is unnecessary on appeal from judgment entered on a special jury verdict. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

Notwithstanding this article and art. 1986, as to conclusiveness of special verdict on parties and court, such special findings may, in view of articles 1612, 2023, Court of Civil Appeals rule 24 (142 S. W. xii), and rule 71a for district and county courts (145 S. W. vii), be attacked on motion for new trial, and its refusal reviewed on appeal. *Hale County v. Lubbock County* (Civ. App.) 194 S. W. 678.

**Sufficiency of evidence to support findings.**—See notes under art. 1985.

**Art. 1991. [1333] [1333] Exceptions to conclusions or judgment noted in judgment; appeal, etc.; transcript.**

Exceptions and motions for new trial.—Under this article the party excepting to a judgment held entitled to appeal on a statement of facts without having conclusions of fact and law filed and to attack the sufficiency of the evidence as matter of law to support the judgment. *Cornelius v. Harris* (Civ. App.) 163 S. W. 346.

Where appellant, in action to court, has failed to move for new trial, only fundamental errors will be considered, unless he has excepted to the judgment and caused the filing of findings and conclusions or brought up a statement of facts. *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

An appellant may complain of a judgment because contrary to the findings of fact without excepting to the findings. *St. Louis S. W. Ry. Co. of Texas v. Miller & White* (Civ. App.) 176 S. W. 830.

Under this article it is not a prerequisite to perfecting an appeal that the appealing party shall move for new trial, where the trial below is without a jury. *Craver v. Greer* (Sup.) 179 S. W. 862, answering certified questions (Civ. App.) 178 S. W. 690, and answer conformed to (Civ. App.) 182 S. W. 368.

Under Rev. St. 1911, arts. 1612, 1989–1991, rules 24, 69, for Courts of Civil Appeals (142 S. W. xii, xxii), and rule 71a (145 S. W. vii), held that motion for new trial was a prerequisite to the consideration of assignments of error other than those fundamental in character. *Craver v. Greer* (Civ. App.) 178 S. W. 699, certified questions answered (Sup.) 179 S. W. 862, answer to certified questions conformed to (Civ. App.) 182 S. W. 368.

Under Rev. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136, and articles 1987–1991, exceptions to conclusions of law and findings of fact by the court held sufficient without motion for a new trial and bills of exceptions thereto. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

Notwithstanding this article and art. 1990, requiring judgment to be rendered on separate conclusions of fact by the judge, where there is no statement of facts and there are findings of fact, such findings will support the judgment, although not stating affirmatively every fact necessary to support. *Producers' Oil Co. v. Snyder* (Civ. App.) 190 S. W. 514.

Where appellee did not complain of judgment for him on account of its failure to dispose of damages presented by the pleadings, either in lower court or in Court of Civil Appeals, he acquiesced therein. *Pitt v. Gilbert* (Civ. App.) 190 S. W. 1157.

Under this article and art. 1990, providing for entry of judgment on special verdicts, and Supreme Court rule 71a (145 S. W. vii), requiring motions for new trial except where not required by statute, a motion for new trial is unnecessary on appeal from judgment entered on a special jury verdict. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

Under this article and art. 1612, and district court rule 71a (145 S. W. vii), motion for new trial held unnecessary in case tried without a jury, where conclusions of fact and law are filed and exception taken. *Wilkerson v. Stasney & Holub* (Civ. App.) 179 S. W. 669.

Under this article a party appealing from the judgment, rendered by the court without a jury, need not file a motion for new trial. *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

Under this article and art. 1990, the right of appeal attaches in a case tried without a jury, where the trial court files separate findings of fact and conclusions of law, and a motion for new trial is not required. *Cooney v. Dandridge* (Civ. App.) 158 S. W. 177.

A cross-assignment of error assigning insufficiency of judgment will not be considered, where record does not show that appellee excepted to judgment and had such exception noted as required by this article. *Levy v. Engle Bros. Co.* (Civ. App.) 192 S. W. 548.

Where record contains statement of facts, court's findings may be attacked under exception to judgment. *De Bruin v. Santo Domingo Land & Irrigation Co.* (Civ. App.) 194 S. W. 654.

An exception to the judgment is sufficient to authorize a challenge of the trial court's findings of fact. *St. Louis, B. & M. Ry. Co. v. Paine* (Civ. App.) 188 S. W. 1033.

Under this article an exception to the judgment authorizes a review of findings of fact and conclusions of law. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

An exception to a judgment authorizes the excepting party to assail the finding on which the judgment is based, if not supported by the statement of facts in the record, without an exception to any specific finding. *Edwards v. Youngblood* (Civ. App.) 160 S. W. 288; see, also, notes under arts. 1612, 2019, 2058.

**Art. 1992. [1333] [1333] No submission of special issues unless requested.**

See art. 1984a and notes.

Cited, *Wood v. J. M. Radford Grocery Co.* (Civ. App.) 164 S. W. 1070.

## CHAPTER FIFTEEN

## JUDGMENTS

Art.	Art.
1994. Judgments, how framed.	1999. Court shall enforce its own decrees; in certain cases, how.
1995. For or against one or more plaintiffs, etc.	2000. Judgments of foreclosure of liens.
1995a. Contribution between tort feasons on payment of judgment.	2004. Judgments against executors, etc.
1997. But one final judgment.	2005. Against executors acting independently of probate court.
1998. Judgment may pass title, etc.	2006. Against partners when all not sued.
	2007. Confession of judgment.

**Article 1994. [1335] [1335] Judgments, how framed.**

Cited, *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439; *Hale County v. Lubbock County* (Civ. App.) 194 S. W. 678.

1. **Entry of judgment.**—A mere notation by the trial judge on his docket is not a part of the judgment and cannot be relied on as a judgment under the doctrine of *res judicata*. *Cow Bayou Canal Co. v. Orange County* (Civ. App.) 158 S. W. 173.

Where the record did not show that appellants objected to rendition of judgment on the last day of the term, the objection cannot be urged on appeal. *Knight v. England* (Civ. App.) 175 S. W. 480.

The "judgment" of a court is what the court pronounces; its "rendition" is the judicial act by which the court settles and declares the decision of the law upon the matters at issue; and its "entry" is the ministerial act by which the induring evidence of the judicial act is afforded. *Moore v. Toyah Valley Irr. Co.* (Civ. App.) 179 S. W. 550.

4. **Sufficiency and certainty of determination in general.**—A judgment for the "sum of \$—", being the amount of" a replevy bond, was not void for uncertainty, if the bond was in the record and the amount thereof was fixed, under the rule that a judgment is certain which can be made certain. *Lester v. Gatewood* (Civ. App.) 168 S. W. 389.

A decree awarding to individuals the control and possession of property of an irrigation company and restraining the holders of the majority of the stock from voting it held indefinite and uncertain and incapable of performance. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991.

That judgment setting apart land describes it as having been rendered in one county, when it was rendered in another, does not prevent the title being a good marketable one. *Nelson v. Butler* (Civ. App.) 190 S. W. 811.

5. — **In trespass to try title.**—In trespass to try title to land which was inclosed by plaintiffs, a verdict for them, which did not accurately describe the land in controversy will sustain a judgment for plaintiffs for the land inclosed, where the verdict could be construed as a finding in plaintiff's favor either on a question of boundary or adverse possession. *Schubert v. Voges* (Civ. App.) 169 S. W. 402.

That the description in a judgment for plaintiff in trespass to try title did not conform to its pleadings held not to require a reversal, where defendants filed a cross-action putting in controversy the title to additional land, and the court decreed that they take nothing in their cross-action. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

13. **Conditions.**—On setting aside an exchange of land for fraud, after plaintiff had transferred to a bona fide purchaser notes executed by defendant for the difference in the agreed values, the judgment should provide that execution in favor of defendant should not issue for that part of the judgment in his favor for the value of the notes transferred until he paid a part thereof. *Maddox v. Clark* (Civ. App.) 163 S. W. 309.

In proceedings against nonresident defendant wherein writ of garnishment is sued out, it is proper to follow general judgment establishing debt against defendant by restriction limiting its execution to property in custody of court. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

14. **Validity and partial invalidity.**—In an action against a bank as guarantor of a note, the judgment recited that the bank had made default, although duly cited, though in fact the bank had an answer on file. Held, that as the answer merely pleaded *ultra vires*, and as the judgment recited that evidence was introduced to prove the cause of action, the judgment was not invalid on account of such false recital. *First Nat. Bank v. Thurmond* (Civ. App.) 159 S. W. 164.

A judgment against an insane person is voidable only, not void. *Pyle v. Pyle* (Civ. App.) 159 S. W. 488.

Where infants sued as adults were duly served with process and the proceedings of the trial did not disclose that they were infants, a judgment against them was voidable only. *Kelly v. Kelly* (Civ. App.) 178 S. W. 686.

Judgment against vendor and vendees on notes given the vendor and indorsed over by him was not void because based in part on notes not due. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

In suit against nonresident debtor wherein writ of garnishment was sued out, failure of court to limit execution of judgment in main suit to property reached by garnishment proceedings will not render entire judgment void. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

In a suit by private citizen under authority of Rev. St. 1911, art. 4674, to enjoin an incorporated club from maintaining a liquor nuisance, where petition does not allege that club permitted playing of cards or games to be played with cards upon its premises, and proof does not show such acts, that part of decree enjoining club from permitting such games on its premises was error. *Rowan v. Stowe* (Civ. App.) 193 S. W. 434.

Where judgment and sheriff's return on citation in a divorce action were sufficient to show personal service on defendant therein, it was not void, but merely voidable upon showing by evidence alunde record that it was invalid. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

**15. Construction and operation.**—A judgment construed in connection with the court's findings held a determination of defendant's cross-complaint therein and was therefore final. *Bowles v. Belt* (Civ. App.) 159 S. W. 885.

A judgment which recited the appearance, etc., of the parties and that "the court, having heard the pleadings, the evidence, and the argument of counsel, and fully understanding the matter, is of the opinion that the law is with plaintiffs," held to have passed upon the defenses raised by defendants. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.

A judgment in favor of plaintiff on one only of his claims held an implied finding against another of plaintiff's claims. *Garrett v. A. G. McAdams Lumber Co.* (Civ. App.) 163 S. W. 320.

One against whom a judgment operates cannot, as a rule, be denied the advantage of its operation in his favor. *Masterson v. Harris* (Sup.) 174 S. W. 570, answer to certified questions conformed to (Civ. App.) 179 S. W. 284.

A judgment that plaintiff was not entitled to attached property because the debtor became a bankrupt within four months after attachment is not an adjudication that other creditors were entitled to the property. *Dyke v. Farmersville Mill & Light Co.* (Civ. App.) 175 S. W. 478.

A judgment held not to show on its face that a defendant did not appear at the trial as the record showed he did. *Baugh v. Baugh* (Civ. App.) 175 S. W. 725.

A direction in a judgment that both defendants should be jointly liable for costs held not nullified by subsequent provision that in case of deficiency the balance should be collected from one of the defendants. *Jones v. Gough* (Civ. App.) 175 S. W. 1107.

Judgment against defendant, as manager of a theater and agent of another, rendered on petition referring to defendant in the same way, is a personal judgment. *Weis v. Skinner* (Civ. App.) 178 S. W. 34.

In action by irrigation company and its lienor to set aside a judicial sale of the company's property, with cross-action by purchaser's assignee against lienor, judgment for assignee against lienor held contradictory and erroneous. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 180 S. W. 928.

A judgment based on findings duly made cannot be said to deprive of property without compensation. *Cochran v. Gibson* (Civ. App.) 191 S. W. 161.

Record showing that court "is of the opinion that said plea (in abatement) is not well taken \* \* \* and is overruled" held to show an overruling of plea on its merits and not sustaining of exception. *Schaff v. Nash* (Civ. App.) 193 S. W. 469.

**18. Service of process.**—Process and returns, see arts. 1850-1885, and notes.

Where the judgment recited due service on the principal defendant, plaintiff cannot complain on appeal that such defendant was not cited by the intervener who sought to foreclose lien superior to that of plaintiff. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

Judgment against nonresident debtor, cited only by publication, would have been void without garnishment proceedings against purchaser of debtor's stock of goods in bulk, because court would have had no jurisdiction either of defendant's person or of any property. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

**20. Collateral attack in general.**—In a collateral attack on a judgment for the amount of a replevy bond, the question whether the judgment should have been for the amount of the bond or for the value of the property replevied cannot be considered. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

A judgment held conclusive on collateral attack, though voidable, where not void. *Baker v. Stephenson* (Civ. App.) 174 S. W. 970.

Upon collateral attack on a judgment of a domestic court it will, where the action was within the court's general jurisdiction, be presumed that the necessary jurisdictional facts existed, though they do not appear of record. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

**21. — Invalidity in general.**—A judgment of a court of competent jurisdiction, if it be void, may be collaterally attacked at any time and in any proceeding where it is urged in support of any right. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

A void judgment may be attacked in any proceeding by any one. *Bonougli v. Brown* (Civ. App.) 185 S. W. 47.

A judgment, the invalidity of which is apparent upon the record, may be successfully attacked at any time and under any circumstances. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

Where final judgment in partition shows that commissioners departed from the first judgment and their instructions and substituted other lands for those directed to be partitioned, the judgment is void, and subject to collateral attack. *Adkins v. Gillespie* (Civ. App.) 189 S. W. 275.

**22. — Want of jurisdiction.**—A judgment rendered at a time when the court had no jurisdiction over the subject-matter is void and open to collateral attack. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

The want of jurisdiction must be ascertained from the record alone. *Id.*

A presumption in favor of a court of general jurisdiction acting within the ordinary scope of its powers and upon a subject-matter within its jurisdiction arises only as to jurisdictional facts on which the record is silent, but the regularity of a judgment will not be presumed against a record disclosure that the court exceeded its jurisdiction. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

A judgment rendered by a court without legal organization or without jurisdiction of the subject-matter or jurisdiction of the person, or which has lost such jurisdiction, is absolutely void. *Id.*

The judgment and all other proceedings of a court inherently without power to hear and determine the suit are mere nullities. *Pecos & N. T. Ry. Co. v. Rayzor*, 172 S.



W. 1103, 106 Tex. 544, answer to certified questions conformed to (Civ. App.) 174 S. W. 916.

A judgment is not void, so as to be subject to collateral attack, because rendered without bringing defendant into court, unless the want of authority over him appears in the record. *Gallagher v. Teuscher & Co.* (Civ. App.) 186 S. W. 409.

Party affected by judgment obtained in suit by publication has right to show by record, either in direct or collateral proceeding, that there was no service, or such facts as show court did not have jurisdiction, or render the judgment void. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

A judgment of a domestic court of general jurisdiction, void upon its face for lack of jurisdiction, may be collaterally attacked. *Harris v. Wise* (Civ. App.) 191 S. W. 588.

Where a judgment is silent regarding the method of service, the record on collateral attack may be examined to determine its validity. *Stockyards Nat. Bank v. Presnall* (Sup.) 194 S. W. 384.

A judgment cannot, upon collateral attack, be held void because defendant was a nonresident, where the record fails to establish such fact. *Id.*

In a collateral attack upon a judgment, the method of service can be determined only by the record. *Id.*

23. — **Rights of parties or third persons to impeach judgment.**—Chattel mortgagee held neither party nor privy to action to enforce lien on property of mortgagor; hence he may collaterally attack the judgment by evidence dehors the record. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

24. — **Effect of recitals in record or judgment.**—Where a judgment foreclosing a tax lien recited proper process and service, such recital imported absolute verity on collateral attack, and plaintiff in trespass to try title could not show that the recital was erroneous. *Hollingsworth v. Wm. Cameron & Co.* (Civ. App.) 160 S. W. 644.

Where it was alleged that a certain judgment, execution upon which was sought to be restrained, was upon a replevy bond, and that it stated it was for the amount of the bond, it will be conclusively presumed that the bond was a record in the cause in which the judgment was rendered. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

In proceeding collateral to judgment, such as a garnishment proceeding, if judgment on its face shows jurisdiction, party claiming under it is not required to go further. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

25. — **Errors and irregularities.**—A judgment, though erroneous for taxing as costs against successful infant defendants the compensation allowed their guardian ad litem, is not subject to collateral attack. *Simmons v. Arnim* (Civ. App.) 172 S. W. 184.

26. — **Fraud or perjury.**—As between parties, and privies, a judgment obtained by fraud is not absolutely void, but voidable. *Young v. Bank of Miami* (Civ. App.) 175 S. W. 1102.

In a suit to recover homestead property, if there was an agreement by the husband in fraud of the homestead rights of his wife, or mistake or fraud whereby the judgment was not entered in accordance with the true agreement, the judgment could only be set aside in a direct proceeding. *Brown v. Foster Lumber Co.* (Civ. App.) 178 S. W. 787.

27. — **Foreign judgment.**—Judgment of a court of foreign jurisdiction can be collaterally attacked for want of jurisdiction by parties or privies, even by evidence dehors the record. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

28. — **What is collateral attack.**—Claim that an order appointing an administrator de bonis non, and authorizing the sale of an unlocated balance of a headright certificate was without jurisdiction of the probate court because the estate had been finally closed was a collateral attack on the order. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

An objection to a copy of an order, authorizing the sale of the assets of a national bank, authenticated by the Comptroller of the Currency, but which does not show that it was ever entered in a court of record, is not a collateral attack upon an order of court. *Tourtlot v. Booker* (Civ. App.) 160 S. W. 293.

An attack on a judgment is not necessarily collateral because made by a cross-bill; the parties, court, and subject-matter being the same as in the original suit. *Patruccio v. Selkirk* (Civ. App.) 160 S. W. 635.

The rules against collateral attack of a judgment apply in a proceeding to revive it. *Gallagher v. Teuscher & Co.* (Civ. App.) 186 S. W. 409.

Attack by garnishee on original judgment against defendant, amended after term to correct mistake in entry, is a collateral attack. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

Suit to enjoin execution upon judgment on ground that judgment was absolutely void, which did not pray to vacate judgment, is collateral and not direct attack. *Texas Cent. R. Co. v. Hoffman* (Civ. App.) 193 S. W. 1140.

29. **Conclusiveness of judgment in general.**—A decision of the court on appeal affirming a judgment for plaintiff suing a city on warrants for current expenses of a fiscal year, that the judgment bears interest, though the city charter provided that warrants should not bear interest, is conclusive on the parties in a subsequent action by plaintiff for mandamus to compel the city to pay the judgment and to levy a tax therefor. *City of San Antonio v. Alamo Nat. Bank* (Civ. App.) 155 S. W. 620.

On application for a receiver of traction company and to require him to carry out a contract, a judgment foreclosing an intervenor's lien held not to conclude the question of priority between intervenor's and plaintiff's liens. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

A former judgment would bar a subsequent action only as to material questions which were fairly within the scope of the pleadings in the prior action. *Id.*

Judgment against plaintiff on his note to the amount of \$76 held conclusive as against his right to recover for damages to that extent on the ground of fraud in obtaining the note, as such claim could have been interposed. *Edwards v. Dennington* (Civ. App.) 161 S. W. 929.

A judgment of a court of competent jurisdiction, though erroneous, must be given full effect until reversed, set aside, or otherwise annulled. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

A judgment is only conclusive on the issues tendered by the complaint, and does not conclude collateral issues or matters of inference arising in the course of the proceeding. *Ellerd v. Ellison* (Civ. App.) 165 S. W. 876.

A decree foreclosing mortgage on land in a suit to which plaintiffs were not parties held not res judicata of their claim to one-half of the land, which claim was not in issue therein. *Id.*

A judgment in a prior suit for breach of a contract construing and applying the contract, while not res judicata in a subsequent suit for a further breach, was operative as an estoppel precluding the litigation of any matter or issue determined in the original suit sought to be raised in the subsequent one. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 168 S. W. 28.

An adverse judgment in a proceeding to enjoin execution against plaintiff and another judgment debtor on the ground that the other judgment debtor had paid the judgment or that it had been satisfied by the application of his deposit in the judgment creditor's bank held conclusive as against plaintiff in a subsequent proceeding to enjoin execution on the same ground. *Kell Milling Co. v. Bank of Miami* (Civ. App.) 168 S. W. 46.

Where a contract provided that each party should deposit \$50 to secure performance, to be forfeited as liquidated damages on default, and on the vendee's refusal of the title to the land sold he assigned his claim to C., who recovered judgment for the deposit, such judgment was res judicata of the vendor's right to damages for the vendee's alleged breach. *Goshorn v. Daniel* (Civ. App.) 169 S. W. 1071.

A judgment on the merits is conclusive between the parties and those in privity with them, as to every matter litigated and any matter which might have been litigated. *Zimmer v. First Nat. Bank of Pecos* (Civ. App.) 173 S. W. 1016.

The principle of res judicata operates as a bar to a second suit only when the point in controversy is the same in both suits. *Id.*

A judgment that funds in possession of a garnishee are exempt, because the proceeds of a homestead sale less than six months before the service of the writ, bars a subsequent garnishment by the same creditor for the same funds. *Id.*

It is not always necessary that parties to two suits should be nominally the same in order that one may bar another, but it is generally sufficient if they are substantially the same in interest. *Young v. Bank of Miami* (Civ. App.) 175 S. W. 1102.

A judgment or decree of a court having jurisdiction over the parties and the subject-matter of the litigation is final between the parties to the suit covering the cause of action alleged. *Beaumont Irrigating Co. v. Delaune* (Sup.) 180 S. W. 98.

The judgment of a court having jurisdiction over the parties and the subject-matter is final as to all questions involving the same cause of action and the defenses thereto which the parties to the suit might have adjudicated therein. *Id.*

A judgment in favor of guarantors in an action by a railroad company on a guaranty of a bonus for construction of the road held not a conclusive adjudication against defendant's liability on a note given to secure construction of the road which was duly transferred to plaintiff's assignor, who had contracted to and did procure construction of the road. *Brown v. Crumpton* (Civ. App.) 181 S. W. 540.

In suit against warrantor on his covenant, record of suit between his vendee and third party involving title conveyed, to which warrantor was not a party, held not admissible to show recovery under a paramount title. *Miles v. Bodenheim* (Civ. App.) 184 S. W. 633.

Identity of parties and of causes of action are essentials to create res judicata. *West Texas Bank & Trust Co. v. Rice* (Civ. App.) 185 S. W. 1047.

No person can take advantage of a judgment, unless, being a party or privy, he would have been prejudiced had the decision been against him. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

Where vendors by executory contract sued their buyer and his successor upon default in payment for debt and to foreclose their lien, a judgment creditor of the buyer's successor, claiming that it was not a party to the foreclosure suit, could not claim any right given by the judgment. *Reyes v. Kingman Texas Implement Co.* (Civ. App.) 188 S. W. 450.

31. — **Jurisdiction.**—No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party. *El Paso & S. W. Co. v. Chisholm* (Civ. App.) 180 S. W. 156.

Where judgment for defendant was not set aside during the term, but the district court, at a subsequent term, rendered a judgment nunc pro tunc and granted a motion for new trial and the parties amended and proceeded with a retrial without objection, held, that the court had jurisdiction to retry the case. *Ætna Ins. Co. v. Dancer* (Civ. App.) 181 S. W. 772.

In suit to enjoin execution on judgment held that as record did not show that plaintiff filed only original petition and that defendant did not enter appearance, evidence that one on whom citation was served was not agent of defendant was properly excluded. *Texas Cent. R. Co. v. Hoffman* (Civ. App.) 193 S. W. 1140.

32. — **Dismissal or nonsuit.**—A judgment sustaining a plea in abatement and dismissing the suit without prejudice to plaintiff's right to file a new suit did not bar a new suit by plaintiff on the same cause of action. *Freidenbloom v. McAfee* (Civ. App.) 167 S. W. 28.

A judgment of dismissal, not on the merits, does not bar a later suit on the same cause of action. *Qualls v. Fowler* (Civ. App.) 186 S. W. 256.

33. — **Judgment by default.**—Judgment by default for the payee in an action on a note is not a bar to a suit by the maker to avoid another note on the ground of fraud in the contract under which both notes were given. *Cattlemen's Trust Co. v. Blasingame* (Civ. App.) 184 S. W. 574.

Judgment by default for the payee suing on a note, when made final, is a bar to suit by the maker to cancel the note for fraud. *Id.*

Default judgment against married woman is not open to collateral attack except as to some irregularity or defect disclosed on face of record in original case, and is merely voidable, even in direct action to set it aside. *Akin v. First Nat. Bank* (Civ. App.) 194 S. W. 610.

34. — **Finality of judgment.**—See notes under arts. 1997, 2078.

In interlocutory order sustaining exceptions to the petition not being conclusive as a judgment, defendants, if dissatisfied with the amended petition, cannot set up a plea of *res judicata*, but must urge such exceptions as they deem necessary, and assign error in the action of the court in overruling them. *Darby v. White* (Civ. App.) 165 S. W. 481.

No action can be brought to enforce a judgment which is not final. *Willis v. Keator* (Civ. App.) 181 S. W. 556.

39. — **Foreign judgments.**—Where a judgment is recovered in one state, if proof is made that it is rendered by a court having jurisdiction of the cause and of the parties, it is not re-examinable upon the merits. *Wallace v. Schneider* (Civ. App.) 185 S. W. 333.

In seeking recovery on judgment of court of limited jurisdiction in another state, it is necessary only to show that the court had jurisdiction of the parties and subject-matter, and that a judgment was rendered, and it is not necessary to prove that the judgment is still in force. *Id.*

In seeking recovery on the judgment of a court of limited jurisdiction of another state, where the creation of the court, and the fact that it rendered the judgment with jurisdiction of the person is proved, it is on the same plane as if rendered by a court of general jurisdiction. *Id.*

In spite of Const. U. S. art. 4, § 1, as to full faith and credit, a decree of divorce in one state may be attacked in the courts of another if pleaded or presented therein, by a showing that the court which rendered it had no jurisdiction. *Jones v. Bartlett* (Civ. App.) 189 S. W. 1107.

Where a wife in Texas signed notes as surety, and mortgaged her separate property to secure payment, and the payee sued in Oklahoma, and the wife, by authority of her husband, filed an answer setting up invalidity as a defense, judgment for payee was entitled to full faith and credit. *Bray v. Union Nat. Bank of Dallas* (Civ. App.) 194 S. W. 1165.

40. **Persons concluded.**—The holder of a deed of trust subsequent to a vendor's lien who purchased the land on foreclosure of his deed of trust was not concluded by the judgment in a suit to foreclose the lien to which he was not a party. *Standard Paint & Wall Paper Co. v. Rowan* (Civ. App.) 158 S. W. 251.

Where an attorney, who had acquired an interest in land under a contract for a contingent fee, conveyed such interest to a company holding the legal title for his clients in aid of their defense to a suit, his subsequent participation in the defense of the suit did not estop him from asserting his interest in the land after judgment for the company. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

A judgment is not binding upon one who was not a party to the proceedings, so as to have an opportunity to defend. *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

Where heirs of deceased defendant agreed upon settlement of controversy, and the administrator merely formally agreed to the judgment, heirs held bound by the judgment, whether or not the administrator had power to enter an agreed judgment. *Castleberry v. Bussey* (Civ. App.) 166 S. W. 14.

Where an owner of land agreed on conditions to convey a part to L., judgment in action to recover the land against the owner and L. held not conclusive against a grantee of L., which grantee was not a party to the action. *Wilson v. Clemmons* (Civ. App.) 170 S. W. 855.

Guarantors of note reserving right to select their attorney to prosecute it to judgment, and suing thereon, held privies or parties to the judgment so as to be concluded thereby. *Young v. Bank of Miami* (Civ. App.) 175 S. W. 1102.

Guarantors of note, who had interest in suit against principal and opportunity to protect their rights, held not entitled to attack judgment collaterally when sued thereon. *Id.*

Guarantors of note, with direction of suit to reduce it to judgment, after entry of judgment, held concluded thereby and not entitled to set up prior postponement of collection of claim or misrepresentations as to maker's financial standing. *Id.*

The judgment rendered against a corporation held admissible in an action against the directors to hold them personally liable on the same matter. *McCullom v. Dollar* (Civ. App.) 176 S. W. 876.

The findings, in an action against a corporation in which judgment was rendered against it, are admissible, against its directors, in an action to hold them personally liable on the same matter. *Id.*

A judgment, conclusively establishing certain land as public property, held not admissible in an action to try title as against a railway taking over the company against which the judgment was rendered, but not purchasing the land in suit from it. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Finding that a steamship company was not liable for damages to shipment due to hurricane, under Act Cong. Feb. 13, 1893, § 3, held to prevent a recovery against a connecting railroad carrier. *Texas & P. Ry. Co. v. Erambert* (Civ. App.) 184 S. W. 274.

Bank, to which note was delivered as collateral security, which returned it to the pledgor that suit might be brought, one of the bank's attorneys prosecuting the suit to judgment, held bound by the judgment rendered. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

Where judgment was obtained by the remote assignee of a claim against the debtor and the immediate assignee, the principle of *res judicata* does not apply in an action by one of the original assignors against such remote assignee for misappropriating the proceeds of the claim. *West Texas Bank & Trust Co. v. Rice* (Civ. App.) 185 S. W. 1047.

In suit to foreclose vendor's lien on land purchased by community, judgment did not bar wife, who was not a party; the husband having voluntarily conveyed to her, subject to the lien. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

The title of a grantee of land is not affected by subsequent judgment against his grantor. *Hodges v. Moore* (Civ. App.) 186 S. W. 415.

Under a declaration of trust of joint stock association giving trustees power to sue and defend suits without joining stockholders, judgment in an action in which the trustees were parties is binding on the stockholders. *Village Mills Co. v. Houston Oil Co.* of Texas (Civ. App.) 186 S. W. 785.

"Privies," in sense that they are bound by judgment, are those who acquired interest in subject-matter after rendition of judgment. *Id.*

In application of rule of *res judicata*, it is essential that operation of judgment be mutual. *Id.*

A suit prosecuted or defended in good faith by a trustee for beneficiaries with their knowledge and consent, particularly if at their request, will be conclusive on them in its results. *Id.*

A judgment is not binding upon persons not parties nor privies thereto. *Houston Oil Co. of Texas v. Stepney* (Civ. App.) 187 S. W. 1078.

Subsequent vendee or lienholder is not estopped or bound by a foreclosure decree to which he was not a party, and such decree does not estop or conclude the vendor or superior lienholder as to the sublienholder not a party when the contract of sale foreclosed was executory. *Reyes v. Kingman Texas Implement Co.* (Civ. App.) 188 S. W. 450.

A subsequent vendee or lienholder is not estopped or bound by a foreclosure decree to which he was not a party. *Id.*

A junior incumbrancer or lienholder, of whose rights the senior lienholder had notice when he sued to foreclose, and who was not joined as a party, is not bound by the judgment of foreclosure. *Wiggins v. Wagley* (Civ. App.) 190 S. W. 736.

Action by payee of note against makers and judgment rendered therein constitute no bar to an action by defendants against a third person primarily liable for amount of note. *Randals v. Pecos Valley State Bank* (Civ. App.) 192 S. W. 363.

42. **Matters concluded in general.**—A judgment construed, and held, that there had been *prima facie* an adjudication that plaintiff was not entitled to recover on one cause of action relied on. *Randle v. Barden* (Civ. App.) 164 S. W. 1063.

A judgment in favor of estate of a decedent, in a suit by a creditor to establish his claim, is binding in an action by creditor against a purchaser of decedent to set aside a sale of personality as in fraud of creditors. *Powell v. Stephenson* (Civ. App.) 189 S. W. 570.

43. — **Matters in issue and essentials of adjudication.**—A party in whose favor a judgment is rendered is not estopped, in a subsequent suit, from denying findings not essential or material to the judgment. *Word v. Colley* (Civ. App.) 173 S. W. 629.

In an action to recover back a horse or its value, on rescission of a horse trade, a verdict for plaintiff settled the issues, but judgment should direct a return by plaintiff of horse received from defendant. *Bobo v. Wright* (Civ. App.) 174 S. W. 929.

Judgment in action on note by assignee against the maker, who gave it for an insurance premium, to which purpose it was never applied, having been converted by the insurance agent, held not a bar to an action by the maker's assignee against the insurer to recover the amount of such note; the causes not being identical. *Adams v. San Antonio Life Ins. Co.* (Civ. App.) 185 S. W. 610.

A judgment is not technically conclusive of any matter, if the matter is not such that it had of necessity to be determined before judgment could be given. *West Texas Bank & Trust Co. v. Rice* (Civ. App.) 185 S. W. 1047.

Where an injunction has been dissolved, complainant by amendment or by supplemental bill may procure a second injunction, but not upon grounds set up in the first bill or which should have been set up therein. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

Where a set-off is pleaded by defendant and attempted to be supported by evidence, it will, whether allowed or disallowed, become *res adjudicata*. *Trinity County Lumber Co. v. Conner* (Civ. App.) 187 S. W. 1022.

45. — **Title or claim to property.**—A judgment foreclosing vendor's lien notes held a conclusive adjudication against plaintiffs' subsequent claim that they were mortgagors of the land and that their conveyance to the maker of the notes was merely to secure a loan. *Sells v. White* (Civ. App.) 175 S. W. 1079.

A judgment for an assignee suing an assignor and the debtor on the account assigned is conclusive as to the ownership of the claim and is binding on the assignor. *Day v. Van Horn Trading Co.* (Civ. App.) 183 S. W. 85.

Where plaintiff sought to recover on note as payee and alleged and proved that apparent payee was his agent and named as such by mistake, contention that judgment was erroneous for failure to prove transfer for value held untenable. *Ford v. Johnston* (Civ. App.) 184 S. W. 303.

A judgment establishing title of grantor as against a third party does not inure to benefit of grantee in deed under general warranty made and delivered prior to suit in which judgment was rendered, nor does it inure to such grantee's benefit where another deed of same property is made to him by grantor after suit. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

A decree in a suit to recover title to land was an adjudication of the rights of all parties to that suit and a bar in a subsequent suit to any equities of defendants in growing crops on land adjudicated to plaintiff, not set up in the prior suit. *Schaefer v. First Nat. Bank, Bay City* (Civ. App.) 189 S. W. 556.

In trespass to try title in which the issue was as to a boundary, it was error to allow a witness to testify to location of boundary as shown on a map before jury as established by decision of Supreme Court in another case. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

46. — **Rights and liabilities under contracts.**—Where the court ruled that the plaintiff could not recover for delay resulting from the negligence of connecting car-

riers, it was not error to exclude evidence of the judgment rendered as to those carriers at a previous trial of the same case. *St. Louis, E. & M. Ry. Co. v. True Bros.* (Civ. App.) 159 S. W. 152.

In an action for the value of a vendor's lien note, where the plaintiff alleged in the alternative that the defendant had bought the note but had not paid for it, and that he had converted the note to his own use, a prior judgment in an action to foreclose the note to which both plaintiff and defendant were parties, that the defendant was the owner of the note, was not a bar to the plaintiff's recovery. *Cage v. King* (Civ. App.) 159 S. W. 174.

Where the right to a recovery of money paid as a consideration for a void deed is not adjudicated in an action of trespass to try title, the party entitled to such return may maintain a subsequent action therefor. *Lafferty v. Wilson* (Civ. App.) 162 S. W. 379.

Where a purchaser of real estate secured a quitclaim deed from third persons, then brought trespass to try title against the vendor, who obtained judgment, the judgment was not res judicata in a suit by the purchaser for the specific performance of the contract. *Groves v. Whittenberg* (Civ. App.) 165 S. W. 889.

In suits by creditors to avoid gift by insolvent, creditor's judgment, rendered subsequent to conveyance, creditor's suit, to which grantee was not a party, is admissible to establish indebtedness, being conclusive as to grantor, but merely prima facie evidence as against grantee. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

In wife's suit against husband's creditor to enjoin sale under execution of land conveyed her by husband, husband can testify to truth relative to indebtedness to creditor, though he is bound by creditor's judgment against him. *Id.*

47. **Conformity to pleadings and proof in general.**—Proof of an essential fact not averred will not sustain a judgment. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260; *Osvold v. Williams* (Civ. App.) 169 S. W. 185; *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728; *Benson v. Ashford* (Civ. App.) 189 S. W. 1093.

A judgment must be supported by both pleadings and evidence, and lack of either will require reversal. *First State Bank of Teague v. Munger* (Civ. App.) 191 S. W. 596; *Browne Grain Co. v. Farmers' & Merchants' Nat. Bank of Abilene* (Civ. App.) 173 S. W. 942; *Needham v. Cooney* (Civ. App.) 173 S. W. 979; *Angelina County Lumber Co. v. Hines* (Civ. App.) 184 S. W. 596.

Where plaintiff in trespass to try title specially averred that he claimed under the heirs of C., who died leaving a widow entitled to one-half of the community property, he was bound by the title pleaded, and could only recover a half interest of the title to the premises, with exclusive possession of the whole. *Chambers v. Rawls* (Civ. App.) 158 S. W. 208.

In an action to recover for professional services rendered by an attorney for a drainage district, a judgment for services, the claim for which was erroneously stricken by the court from the complaint, does not conform to the pleadings. *Hidalgo County Drainage Dist. No. 1 v. Swearingen* (Civ. App.) 158 S. W. 211.

In an action on notes, where there was no plea of fraud or misrepresentation, evidence thereof erroneously admitted could not form the basis for a judgment. *Newman v. Buffalo Pitts Co.* (Civ. App.) 160 S. W. 657.

In an action to foreclose vendor's lien notes, where the plea of intervention filed by the purchaser of the maker's interest was stricken, the court could not in its judgment determine the rights of the intervener to the surplus, if any, after foreclosure; such determination having no support in the pleadings. *Brown v. Bay City Bank & Trust Co.* (Civ. App.) 161 S. W. 23.

Defendant in trespass to try title, who did not urge his claim to a return of money paid for a void sheriff's deed through which he claimed, during the trial thereby waived his right to recover in such action. *Lafferty v. Wilson* (Civ. App.) 162 S. W. 379.

In action against president and vice president of corporation on note for money borrowed for its benefit, judgment in their favor against corporation will not be denied on the ground that its liability was on an implied obligation, the plea not founding their right, as claimed, on the note. *Georgetown Mercantile Co. v. First Nat. Bank* (Civ. App.) 165 S. W. 73.

In an action against a railroad company for damages from the construction of its line, damages for trespasses outside of the land contracted for as a right of way cannot be recovered, where plaintiff was not the owner at the time of the trespass, and his petition did not allege any assignment of the right of action. *Timpson & H. Ry. Co. v. Smith* (Civ. App.) 165 S. W. 86.

A party, against whom a defendant by a cross-action sought to recover judgment, who did not enter an appearance, was not entitled to a judgment in his favor, if the cause of action alleged against him was not subject to general demurrer. *Reserve Loan Life Ins. Co. v. Benson* (Civ. App.) 167 S. W. 266.

Where the petition complains of a defendant in his individual capacity only, a judgment against him can only bind him in that capacity. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

The court in determining the kind of judgment the pleadings will support may consider the averments of both parties. *Law Reporting Co. v. Texas Grain & Elevator Co.* (Civ. App.) 168 S. W. 1001.

In an action to foreclose a lien, defendant's failure to deny specifically under oath facts pleaded in support of the lien does not authorize judgment of foreclosure, if pleading does not sustain the lien. *Good v. Smith* (Civ. App.) 170 S. W. 257.

A money judgment for deficiency in purchase price in favor of a corporation suing to set aside an alleged unauthorized conveyance of land by its officers held without support in the pleadings or evidence. *Patterson v. Sylvan Beach Co.* (Civ. App.) 171 S. W. 515.

In an action to enjoin a city from claiming land for a public street, where the jury found that plaintiff's ancestor intended to dedicate, held that the court, if of opinion that the evidence did not show such intention, could not give judgment for plaintiff, but should have granted a new trial. *City of Kaufman v. French* (Civ. App.) 171 S. W. 831.

In action against a partner, named in the petition as "C. B. B.," served as "C. V. B." (the correct middle initial), there was no error in disregarding the misnomer and rendering judgment against C. V. B. *Browne Grain Co. v. Farmers' & Merchants' Nat. Bank of Abilene* (Civ. App.) 173 S. W. 942.

Where jurisdiction of a suit to cancel vendors' lien notes is acquired, the court has jurisdiction to award damages to plaintiff on it appearing that he is not entitled to cancellation by reason of transfer of the notes to an innocent holder. *Wright v. Chandler* (Civ. App.) 173 S. W. 1173.

Pleadings in injunction against an irrigation company held not to sustain a mandatory injunction requiring company to furnish water at given price for 50 years. *Toyah Valley Irr. Co. v. Winston* (Civ. App.) 174 S. W. 677.

Though the amount stated in the ad damnum clause is less, judgment may be rendered for the amount due, calculated according to the terms of the notes sued on, fully described in the petition. *McCaulley v. Farmers' & Merchants' State Bank & Trust Co.* (Civ. App.) 175 S. W. 728.

Where a shipper testifies without objection to the value of property claimed to have been injured through the carrier's negligence, held, that there is sufficient basis for a judgment. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 175 S. W. 749.

Where plaintiff in trespass to try title pleaded the description of his lands, and defendants pleaded that their contiguous lands were not described as plaintiff alleged, a judgment thereon for plaintiff is not necessarily unsupported by allegation and proof. *Birge-Forbes Co. v. Wolcott* (Civ. App.) 176 S. W. 605.

In action on note, judgment against person claimed to have promised to sign the note, but fraudulently failed to do so, held not sustainable. *Kelley v. Audra Lodge No. 438, Fraternal Union of America* (Civ. App.) 176 S. W. 784.

A decree adjudicating title to lands concerning which no issue was raised in the pleadings is erroneous. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991.

The court cannot arbitrarily render judgment for half only of what the only evidence as to indebtedness showed due. *Kelsay Lumber Co. v. Rotsky* (Civ. App.) 178 S. W. 837.

The issues found by the jury should respond to the pleadings, and if they do not the issues so found should be regarded as immaterial, and not be considered in rendering the judgment. *Morris v. McSpadden* (Civ. App.) 179 S. W. 554.

Contract of sale not containing provision for return of goods held not subject to rescission for breach of warranty, where fraud was not alleged or proved. *Texas-Kalamazoo Silo Co. v. Alley* (Civ. App.) 180 S. W. 621.

Where there was no evidence as to the reasonableness of a charge for repairs other than plaintiff's testimony, that the charge was reasonable, the court cannot find a smaller sum to be a reasonable charge. *W. K. Henderson Iron Works & Supply Co. v. Wilkins* (Civ. App.) 180 S. W. 913.

Judgment for plaintiffs for destruction of grass by defendant's cattle cannot be sustained, there being no testimony supporting the only ground of complaint, that defendant tore down the fence. *Matthews v. Sorrells & Seitz* (Civ. App.) 180 S. W. 918.

In action to set aside a judicial sale of irrigation company's property, decree of money tendered into court by plaintiffs to the purchaser, who had paid the amount of the judgment, but disclaimed any interest in the land, held erroneous. *Trans-Peros Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 180 S. W. 928.

In action to set aside a judicial sale, recital in judgment of election as to which of plaintiffs could prosecute held erroneous, where there was no record evidence of such election. *Id.*

Under this article judgment for plaintiff cannot be reversed on a defense not pleaded or urged below. *Bank of Garvin v. Freeman* (Sup.) 181 S. W. 187.

Plaintiffs held not entitled to recover for ties sold by them to defendants and rejected by defendants under petition alleging sale by a third party and transfer of the account to plaintiffs. *Price v. J. B. Faircloth & Co.* (Civ. App.) 181 S. W. 707.

Where a buyer of railroad ties was to have the right of inspection, and its inspector refused the ties, the seller could not recover for the ties refused without pleadings and proof warranting such recovery. *Id.*

A judgment cannot be upheld, where the petition did not state a cause of action against the parties, regardless of what the evidence showed. *Seaton v. Majors* (Civ. App.) 182 S. W. 712.

It is fundamental error for judgment to be rendered on answer of jury which is not responsive to issue without which there is no basis for judgment. *Indiana Co-op. Canal Co. v. Gray* (Civ. App.) 184 S. W. 242.

In a suit for breach of contract, where plaintiff pleaded no facts entitling her to a personal judgment against a defendant, though the evidence showed that he was personally liable to her, such a personal judgment could not stand. *Nalls v. McGill* (Civ. App.) 184 S. W. 275.

Brokers, who contracted with landowners to sell for a commission payable in the purchase-money notes if such were taken, to whom the landowners, after sale on credit, tendered the commission in notes, which were refused, were not entitled to recover a money judgment for commission. *Patterson v. Kirkpatrick* (Civ. App.) 184 S. W. 739.

In a suit to require grantee to remove gates on a roadway, the deed stipulating that grantee was "to keep open for a permanent roadway 15 feet wide on the extreme east of" the tract conveyed "so that the said" grantor "may have access to the public road," evidence held to support decree for defendant. *Arden v. Boone* (Civ. App.) 187 S. W. 995.

Where a petition is defective in substance to the extent of failing to show a cause of action, a judgment for the plaintiff is null and void. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

In suit on note, held that, in view of original petition, court properly refused to render judgment on original note for which the note in suit was given; all mention of such original note being merely descriptive and matter of inducement. *Caldwell Nat. Bank v. Reep* (Civ. App.) 188 S. W. 507.

In bank's suit on note given to renew others, where plaintiff averred in a supplemental petition that it was owner and holder of all the notes, without any notice of an

agreement between defendants, there was no declaration of liability upon the original notes for judgment. *Id.*

In bank's suit on note, held that, in view of allegations of supplemental petition, the court properly refused to render judgment on former notes for which the note in suit was executed. *Id.*

A plaintiff must allege a cause of action against a defendant in order to recover thereon. *Gulf. C. & S. F. Ry. Co. v. Goodman* (Civ. App.) 189 S. W. 326.

In suit for automobile wrongfully attached and sold as property of another, held, on evidence, that plaintiff should have judgment for detention, or in the alternative for its value with such damages. *Taylor Bros. Jewelry Co. v. Kelley* (Civ. App.) 189 S. W. 340.

A petition subject to general demurrer will not support any judgment. *Montgomery v. McCaskill* (Civ. App.) 189 S. W. 797.

Where one defendant in cross-petition failed to bring in as a party an interested person whom plaintiff impleaded, defendant could not have any relief against such party. *Cathey v. Weaver* (Civ. App.) 193 S. W. 490.

48. — **Issues raised by pleadings.**—Where the petition, in an action to set aside a partition judgment for fraud by defendant in procuring it, alleged that title did not pass at the partition sale to defendant, or to the purchasers from him, because of such fraud, plaintiff cannot recover damages against defendant for the value of the land, or the price he sold it for. *Dean v. Dean* (Civ. App.) 165 S. W. 90.

A petition in an action by a grantor against the grantee assuming the grantor's debts, which seeks to recover the value of the land conveyed, and which does not seek a recovery of any of the debts paid by the grantor and merely sets forth a payment of a debt by the grantor to show a breach of the contract, does not justify a judgment for the grantor for the debt paid. *Closner v. Chapin* (Civ. App.) 168 S. W. 370.

A petition for libel and slander against many defendants which alleged a conspiracy to injure plaintiff and his good name authorizes a recovery against those actually libeling plaintiff, though no proof is made of the conspiracy. *Dickson v. Lights* (Civ. App.) 170 S. W. 834.

Judgment awarding interest from February 3d to June 2d, as damages from temporary injunction restraining sale under deed of trust, held not supported by answer alleging that defendants were deprived of the selling price from February 3d to the trial on April 7th. *Hicks v. Murphy* (Civ. App.) 172 S. W. 1135.

In action to cancel vendors' lien notes as cloud on title, with intervention by defendant's wife, seeking a cancellation of her deed, etc., where plaintiffs did not plead subrogation they had no right to complain that such relief was not granted. *Bludworth v. Dudley* (Civ. App.) 173 S. W. 561.

In action to try title by cotenants against grantee under unauthorized sale by their cotenants, plaintiffs are restricted to relief as to land described in petition only. *Broom v. Pearson* (Civ. App.) 180 S. W. 895.

Where plaintiff sued on an express contract, no recovery on the quantum meruit can be had. *Pictorial Review Co. v. Pate Bros.* (Civ. App.) 185 S. W. 309.

Until their action is called in exercise by pleadings, courts have no more power to render judgment in favor of a person than to render judgment against a person until he has been brought within their jurisdiction. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

In an action on a contract by defendants' remote warrantor to perfect title to land, held that, under the contract and pleadings, judgment that title acquired by grantor after contract did not pass under his warranty was improper. *Roberts v. Atwood* (Civ. App.) 188 S. W. 1014.

In an action by a lessee for his one-half interest in the proceeds of wheat raised on demised premises, held that, though petition alleged the wheat sold for \$3,900, and lessee had not received his half, judgment is not objectionable as based on matter not pleaded because of testimony by lessee that check to his order by lessor, and paid, related, not to sum in controversy, but to wheat in an elevator. *Woodley v. Pike* (Civ. App.) 189 S. W. 746.

Where the payee of a note sued its agent, who had indorsed the note, together with the maker, its suit was on express contract, and it could not recover the commission paid the agent on the sale for which the note was given, since that arose from implied contract. *Hackney Mfg. Co. v. Celum* (Civ. App.) 189 S. W. 988.

Where pleadings put in issue plaintiff's right to recover upon two causes of action, judgment on one, silent as to the other, was prima facie an adjudication that he was not entitled to recover upon other cause, and was res adjudicata as to it. *Pitt v. Gilbert* (Civ. App.) 190 S. W. 1157.

In action for price of goods sold on open account, where defendants alleged a contract under which the goods were sold, and the court found that the contract had been made, but broken by defendants, judgment for plaintiff for the reasonable value independent of the contract could not be sustained. *Cumby Light & Telephone Co. v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 194 S. W. 170.

In suit for recovery of \$2,300 paid for automobile, judgment could not find that there was no market value, where plaintiff stated in his plea that automobile was worth \$300. *J. I. Case Threshing Mach. Co. v. Rachal* (Civ. App.) 194 S. W. 418.

In action on note to which party claiming to own it was made a party, judgment against it for amount collected on the note held erroneous, where such collection was not alleged. *Buckholts State Bank v. Harris* (Civ. App.) 194 S. W. 961.

49. — **Prayer for relief in general.**—If defendant prays for relief and shows himself entitled thereto by the evidence, the court may grant it notwithstanding the pleadings of the plaintiff do not request it. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

Where a cross-complainant, in trespass to try title, relied on the theory that her conveyance to the defendant in the cross-action was in trust, such defendant, having pleaded only the general issue, was not entitled to an affirmative judgment for an interest in the land against the cross-complainant. *Cox v. Garrow* (Civ. App.) 162 S. W. 924.

Where plaintiffs, having title to 160 acres by adverse possession, received from the record owner a deed to 200 acres, sold 100 acres, and sued to cancel the deed and vendor's lien, court held not to have erred in rendering judgment in determining the shares of the parties in the purchase price for the 100 acres, though such relief was not asked. *Stewart v. Williams* (Civ. App.) 167 S. W. 761.

Judgment requiring railroad company to permit express company to use jointly with another express company cars set apart to such other express company held not broader than the relief prayed for. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

Under a prayer for general relief in law and equity in a suit to cancel vendor's lien notes for fraud, the court may award damages. *Wright v. Chandler* (Civ. App.) 173 S. W. 1173.

In action on notes given for an automobile and to foreclose a chattel mortgage, defendant, on his answer and cross-bill seeking a rescission of sale and the cancellation of the notes, held not entitled, under his prayer for general relief, to damages sustained to automobile. *Roberts v. Houston Motor Car Co.* (Civ. App.) 188 S. W. 257.

In action against partnership composed of two partners, where petition concluded with prayer for judgment for amount of plaintiff's debt, interest, and attorney's fee, etc., and "for such other and further relief to which it may show itself entitled," etc., it authorized judgment against defendants individually. *Crews & Williams v. Gullett Gin Co.* (Civ. App.) 189 S. W. 793.

50. — **Amount demanded.**—In suit by land buyer against title abstract company for failure to search for matters affecting title, judgment for \$2,118.25 held not erroneous as for sum over that claimed in petition, which alleged damages at \$2,500, not stating items. *Decatur Land, Loan & Abstract Co. v. Rutland* (Civ. App.) 185 S. W. 1064.

Where plaintiff alleged damages by overflow due to railroad embankment in the sum of \$150, judgment of \$175 was excessive. *Gulf, C. & S. F. Ry. Co. v. Moore* (Civ. App.) 188 S. W. 24.

Under contract for sale of embalming fluid by which seller furnished embalming table free of charge and the court declared rescission for breach of warranty of fluid, judgment for seller for value of the table was erroneous, where purchaser offered return of the table. *Frigid Fluid Co. v. Sid Westheimer Co.* (Civ. App.) 189 S. W. 334.

In suit to cancel deed, where pleading only authorized recovery of rent for year 1914 at \$150 and an item of \$80 for expense, it was error to render judgment against defendant for \$380, \$300 of which was rent for two years. *Pitt v. Gilbert* (Civ. App.) 190 S. W. 1157.

In an action for breach of warranty of a silo, plaintiff could recover its full value as erected had it not cracked, though the pleadings did not allege the amount of cash paid on the silo, which was an element as evidence entering into its value. *Texas Kalamazoo Silo Co. v. Alley* (Civ. App.) 191 S. W. 774.

In an action for breach of warranty of a silo, where there was no pleading for the rental value of the silo for five months, for which the jury found in the sum of \$75, such item of the recovery was improper. *Id.*

In a suit for conversion of automobile, where plaintiff alleged value of automobile and did not ask for interest and jury gave him exact amount alleged in his petition, it was error for court to add interest in excess of amount prayed for. *Magnolia Motor Sales Corp. v. Chaffee* (Civ. App.) 192 S. W. 562.

51. — **On counterclaim.**—Where defendant, in an action to cancel a deed on the ground of fraud, has paid out money by reason of plaintiff's fraud he may plead that fact and have it adjudicated in case a rescission is decreed. *Paschal v. Hudson* (Civ. App.) 169 S. W. 911.

In suit on note given for part of price of engine, where defendant, alleging fraud, pleaded total failure of consideration, alleging the engine was worthless, he could nevertheless recover \$750, difference between \$1,000 paid by him in cash and \$250 which the jury found the engine was worth. *Bruns Kimball & Co. v. Amundsen* (Civ. App.) 188 S. W. 729.

52. **Conformity to verdict or findings in general.**—A judgment must follow the verdict, though there be good grounds to set the verdict aside on a motion for new trial. *Hancock v. Haile* (Civ. App.) 171 S. W. 1053; *Houston & T. C. Ry. Co. v. Lewis* (Civ. App.) 185 S. W. 593; *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761; *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

Under this article the court cannot render a judgment contrary to the verdict, even if the verdict is not sustained by the evidence, so that it could be set aside. *Armstrong v. Hix* (Sup.) 175 S. W. 430; *Kirkland v. Matthews* (Civ. App.) 162 S. W. 375.

In trespass to try title where the defense was adverse possession and the jury affirmatively found that defendants had had adverse possession of only  $2\frac{1}{2}$  acres, the judgment thereon must conform to the verdict, and defendants' motion for judgment for the entire tract on the theory of constructive possession was properly refused. *Dupont v. Texas & N. O. R. Co.* (Civ. App.) 158 S. W. 195.

While a judgment must conform to the verdict, it need not literally follow the verdict, but must be rendered in accordance with the disposition of the issues made. *Browne v. Fechner* (Civ. App.) 159 S. W. 461.

Where the jury merely found for defendant on his counterclaim, without disposing of plaintiff's cause of action, it was error for the judgment to recite that plaintiff takes nothing. *Waco Cement Stone Works v. Smith* (Civ. App.) 162 S. W. 1158.

Findings that a lodge member was suspended for nonpayment of dues, but that such suspension was improper, did not authorize a judgment for the beneficiary, since the question of the authority for the suspension was one for the court, not for the jury. *Sovereign Camp Woodmen of the World v. Wagon* (Civ. App.) 164 S. W. 1082.

In an action in the nature of trespass to try title, where the jury found for the plaintiff for the quieting of her title and for a sum of money, judgment based upon findings of the court as to incumbrances, not included in the verdict, held improper. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

In an action for wrongful attachment, verdict for plaintiffs in a certain amount "as actual damages over and above the principal and interest of the judgment" held suf-



ficient to warrant the cancellation of the judgment recovered by defendant in the attachment action. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

On trial by jury the court has no power to enter judgment upon facts well pleaded and indisputably proven, unless the issue has been found by the verdict in favor of the party for whom the judgment is rendered. *Good v. Smith* (Civ. App.) 170 S. W. 257.

Where the court charged that the only issue was whether defendants agreed to obtain consent of holders of superior title to sale of land, verdict that they did so agree warrants judgment for plaintiff. *Hahl v. McPherson* (Civ. App.) 176 S. W. 804.

If jury's findings in defendants' favor were material, or if its findings established any material matter constituting a defense, judgment for plaintiffs held erroneous. *Grove v. Keeling* (Civ. App.) 176 S. W. 822.

A judgment in trespass to try title will not be reversed as not supported by the verdict, where it appears that both parties attempted to put in issue the title to the land described in the judgment, but made a mistake as to the length of a line. *Bundick v. Moore-Cortes Canal Co.* (Civ. App.) 177 S. W. 1030.

In a suit for a partnership accounting, finding as to funds not divided by agreement held immaterial, no division by agreement having been pleaded, and not to render judgment on the other findings erroneous. *Morris v. McSpadden* (Civ. App.) 179 S. W. 554.

In an action against railroads and the receiver of one of them, where the jury found against each of the roads for \$546, but did not mention the receiver, judgment against him was improper. *San Antonio & A. P. Ry. Co. v. McCammon* (Civ. App.) 181 S. W. 541.

When the alternative finding of the trial court in a suit for negligence, that either of two acts or omissions of the defendant was negligent, is conditioned upon the insufficiency of the evidence to sustain the first finding, and such first finding is supported by the evidence, the alternative finding cannot be considered in support of the judgment. *Texas Co. v. Charles Clarke & Co.* (Civ. App.) 182 S. W. 351.

Where answers to the special questions showed inconsistent findings on the question of the liability of defendant railroad company for destruction of plaintiff's crops by oil washed thereon from its tanks, judgment for plaintiff cannot stand. *Houston & T. C. R. Co. v. Walsh* (Civ. App.) 183 S. W. 18.

Judgment in personal injury action, rendered for plaintiff as to one defendant and for the other defendant, and against both defendants on their cross-petitions against each other, held not invalid for going beyond the verdict which found only for plaintiff as to one defendant and against him as to the other, without finding on the cross-petitions. *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867.

In suit by assignee of a bank which guaranteed collection against it and its debtor, entry of judgment for plaintiff against the debtor on verdict finding for plaintiff against the bank and further finding for the bank against the debtor held proper. *Carver Bros. v. Merrett* (Civ. App.) 184 S. W. 741.

In suit by realty brokers for breach of a landowner's undertaking to give them exclusive right to sell for a specified time, judgment for defendant held supported by two findings of fact, denominated conclusions of law, though the finding that the owner had not contracted with plaintiffs was inconsistent with another. *Osborne & Beck v. Sanders* (Civ. App.) 184 S. W. 1101.

In a boundary suit, where jury by its verdict does not definitely locate a boundary line it is error for court to do so by its judgment. *Bonner v. Pitts* (Civ. App.) 186 S. W. 281.

53. — **Special verdict and findings.**—Under this article and arts. 1986 and 1990, the court must conform the judgment to the special findings of the jury. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536; *Ketchum v. Boggs* (Civ. App.) 194 S. W. 201.

Buyer, counterclaiming for breach of contract to furnish all the fuel oil required for six months, held not entitled to judgment for profits lost while its plant was closed due to the breach, where the special issues submitted did not call for sufficient information; art. 1985 having no application. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

When a special verdict has been returned, the trial court, in rendering judgment, cannot disregard a finding on a material issue, even though such finding has no support whatever in the testimony. *Houston & T. C. R. Co. v. Smallwood* (Civ. App.) 171 S. W. 292.

Special findings that carriers' only negligence consisted of acts other than those alleged held to entitle the carriers to judgment. *St. Louis, B. & M. Ry. Co. v. McClellan* (Civ. App.) 173 S. W. 258.

Where a special verdict is returned, the court must enter judgment in accordance therewith, however erroneous such verdict may appear; for a judgment must conform to the verdict. *Pyron v. Hodges* (Civ. App.) 177 S. W. 508.

In broker's action for commission on a sale of a hotel, which, by contract, was not payable unless the purchase-money notes were paid, finding that such notes were "paid in full" held to mean "canceled" on rescission of the sale, so as to render proper the entry of judgment for the defendant. *Id.*

In an action to recover for a deficiency in property received in exchange, findings definitely fixing the value of plaintiffs' property, the value of the ranch lands defendants actually conveyed, and the value per acre of the shortage and of the tract to which title failed held sufficiently definite to support judgment for plaintiffs, though elicited by confused questions. *Foster v. Atilr* (Civ. App.) 181 S. W. 520.

In suit by seller of land against his own agent and the buyer, court's refusal to render judgment for seller on jury's answer to a special issue held proper in view of other findings. *Stockwell v. Melbern* (Civ. App.) 185 S. W. 399.

Judgment must conform to the jury's findings on special issues, though the court can afterwards set it aside, as contrary to the evidence. *Jackson v. Walls* (Civ. App.) 187 S. W. 676.

While the court might set aside a verdict for defendant on special issues, it had no power to render judgment contrary thereto. *Posey v. Adam Schaaf Co.* (Civ. App.) 189 S. W. 977.

In action for damages to cattle in transit, where jury found that damage proved was \$317.88, whereupon plaintiff's motion to enter judgment for \$800, the amount sued for, was properly granted. *Texas-Mexican Ry. Co. v. Sutherland* (Civ. App.) 189 S. W. 983.

54. — Amount awarded.—In architect's action, verdict held to sustain judgment for 3½ per cent. of \$69,000. *Vaky v. Phelps* (Civ. App.) 194 S. W. 601.

55. — Parties.—Where, in an action against the maker and an indorser of a note, the jury rendered a verdict for plaintiff "against defendant L. (the maker) and the F. company (the indorser)," judgment was properly rendered against the two defendants jointly and severally, especially as the maker, who complained thereof, was unquestionably liable for the full amount. *Lloyd v. American Nat. Bank* (Civ. App.) 158 S. W. 785.

In an action against initial and connecting carriers for delay in transporting stock, a judgment against both held not sustained by the findings. *St. Louis S. W. Ry. Co. of Texas v. Miller & White* (Civ. App.) 176 S. W. 830.

56. — Interest and attorney's fees.—It is error to award a successful suitor interest upon the amount of his recovery where the issue of interest was not submitted to or determined by the jury. *Houston & T. C. Ry. Co. v. Lewis* (Civ. App.) 185 S. W. 593.

57. — Aider of judgment.—Though the verdict, in an action to recover possession of land, in which defendant prayed the cancellation of a deed therefor executed to plaintiff by his fraud, did not specifically find for a cancellation, the judgment properly canceled the deed where the verdict established fraud warranting cancellation. *Maddox v. Clark* (Civ. App.) 163 S. W. 309.

59. — Notwithstanding the verdict.—See art. 1990 and notes.

A judgment non obstante veredicto is not permissible and cannot be sustained, but the court can only set aside a verdict contrary to the evidence. *Hayes v. G. A. Stowers Furniture Co.* (Civ. App.) 180 S. W. 149; *Frith v. Wright* (Civ. App.) 173 S. W. 453; *Wellborn v. Wellborn* (Civ. App.) 185 S. W. 1041.

Judgment non obstante veredicto is permissible only when there is undisputed evidence, outside of the facts found by the jury, on which a verdict should have been directed. *Mixon v. Wallis* (Civ. App.) 161 S. W. 907.

In trespass to try title, it is improper for the trial court, after verdict by the jury for plaintiffs, to render judgment for defendant upon findings of fact made without the aid of the jury, upon what was claimed to be uncontroverted evidence. *Payne v. Ellwood* (Civ. App.) 163 S. W. 93.

Where a judgment was the only one which could have been rendered upon the verdict, the appellant was not entitled to a judgment non obstante veredicto on the ground that the finding upon an issue was without evidence to support it. *Kuehn v. Meredith* (Civ. App.) 187 S. W. 386.

59½. — Exhibits.—Exhibits not before the jury to whom the case was submitted are improper for the court's consideration on motion for judgment. *Ketchum v. Boggs* (Civ. App.) 194 S. W. 201.

65. Nonresidents, judgments in suits against.—Process against nonresidents, see art. 1869 et seq. and notes.

69. Foreign judgments.—A money judgment by confession rendered in another state without a suit against the defendant having been filed, as was permitted by the laws of that state, held sufficient as a judgment to which full faith and credit must be given. *Tourtelot v. Booker* (Civ. App.) 160 S. W. 293.

A judgment of a foreign court which it was without jurisdiction to render is not entitled to credit anywhere. *Banco Minero v. Ross*, 172 S. W. 711, 106 Tex. 522.

A foreign judgment against a citizen will only be credited on proof that the court had jurisdiction of the parties and subject-matter, and that there was a full and fair trial by regular proceedings according to a system of civilized jurisprudence, etc. *Id.*

A full and fair trial, essential to give credit to a foreign judgment, means not a summary proceeding sanctioned by the law of the forum, but an opportunity to be heard on the proof where the cause involves questions of fact, and to have it considered by an unprejudiced court. *Id.*

A Mexican judgment against citizens of the United States held not to have been rendered after a full and fair trial, and not entitled to credit in the United States. *Id.*

Under Const. U. S. art. 4, § 1, judgment of Wisconsin court having jurisdiction of subject-matter and parties held entitled to same force and effect in Texas as in Wisconsin. *American Express Co. v. North Ft. Worth Undertaking Co.* (Civ. App.) 179 S. W. 908.

### Art. 1995. [1336] [1336] For or against one or more plaintiffs, etc.

Joint and several judgments.—In an action against members of a voluntary association on a note, with cross-action by part of the defendants against their codefendants, held, that a judgment might be rendered for plaintiff against the defendants jointly and severally, and a judgment for each defendant over against each other defendant. *Hardy v. Carter* (Civ. App.) 163 S. W. 1003.

Judgment, within the pleadings, in action against the members of a voluntary association upon a note on which they were primarily liable as co-obligors, held not objectionable, because the several amounts which plaintiff was to recover against each of the defendants was calculated and entered therein. *Id.*

Where the original defendant asked to have others made parties defendant, and all of the parties appeared and answered, except one, who was not a necessary party, and thereafter defendant's motion to dismiss as to the party not answering was granted, it was error to render judgment for that party. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Where the verdict found a joint liability against defendants, there was no error in a judgment decreeing a joint and several liability. *San Antonio U. & G. Ry. Co. v. Yarbrough* (Civ. App.) 179 S. W. 523.

Under this article, allowing judgments for or against one or several parties, amendment of petition by joint owners for injury to property so as to leave but one party plaintiff is immaterial, not subjecting suit as amended to bar of statute of limitations. *Baker v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 184 S. W. 257.

**Judgment for party and third person.**—Where plaintiff showed that he held an equitable assignment of certain funds belonging to defendant in the hands of G., who was not a party, a provision of the judgment for plaintiff that he was entitled to the fund as against G. was a nullity as to G., though such fact did not invalidate the judgment; G. being a proper, though not a necessary, party. *McLane v. Haydon* (Civ. App.) 160 S. W. 1146.

**Variance as to causes of action.**—The variance between a petition, alleging a joint cause of action in favor of two plaintiffs, and proof of a separate cause of action in favor of each cannot be corrected by dismissing the action as to one plaintiff and rendering judgment for the other. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 189 S. W. 997.

**Art. 1995a. Contribution between tort feasons on payment of judgment.**—That from and after the passage of this Act, any person against whom, with one or more others, a judgment is rendered in any suit on action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery, over, by and between the defendants is given by statute or exists under the common law, shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment; provided that if any of the persons co-defendant as above mentioned, be insolvent, then recovery may be had in proportion of such defendants as are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment, shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency. [Act March 30, 1917, ch. 152, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 1997. [1337] [1337] But one final judgment.**

Cited, *State v. Dayton Lumber Co.* (Civ. App.) 164 S. W. 48; *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

**Essentials of final judgment.**—The test of whether a judgment is final so as to be appealable is whether it disposes of the whole matter in controversy as to all of the parties. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 162 S. W. 922; *Wright v. Chandler* (Civ. App.) 173 S. W. 1173; *Busby v. Schrank* (Civ. App.) 174 S. W. 295.

Where a judgment appealed from was final in form, it was reviewable, notwithstanding it was based on a verdict which was defective in that it failed to dispose of certain cross-pleas filed by the defendants. *Ft. Worth Belt Ry. Co. v. Perryman* (Civ. App.) 153 S. W. 1181.

Under this article there is no appealable final judgment in an action against several defendants until it is finally disposed of as to all of them. *Gulf, C. & S. F. Ry. Co. v. Atlantic Fruit Distributors* (Civ. App.) 184 S. W. 294.

Where an action against two defendants and a cross-action against a railway were tried together, there can be no appeal from a judgment against the railway until final judgment was rendered as to both defendants. *Id.*

Whether dismissal of the cross-action of defendants, as to whom plaintiff dismissed his suit, was rightful, is immaterial, relatively to there having been a disposition of the issue, making the judgment final, and so giving the appellate court jurisdiction. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

Disposition of any cross-action pleaded by defendants as to whom he dismissed his suit is essential to finality of the decree or judgment. *Id.*

Fact that judgment was rendered in part on notes not due at time did not affect validity of registration in county clerk's office of abstract of judgment, and did not impair validity of lien fixed by registration on judgment debtor's property. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.

— **Judgments which are final.**—A judgment held final, so that an appeal might be duly perfected therefrom, even though it did not specifically dispose of defendants' counterclaim. *Swan v. Price* (Civ. App.) 162 S. W. 994.

The county court's judgment in a condemnation proceeding awarding a right of way to plaintiff therein, to revert to the owner of the fee upon nonuser within two years became a final judgment upon the adjournment of that term of court, and hence could not be reopened two years afterwards by a motion to declare a forfeiture alleging neither accident, fraud, or mistake as a basis therefor. *St. Louis Southwestern Ry. Co. of Texas v. Temple Northwestern Ry. Co.* (Civ. App.) 170 S. W. 1073.

Judgment in partition suit confirming commissioners' report held final as to rights of parties, and the court erred in setting it aside, continuing the question of confirmation, and retrying the cause at a subsequent term. *Rogers v. Dickson* (Civ. App.) 176 S. W. 865.

From the order of dismissal of plaintiff's suit as to part of defendants and the judgment after trial against defendant N., held, as regards there being a final judgment, giving the appellate court jurisdiction, that dismissal as to all but N. was plainly and necessarily implied. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

There is an implied disposition, by discontinuance or dismissal, of the other defendants' cross-action, in the order that plaintiff's suit was dismissed as to them, "and that this cause stand for trial with M. as plaintiff, and N. as defendant." *Id.*

The cross-action of defendant for the land sued for by plaintiff is by necessary im-

plication disposed of and adjudicated against him by the judgment for plaintiff therefor. *Id.*

Under this article, in an action against contractor and sureties on contractor's bond, a judgment against contractor on admission of liability and sustaining exceptions of sureties to complaint, being a final judgment, to which contractor was not a party, a reversal for error will operate as a reversal as to all parties. *Buell Planing Mill Corp. v. Bullard* (Civ. App.) 189 S. W. 776.

— **Judgments not final.**—A judgment which does not dispose of all the parties and issues is not final. *Willis v. Keator* (Civ. App.) 181 S. W. 556; *Bryant v. Moore* (Civ. App.) 169 S. W. 395; *St. Louis, S. F. & T. Ry. Co. v. Tuttle* (Civ. App.) 171 S. W. 797.

A decree restraining a levee district from completing a levee adjacent to the water works of complainant city held not a final judgment, from which an appeal would lie. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

Where a judgment did not dispose of the action as to all of the defendants and with reference to the entire subject-matter of the litigation, it was not final or appealable. *McCarty v. Gray* (Civ. App.) 158 S. W. 1154.

Where a receiver for a railroad originally filed a suit, though the railroad company afterwards filed an amended petition, alleging that it had acquired the claim sued on by assignment from the receiver, and there was no order permitting the holder to be substituted as plaintiff, a judgment which did not dispose of the receiver's interest in the claim was not final, so as to be appealable; nor was it final and appealable, where it did not dispose of either of two defendants. *Browne v. International & G. N. Ry. Co.* (Civ. App.) 158 S. W. 1152.

Where verdict was rendered for several railroads who were defendants, together with a receiver, a judgment, which recited the verdict but failed to provide that plaintiff take nothing against such railroad defendants, was not final so as to give the court of civil appeals jurisdiction of an appeal therefrom. *Freeman v. Miller* (Civ. App.) 160 S. W. 126.

A judgment sustaining exceptions to a plea in reconvention held not to dispose of the plea, leaving a judgment for plaintiff in the main action interlocutory and not appealable. *Lanius v. People's Home Telephone Co.* (Civ. App.) 160 S. W. 304.

In an action to recover damages, and also to cancel one contract, and reinstate another, a judgment awarding plaintiff damages, and dismissing the action as to one of the parties defendant, held not final. *Hamilton v. Joachim* (Civ. App.) 160 S. W. 645.

Where the petition in trespass to try title prayed for an adjudication of title and possession in plaintiff, and for damages for converting timber thereon, and the answer merely set up ownership to the timber through conveyance, a judgment which merely awarded plaintiff damages was not final. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 162 S. W. 922.

A judgment which had been affirmed on condition that plaintiff file a remittitur was not, before a motion for rehearing was overruled, final so as to be subject to garnishment. *Dodson v. Warren Hardware Co.* (Civ. App.) 162 S. W. 952.

A judgment against all the defendants except one, but in no way disposing of him, whose dismissal would have resulted in a dismissal of the defendant partnership, of which he was a member, is not final, and so not appealable. *Wichita Mill & Elevator Co. v. Burrus* (Civ. App.) 164 S. W. 16.

Where defendant filed a plea in reconvention for more than plaintiff's claim, a judgment for the plaintiff for the full amount of his claim, which did not mention the defendant's cross-action, was not a final judgment from which an appeal would lie. *Brown v. Wofford* (Civ. App.) 167 S. W. 764.

Where a judgment of the county court on appeal from a judgment of a justice did not dispose of a plea in reconvention, the judgment was not final, and the Court of Civil Appeals acquired no jurisdiction on appeal. *Anderson, Evans & Evans v. Smith* (Civ. App.) 167 S. W. 765.

In an action for several years' rent and for money due for the sale of personalty, a judgment based on a directed verdict for a small amount, not in controversy, which did not dispose of the other issues, cannot be held a final judgment on the theory that the verdict, being for only part of the amount in suit, was an implied finding against plaintiff's other claims. *Bryant v. Moore* (Civ. App.) 169 S. W. 395.

A record showing a judgment rendered against two of the parties defendant, but not showing what disposition was made as to a third defendant, failed to show a final judgment, for want of which the appeal will be dismissed. *Kolp v. Weil Bros.* (Civ. App.) 173 S. W. 1006.

Where, in an action by assignee against debtor and assignor, as guarantor, the issue was whether the debtor was liable to the assignee, a judgment not determining that issue was not final. *Carver Bros. v. Merrett* (Civ. App.) 174 S. W. 929.

Where in suit of interpleader one defendant alleged causes of action for conversion and an accounting against the other, a judgment not disposing thereof held not final, and hence not appealable. *Braden v. Rhyne* (Civ. App.) 178 S. W. 691.

In an action on a note, a judgment not disposing of indorser's prayer for judgment over against his codefendant held not a final appealable judgment. *Houston Transp. Co. v. Peden Iron & Steel Co.* (Civ. App.) 179 S. W. 443.

Where a judgment did not dispose of certain interveners, nor of the subject-matter sued for by them, and there was no order of dismissal as to them, the judgment would not support an appeal. *Moore v. Toyah Valley Irr. Co.* (Civ. App.) 179 S. W. 550.

In an action having several parties plaintiff and defendant, a judgment not disposing of issues between some parties is not final, and not appealable. *J. I. Case Threshing Mach. Co. v. Lipper* (Civ. App.) 179 S. W. 701.

Judgment in suit by corporation to recover title and possession of goods in which interveners claimed, which neither directly nor by implication adjudicated plaintiff's claim, held not a final judgment and not appealable. *Finnigan-Brown Co. v. Escobar* (Civ. App.) 179 S. W. 1127.

In suit to recover title and possession of goods, interests being claimed by defendants and interveners as well as plaintiff, judgment failing to adjudicate on plaintiff's claim was not by implication an appealable final determination because the verdict determined such claim. *Id.*

Where on appeal to the county court from justice court a new plaintiff appeared, and judgment was rendered in his favor without disposing of the original plaintiff, such judgment is not final, and the appeal will be dismissed. *Duke v. Trabue* (Civ. App.) 180 S. W. 910.

**Effect of new trial.**—Where judgment for defendant was not set aside during the term, but the district court, at a subsequent term, rendered a judgment *nunc pro tunc* and granted a motion for new trial and the parties amended and proceeded with a retrial without objection, held, that the court had jurisdiction to retry the case. *Ætna Ins. Co. v. Dancer* (Civ. App.) 181 S. W. 772.

— **Of reversal.**—Notwithstanding this article, where, in trespass to try title, there are several defendants whose defenses are severable, the judgment against nonappealing defendants will be affirmed, though the judgment in favor of other defendants is reversed. *State v. Dayton Lumber Co.* (Civ. App.) 164 S. W. 48.

Under this article reversal as to one defendant reverses judgment as to both. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

— **Of amendment of petition.**—Relative to the judgment disposing of all the subject-matter, giving the appellate court jurisdiction, amendment of the petition reducing the land claimed of itself eliminates all other lands. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

#### Art. 1998. [1338] [1338] Judgment may pass title, etc.

**Passing of title.**—Where a vendor in an executory contract of sale was by judgment restored to his title, the judgment vested the title in him, free from claim of purchaser. *Dicken v. Cruse* (Civ. App.) 176 S. W. 655.

**Possession.**—Possession of land by virtue of a decree and writ of possession issued under a decree in a proceeding to recover title, putting title and possession of land in plaintiff bank, held possession of the growing crops on the land. *Schaefer v. First Nat. Bank, Bay City* (Civ. App.) 189 S. W. 556.

#### Art. 1999. [1339] [1339] Court shall enforce its own decrees, and may in certain cases do so by contempt process.

**Delivery of property.**—Although judgment in suit under art. 1999 to recover a cow erroneously required delivery of the cow, instead of payment of her value, which was under \$50, so that the case was not appealable from the county court, it was not void and subject to direct attack in a proceeding to enjoin its enforcement. *Kalmans v. Baumbush* (Civ. App.) 187 S. W. 697.

#### Art. 2000. [1340] [1340] Judgment of foreclosure of liens.

2. **Action for foreclosure—Condition precedent.**—Where, by the terms of a deed of trust given to secure the payment of notes executed contemporaneously therewith, it was provided that all should become due if any remained unpaid for ten days after maturity, an action could be maintained upon all the notes when one was not so paid, though by the terms of the notes they were not due. *Ward v. San Antonio Life Ins. Co.* (Civ. App.) 164 S. W. 1043.

5. **Distinction between mortgage and conditional deed.**—See notes under art. 1107.

9. **Findings authorizing foreclosure.**—Where the cross-complainant claimed land under conveyances made to him by his codefendants subsequent to the execution of a deed of trust, a finding that the deed of trust should be foreclosed necessarily negated all claims asserted by defendant, and authorized the judgment of foreclosure. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

10. **Foreclosure of several liens.**—Under this article, a judgment foreclosing two vendor's lien notes on two separate parcels of land for the entire indebtedness held erroneous. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

13. **Parties.**—See notes to art. 1849.

One having a prior lien upon property in the hands of a receiver was not a necessary party to an action by a subsequent lienor to foreclose his mortgage. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Where, in a suit to foreclose a mechanic's lien, it was averred that the land was owned by "A. & L. August, by said A. August and by said L. August," a judgment foreclosing the lien on the land of A. August was proper. *August v. Gamer Co.* (Civ. App.) 166 S. W. 1197.

In an action on vendor's lien notes it was not error to establish a lien in favor of one who had furnished the money to take up two similar notes inferior to that of the payee. *Braun v. Hickman* (Civ. App.) 176 S. W. 879.

In a suit to foreclose a mechanic's lien for improvements made by defendant's lessee, a personal judgment against defendant was not authorized. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

Plaintiff, in a suit on notes and to foreclose a chattel mortgage, may join as parties defendants those liable on the different notes if secured by the same chattel mortgage, though the mortgage is not executed by all the defendants. *Coleman Nat. Bank v. Cathey* (Civ. App.) 185 S. W. 661.

14. **Personal and foreclosure judgments.**—Where a purchaser of a part of a tract subject to a vendor's lien did not assume payment of the debt, the holder of the vendor's lien notes could not recover a personal judgment. *Kynard v. Tucker* (Civ. App.) 171 S. W. 1086.

Though a landowner mortgaged part of his estate to secure a debt, his whole estate was liable therefor. *Ramirez v. Lasater* (Civ. App.) 174 S. W. 706.

In action to enforce claim for material, notes not purporting to be the obligations of defendant company held not to authorize personal judgment against it. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

Where court found that a secret agreement existed between purchaser's agents and vendor's agents by which one-half of consideration was to be returned, the judgment

against purchaser for one-half of amount of purchase note was proper. *Varn v. Gonzales* (Civ. App.) 193 S. W. 1132.

Where land subject to vendor's lien was exchanged by holder of legal title, who covenanted to pay the notes and took title to land received in name of third person, in suit to foreclose the lien there was no error in failing to submit issue of partnership between covenantor and third person or in instructing a joint and several judgment for covenantee against them. *Rhoads v. Harris* (Civ. App.) 194 S. W. 621.

**15. Priority of liens.**—In a proceeding to enforce a chattel mortgage, in which the landlord intervened, claiming a lien upon the mortgaged property, the mortgagee cannot complain of a judgment in favor of the landlord on the ground that there was other property out of which the landlord might satisfy his lien, where the judgment required that to be first exhausted. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

Where a judgment foreclosing a mortgage was procured by fraud of the mortgagee and one of the mortgagors, the court properly refused to recognize and foreclose the lien established by the judgment as against the other owners. *Clarke v. A. B. Frank Co.* (Civ. App.) 168 S. W. 492.

A judgment foreclosing a senior mortgage, notwithstanding payment of the debt, with intent to defraud creditors of the mortgagor, does not affect the right of a junior lienholder who was not a party to the suit; and by such payment the junior lien becomes a first lien.—*Id.*

**17. Requisites and validity of judgment.**—Where defendant guaranteed part of a series of vendor's lien notes, the whole of which plaintiff declared due upon nonpayment of the second, the judgment foreclosing the lien and finding against defendant on his guaranty need not prorate the proceeds of the sale of the land between the notes guaranteed and the others. *Borschow v. Stephenson* (Civ. App.) 166 S. W. 121.

That the judgment in mortgage foreclosure proceedings did not describe the land by calls held not to invalidate it where it otherwise described the land. *Williams v. McComb* (Civ. App.) 163 S. W. 654.

A judgment in an action on vendor's lien notes, violating this article, constitutes fundamental error, reviewable in absence of assignments of error in the record. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

A default judgment foreclosing a vendor's lien on several tracts of land, omitting a call for the west side of one of the tracts, was defective. *Gilles v. Miners' Bank of Cartersville, Mo.* (Civ. App.) 184 S. W. 284.

Under this article, a judgment of foreclosure which did not provide for the issuance of an order of sale, nor direct the sheriff to seize and sell the property as under execution, it appearing that the land was never sold under the judgment held insufficient. *Rudolph v. Hively* (Civ. App.) 188 S. W. 721.

In suit by vendor of lands to city to foreclose implied lien on part of them for part of price, description of lands, in judgment foreclosing lien, as all "above high-water mark," held sufficient. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

**20. Conformity of judgment to pleadings, proof and verdict.**—Where the petition in an action to foreclose chattel mortgages against the mortgagor and his assignee and for general relief contained no allegation that the mortgages were duly filed for record, a personal judgment against the assignee as for a conversion held erroneous except as to costs. *Marshall v. G. A. Stowers Furniture Co.* (Civ. App.) 167 S. W. 230.

A petition by a transferee of vendor's lien notes, which merely prays that the land be awarded to him, held not to support a judgment awarding the land to him. *Smith v. Tipps* (Civ. App.) 171 S. W. 816.

In suit on note, where plaintiff asked foreclosure of lien on defendant's insurance policy, but it was alleged and proved that defendant had no beneficial interest therein, court properly refused to foreclose lien. *Ehlinger v. Speckels* (Civ. App.) 189 S. W. 348.

In suit to foreclose mechanic's lien based on house-building contract signed by defendant alone, judgment for plaintiff was error where the complaint failed to allege plaintiff's performance of the contract. *Benson v. Ashford* (Civ. App.) 189 S. W. 1098.

**21. Conclusiveness of judgment.**—The holder of a deed of trust subsequent to a vendor's lien who purchased the land on foreclosure of his deed of trust was not concluded by the judgment in a suit to foreclose the lien to which he was not a party. *Standard Paint & Wall Paper Co. v. Rowan* (Civ. App.) 158 S. W. 251.

A decree foreclosing mortgage on land in a suit to which plaintiffs were not parties held not res judicata of their claim to one-half of the land, which claim was not in issue therein. *Ellerd v. Ellison* (Civ. App.) 165 S. W. 876.

Where a husband and wife executed a mortgage of the wife's separate property, a judgment foreclosing such mortgage after the death of the wife was not binding upon the heirs of the wife; they not being parties. *Vanderwolk v. Matthaei* (Civ. App.) 167 S. W. 304.

A judgment foreclosing vendor's lien notes held a conclusive adjudication against plaintiffs' subsequent claim that they were mortgagors of the land and that their conveyance to the maker of the notes was merely to secure a loan. *Sells v. White* (Civ. App.) 175 S. W. 1079.

Judgment in foreclosure suit in which mortgagors and junior mortgagees were joined, distributing proceeds of sale, held res judicata of the correctness of such distribution. *Freeman v. Klaerner* (Civ. App.) 190 S. W. 543.

**22. Revocation of power of sale.**—See notes under art. 3759.

**23. Sales under foreclosure.**—Where, in a lien foreclosure suit, part of property was ordered first sold for protection of third person, and judgment debtor thereafter mortgaged that part to a bank for an unsecured indebtedness and the amount of the judgment which the bank paid, taking a transfer of the judgment, held that the mortgage, being subsequent to the decree, was subordinate to the third person's right to have that part of the land first exhausted before resorting to the other part. *Cole v. Lewis* (Civ. App.) 159 S. W. 180.

Where in foreclosure suit for protection of third person, part of the land was ordered first sold, and thereafter judgment debtor gave a mortgage for an unsecured indebtedness and the amount of the judgment which the mortgagee paid, taking a transfer there-

of, and after debtor's death mortgagee had property sold by administrator for more than the amount of the judgment, held that equity would apply the proceeds in the manner decreed in the foreclosure, and hence the part of the land to be sold last was free from any lien. *Id.*

When a mortgagor makes successive sales of different portions of the mortgaged premises, and subsequent purchasers have either actual or constructive notice of prior sales, equity will require the tracts of land to be sold in the inverse order of their alienation when the mortgage lien is foreclosed. *Powell v. Stephens* (Civ. App.) 163 S. W. 672, judgment modified on rehearing 164 S. W. 1058.

Upon foreclosure of a mortgage upon an entire tract of land, held, that intervener who had acquired vendor's lien notes given by the first purchaser was entitled to demand that the last land sold should be first sold to satisfy the mortgage. *Id.*

When a mortgagor reacquires a portion of the land which he had sold, those who have purchased from him after he sold the land so reacquired have the right to have the reacquired tract first sold in satisfaction of the mortgage. *Id.*

Where the owner of land subject to a mortgage sold part of the tract which was reconveyed to him upon condition that vendor's lien notes be extinguished, the fact that, at the time he agreed to transfer the notes to appellant, the deed was of record and that her money was not used to redeem the notes, held not to affect her right to demand that land subsequently conveyed should first be sold to extinguish a common mortgage. *Id.*

In a suit to foreclose a chattel mortgage, in which a claimant of the property was made a defendant, an action would not lie against a clerk of the court on a judgment directing him to pay over to plaintiff the proceeds of a sale of the property until the issue of ownership as between plaintiff and claimant was determined. *Willis v. Keator* (Civ. App.) 181 S. W. 556.

24. — **Validity.**—Where assignee of judgment foreclosing vendor's lien agreed to release owner and husband from liability, in consideration of husband's agreement not to bid, but subsequently repudiated such agreement, owners held not entitled to have the sale vacated for fraud. *Moore v. Jenkins* (Civ. App.) 168 S. W. 398.

**Art. 2004. [1344] [1343] Judgments against executors, etc.**

Cited, *Dunn v. Epperson* (Civ. App.) 175 S. W. 837; *Lauraine v. Vaughn* (in dissenting opinion) (Civ. App.) 193 S. W. 712.

**Art. 2005. [1345] [1344] Against executors acting independently of probate court.**

Cited, *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

**Art. 2006. [1347] [1346] Against partners when all not sued.**

See art. 1863 and notes.

**Citation against partners.**—Where an action against a partnership and the three members thereof was dismissed as to one partner for failure to procure service, no judgment could be rendered against the firm. *Tramel v. Guaranty State Bank & Trust Co.* (Civ. App.) 176 S. W. 65.

Where action against partnership and members is unqualifiedly dismissed as to a member because not served and insolvent, judgment cannot be against firm, but only members. *Heidelberg Amusement Club v. Mercedes Lumber Co.* (Civ. App.) 180 S. W. 1133.

**Art. 2007. [1348] [1347] Confession of judgment.**

Cited, *Wiggins v. First Nat. Bank of Denton* (Civ. App.) 175 S. W. 735.

**Construction of judgment.**—Where consent judgment provided that trustee might sell lands for best price obtainable within his discretion for part cash, and balance secured by vendor's lien notes, court cannot read into judgment provision for sale at reasonable market value. *Evans v. Williams* (Civ. App.) 194 S. W. 181.

**CHAPTER SIXTEEN**

**REMITTER AND AMENDMENT OF JUDGMENT**

Art.	Art.
2012. Remitter of excess in verdict.	2016. Misrecitals, etc., corrected in vacation or term time in certain cases.
2013. Remitter of excess in judgment in open court.	2017. Correction made in vacation to be certified to clerk, etc.
2014. Remitter in vacation.	2018. Correction or remitter operates to cure errors.
2015. Mistakes in judgments corrected in open court.	

**Article 2012. [1353] [1351] Remitter of excess in verdict.**

**Power of court.**—It is within the power of the trial court to permit a remittitur, rather than grant a new trial. *Texas Bldg. Co. v. Reed* (Civ. App.) 169 S. W. 211.

**Curing excessiveness.**—Error in awarding an agent an excessive judgment for commissions is cured by requiring him to file a remittitur of the excess. *Channell Chemical Co. v. Hall* (Civ. App.) 187 S. W. 704.

**Art. 2013. [1354] [1352] Remitter of excess in judgment in open court.**

**Curing error by remittitur.**—In a servant's action for personal injury, judgment reciting that it appeared from the findings that the court had rendered a double verdict

and plaintiff's remission of all in excess of the amount intended, with a judgment for such amount, held proper. *Texas Bldg. Co. v. Reed* (Civ. App.) 169 S. W. 211.

#### Art. 2014. [1355] [1353] Remitter in vacation.

**Effect of remitter.**—Where, after appeal, appellee remitted damages improperly awarded, the judgment, under this article will be affirmed, though the costs will be taxed against the appellee. *Atchison, T. & S. F. Ry. Co. v. Boyce* (Civ. App.) 171 S. W. 1094.

#### Art. 2015. [1356] [1354] Mistakes in judgments corrected in open court.

**Authority to reform or enter nunc pro tunc judgment.**—While a justice, under Rev. St. 1911, art. 2374, has no authority to grant a new trial after ten days from the judgment, he can by this article correct a mistake in the record of the judgment so as to make it speak the truth. *Dickensheets v. Hudson* (Civ. App.) 167 S. W. 1097.

Where, through mistake, the judgment entered was not in accordance with the agreement for its rendition, and plaintiffs were not guilty of any negligence, they are entitled to have it corrected. *Weir v. W. T. Carter & Bro.* (Civ. App.) 169 S. W. 1113.

Under this article and arts. 1937 and 1938, petitioner held not entitled to the correction of a final judgment entered on a default. *Mallory v. Mantius* (Civ. App.) 174 S. W. 692.

A succeeding judge may make the record speak a fact actually existing in a judicial proceeding, and which should be a part of the record. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

If first entry of judgment was mistake, and was not judgment of court, it was its right and duty to correct entry on minutes to speak truth. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

Purpose of a nunc pro tunc entry is to correctly evidence upon the records some judgment, decree, or order actually made, but not entered of record at proper time. *Finnigan-Brown Co. v. Escobar* (Civ. App.) 192 S. W. 256.

In view of art. 853, and under the inherent power of the court and this article, held, that the court had jurisdiction to render nunc pro tunc a judgment rendered after conviction at a previous term, but erroneously entered. *Bennett v. State* (Cr. App.) 194 S. W. 148.

— **Judgments and mistakes which may or may not be corrected.**—A court has no jurisdiction by order nunc pro tunc at a subsequent term to amend a judgment to include matter which should have been, but was not, passed on in fact at the prior term. *Hamilton v. Joachim* (Civ. App.) 160 S. W. 645.

When an appeal is perfected during a term of the trial court, that court, during its term, can make orders in the case and alter or revise a final judgment from which the appeal was taken, but after appeal from an interlocutory order on an application for a temporary writ of injunction, the trial judge cannot change his order or exercise any jurisdiction whatever over it. *Boynton v. Brown* (Civ. App.) 164 S. W. 897.

Where one of the several defendants, though duly cited, made default, the judgment for plaintiff was properly amended so as to include him though the verdict failed to mention him. *A. J. Birdsong & Son v. Allen* (Civ. App.) 166 S. W. 1177.

In a suit to correct an order entered on the minutes, showing that a motion for new trial was overruled, while in fact it was granted, the court held authorized to grant relief by the entry of a nunc pro tunc order showing the granting of the motion. *Moore v. Chapman* (Civ. App.) 168 S. W. 6.

Court held to have authority to correct its minutes to make judgment dispose of the rights of all parties, as was done by the judgment as actually rendered. *Moore v. Toyah Valley Irr. Co.* (Civ. App.) 179 S. W. 550.

If first entry of judgment was mistake, and was not judgment of court, and there were mistaken recitals of facts as to date of service, the mistake could be corrected. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

Where appeal from judgment entered upon answers of the jury to special issues was dismissed for want of finality in the judgment, the trial court upon return of the case could not enter nunc pro tunc a judgment varying materially from the prior judgment. *Finnigan-Brown Co. v. Escobar* (Civ. App.) 192 S. W. 256.

**Evidence justifying correction.**—Entry of a judgment nunc pro tunc is not authorized, unless there is an affirmative showing that the court actually rendered the decision which it is sought by the nunc pro tunc entry to formally enter on the records of the court. *Hamilton v. Joachim* (Civ. App.) 160 S. W. 645.

While a decree can only be modified on record evidence, such as a verdict or written instruments contained in the record of the suit in which the decree was rendered, the allegations of the petition as set out in a motion to correct a decree so as to make it adjudicate that plaintiff recover the entire property sued for instead of a half interest in it, taken with the docket entry and judgment, held to furnish sufficient record evidence to authorize the correction of the decree as prayed. *Yarbrough v. Etheredge* (Civ. App.) 163 S. W. 998.

In a suit to correct the entry of a judgment by agreement, parol evidence is admissible to show that the judgment entered by mistake did not comply with the agreement. *Weir v. W. T. Carter & Bro.* (Civ. App.) 169 S. W. 1113.

A party seeking to correct the record of a judgment by proceedings authorized by this article has the burden of showing that the record does not speak the truth. *Mallory v. Mantius* (Civ. App.) 174 S. W. 692.

A trial court may, after adjournment for the term, make its records speak the truth, by order nunc pro tunc or otherwise, though no written memorandum of the proceedings can be found. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

If there is simply a general verdict in a case, with failure to announce a judgment or a correct judgment thereon, such verdict alone authorizes the entry of a nunc pro tunc judgment, but entry of a nunc pro tunc judgment, without evidence showing the same judgment had been in fact previously rendered, and with refusal of evidence offered to



show that the proposed entry evidenced a judgment which in fact was not rendered, was error. *Finnigan-Brown Co. v. Escobar* (Civ. App.) 192 S. W. 256.

A judgment nunc pro tunc should not be entered unless some proper and sufficient evidence be adduced to show that the court had in fact announced or rendered the judgment which it is the purpose of the nunc pro tunc entry to correctly evidence. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 193 S. W. 1087.

**Time for application.**—Where defendant in a suit by a tenant in common for contribution was found to have no interest in the land, but his name was omitted from the judgment of dismissal by mistake, the district court had the right, at any time before final judgment in this court, to correct the mistake and render such judgment nunc pro tunc as should have been rendered. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

Under this article and arts. 2016 and 2373, a justice of the peace could amend the entry of a judgment so as to show the disposition that was made of the cause as to two parties not mentioned therein, though an appeal was pending in the county court. *Thompson v. Field* (Civ. App.) 164 S. W. 1115.

Under this article and art. 2016, held that, where judgment as entered did not dispose of rights of certain parties, correction to conform to judgment rendered could not be made in vacation. *Moore v. Toyah Valley Irr. Co.* (Civ. App.) 179 S. W. 550.

By virtue of continuing power of court over its records, it may correct them and cause entry of judgment to speak truth at time subsequent to term at which it was rendered. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

### **Art. 2016. [1357] [1355] Misrecitals, etc., corrected in vacation or term time, in certain cases.**

Cited, *Yarbrough v. Etheredge* (Civ. App.) 163 S. W. 998.

**Amendments allowable.**—Under the direct provisions of this article, a judgment following the verdict may be amended in case of miscalculation, where it can be done by reference to the record. *A. J. Birdsong & Son v. Allen* (Civ. App.) 166 S. W. 1177.

Judgment for plaintiffs merely may be corrected at a subsequent term to insert names of defendants. *International & G. N. Ry. Co. v. Dawson* (Civ. App.) 193 S. W. 1145.

**Amendments in vacation.**—Under this article and art. 2015, held that, where judgment as entered did not dispose of rights of certain parties, correction to conform to judgment rendered could not be made in vacation. *Moore v. Toyah Valley Irr. Co.* (Civ. App.) 179 S. W. 550.

**Pending appeal.**—Under this article and arts. 2015 and 2373, a justice of the peace could amend the entry of a judgment so as to show the disposition that was made of the cause as to two parties not mentioned therein, though an appeal was pending in the county court. *Thompson v. Field* (Civ. App.) 164 S. W. 1115.

**Appellate courts, amendments by.**—Though judgment was reformed as to computation as it could have been corrected in the court below under this article and art. 2017, costs will be taxed against plaintiff in error, who was not otherwise successful. *Raike v. Clayton* (Civ. App.) 175 S. W. 498.

**Attack on or appeal from corrected judgment.**—Action of the trial court as to its own records, not open to review by proceedings to correct the record incident to appeal or writ of error, can be reached by direct proceedings in the trial court, subject to appeal. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

In absence of affirmative showing on face of proceedings that there was no notice to defendant of motion to amend original judgment to correct mistake in entry, in garnishee's collateral attack on such judgment court is not authorized to hold it void. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

### **Art. 2017. [1358] [1356] Correction made in vacation to be certified to clerk, etc.**

Cited, *Moore v. Toyah Valley Irr. Co.* (Civ. App.) 179 S. W. 550.

**Reformation by appellate court.**—Though judgment was reformed as to computation as it could have been corrected in the court below under this article and art. 2016, costs will be taxed against plaintiff in error, who was not otherwise successful. *Raike v. Clayton* (Civ. App.) 175 S. W. 498.

### **Art. 2018. [1359] [1357] Correction or remitter operates to cure error.**

**Cure by remitter.**—Any impropriety in the jury in striking an average amount by dividing the aggregate of the individual amounts favored by each juror and taking the quotient, \$13,600, and in afterwards agreeing by a majority vote upon a \$14,000 verdict, held cured by accepting plaintiff's proffered remittitur of \$1,000. *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145.

Excessiveness in verdict held not cured by remittitur of \$1,500 required by trial court, where the excess was so great as to indicate that it was the result of passion or prejudice. *Galveston, H. & S. A. Ry. Co. v. Craighead* (Civ. App.) 175 S. W. 1199, denying rehearing 175 S. W. 453.

In an action for breach of marriage promise, requiring a remittitur of the amount found by the jury as special damages held not to cure the error in an instruction authorizing recovery of double damages for the seduction of plaintiff. *Huggins v. Carey* (Sup.) 194 S. W. 133.

## CHAPTER SEVENTEEN

## NEW TRIALS AND ARREST OF JUDGMENT

Art.		Art.	
2019.	New trials may be granted.	2023.	Time of making motion.
2020.	Motion for, requisites of.	2025.	Determined when.
2621.	Misconduct of jury, etc., as ground of motion; evidence.	2026.	Bill of review in suits by publication.
2022.	New trials granted where damages too small, etc.		

**Article 2019. [1370] [1368] New trials, etc., may be granted.**Cited, *Rogers v. Dickson* (Civ. App.) 176 S. W. 865.

## II. GROUNDS FOR NEW TRIAL

8. **In general.**—A judgment rendered against a lunatic by a court, in ignorance of his insanity may be set aside either by an action brought for that purpose, or by an application for a new trial. *Pyle v. Pyle* (Civ. App.) 159 S. W. 488.

An objection that the petition in an action for conversion of mortgaged cotton did not allege the value of the cotton could not be raised for the first time on a motion for a new trial. *Houssels v. Coe & Hampton* (Civ. App.) 159 S. W. 864.

9. **Discretion of court.**—Where the trial was by the court, it has more latitude in considering a new trial for newly discovered evidence than it would have had in a jury case. *House v. Filgo* (Civ. App.) 163 S. W. 373.

The power of the trial court to prevent probable wrong by granting new trial should be freely exercised. *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

A motion for a new trial on the ground of newly discovered evidence is addressed to the trial judge's sound discretion. *Feagins v. Texas Machinery & Supply Co.* (Civ. App.) 185 S. W. 961.

10. **Absence of party.**—Where the lower court, in overruling defendant's motion for a new trial, must have held defendant negligent in failing to be present at the trial, and there is nothing to show an abuse of discretion, the case will not be reversed for that reason. *First Nat. Bank v. Thurmond* (Civ. App.) 159 S. W. 164.

Denial of new trial for the absence of defendant, who failed to show why he did not notify his counsel or the court of his absence, though he knew that his case would be called, held within the court's discretion. *Muldoon v. J. E. Bray Land Co.* (Civ. App.) 171 S. W. 1027.

Appellant who defaulted, but who had engaged counsel to represent him, and whose son was very sick on the day of the trial, held entitled to a new trial on proof of a meritorious defense. *Coward v. Sutfin* (Civ. App.) 185 S. W. 378.

12. **Absence of witness.**—Defendant's motion for new trial on account of its inability to obtain the testimony of witnesses summoned by plaintiff, and excused in good faith by him, who remained within reach by automobile, but to secure whose attendance defendant asked no process or continuance or delay of trial, held properly denied. *Texas City Terminal Co. v. Petitfils* (Civ. App.) 182 S. W. 19.

13. **Misconduct of parties or others.**—In a switchman's action for injuries, where his deposition was on file, it was not erroneous to bring him into courtroom upon a stretcher without showing that he could only reach the courtroom that way, since he had a right to use the deposition or to testify as a witness. *El Paso & S. W. R. Co. of Texas v. Ankenbauer* (Civ. App.) 175 S. W. 1090.

15. **Misconduct of trial judge.**—Where appellant's counsel was present and made no objection to erroneous remarks of the court in retiring the jury after its request to be discharged, his objection to the error came too late in motion for new trial made a week later. *Hunter v. Hunter* (Civ. App.) 187 S. W. 1049.

20. **Surprise in respect to evidence.**—In a suit upon a note wherein an alleged forged receipt was introduced, a new trial held properly granted for surprise, although the evidence was cumulative. *Horne v. Stockton* (Civ. App.) 178 S. W. 962.

A party, having been served with an abstract which showed a deed to the other party to part of the land in controversy in trespass to try title, could not rely thereon where the correct and complete deed was recorded, and, when he did rely thereon, was not entitled to new trial on the ground of surprise when the correct deed was introduced. *Houston Oil Co. of Texas v. Wm. M. Rice Institute* (Civ. App.) 194 S. W. 413.

22. **Insufficiency of evidence.**—If the verdict is not supported by evidence, or is against the great preponderance of the evidence, it should grant a new trial. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

A verdict unsupported by evidence should be set aside on motion for new trial. *Bender v. Bender* (Civ. App.) 187 S. W. 735.

New trial for fraudulent statements in insurance application as to consulting a physician held properly refused. *Brotherhood of American Yeomen v. Hickey* (Civ. App.) 191 S. W. 162.

Where the court considers the jury's findings erroneous, he may grant a new trial. *Ketchum v. Boggs* (Civ. App.) 194 S. W. 201.

25. **Denial of continuance.**—In action by insurance agent for bonus on business written, where defendant company had duplicate set of books of agency in its home office, refusal of postponement to enable company to further investigate agency's books was not ground for new trial. *Reliance Life Ins. Co. v. Beaton* (Civ. App.) 187 S. W. 743.

33. **Newly discovered evidence.**—Where the maker of notes given to a loan company, which advanced a part of the price of certain land, claimed a shortage as a

partial failure of consideration, newly discovered evidence of a division of commissions between the vendor's broker and one who secured the money from the loan company was insufficient to entitle the vendee to a new trial after verdict for the loan company on the note. *Roberts v. Prather* (Civ. App.) 158 S. W. 789.

In a personal injury action brought by a switchman against a railroad company, a new trial cannot be granted on defendant's motion for newly discovered testimony of the yardmaster, who was with the towerman at the time of his alleged negligence in sending a switch engine into an open switch. *Houston & T. C. R. Co. v. Barlett* (Civ. App.) 162 S. W. 1039.

Discovery after trial that a surveyor, who testified for the plaintiff, would testify that he had found the trees of a certain corner not in controversy to be as claimed by the defendant held not to require the granting of a new trial to the defendant, where the testimony was not given at the trial because of the defendant's failure to ask for it. *Moore v. Lehmann* (Civ. App.) 165 S. W. 81.

The trial court in condemnation proceedings properly refused to grant a new trial on the ground of newly discovered evidence; no legal excuse being presented why such evidence was not offered at the trial. *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387.

In an action against a city for compensation for the furnishing of water, held that the city was not entitled to a new trial for newly discovered evidence. *City of Comanche v. Hoff & Harris* (Civ. App.) 170 S. W. 135.

Certain newly discovered evidence held not to authorize a new trial. *Id.*

Where it was not shown on appeal that newly discovered evidence came within the rules authorizing the court to grant a new trial on account thereof, its refusal to grant a new trial was not an abuse of its discretion. *Hudgins v. Hammers* (Civ. App.) 178 S. W. 986.

In coal miner's action for injuries, refusal of new trial on the ground of newly discovered evidence held not an abuse of the court's discretion. *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202.

Where supporting affidavits excluded negligence on part of moving party, held, that new trial should have been granted for newly discovered testimony of apparently disinterested witness. *Lockney State Bank v. Bolin* (Civ. App.) 184 S. W. 553.

35. — **Materiality and admissibility.**—Evidence held material within the rule as to newly discovered evidence. *Harlan v. Texas Fuel & Supply Co.* (Civ. App.) 160 S. W. 1142.

Alleged newly discovered evidence, which was immaterial, would not authorize a new trial. *Vacarezza v. Realty Investment Co.* (Civ. App.) 165 S. W. 516.

In an action on an alleged promise of a landlord to pay for groceries furnished his tenant, newly discovered evidence held not so material to the issue, though tending to discredit plaintiff's testimony, as to render the refusal of a motion for new trial reversible. *Chilson v. Oheim* (Civ. App.) 171 S. W. 1074.

Newly discovered evidence, general in its character and relating wholly to an immaterial issue, did not require granting of new trial. *Flynn v. J. M. Radford Grocery Co.* (Civ. App.) 174 S. W. 902.

A new trial will be granted on newly discovered evidence, although the moving party knew at the time of the trial that he could prove the facts set out in his motion by the witnesses named, where the materiality of such testimony was not known to him until the trial was in progress. *Horne v. Stockton* (Civ. App.) 173 S. W. 962.

New trial cannot be had on the ground of newly discovered testimony, where the testimony relied upon is immaterial and the same facts had already been testified to, but it must appear that the evidence would, on another trial, produce a different result. *Bain v. Polasek* (Civ. App.) 184 S. W. 279.

Where plaintiff testified that his injury resulted when his horse kicked, being frightened by defendant's car, newly discovered evidence that the horse began to plunge and kick when the breaching fell on his legs before the car approached, is material so as to warrant new trial, if diligence is shown. *Tarrant County Traction Co. v. Bradshaw* (Civ. App.) 185 S. W. 951.

It is not an abuse of discretion to refuse new trial in action to try title to wife's separate property, because of newly discovered evidence of admissions made by her husband, not in her presence, after the conveyance under which appellants claim. *Qualls v. Fowler* (Civ. App.) 186 S. W. 256.

The trial court correctly denied a motion for new trial based upon an affidavit that the lever to a stump puller, for whose purchase price the note sued upon was given, was about 20 feet long, instead of 18 feet, as stated at the trial. *Jenkins v. Morgan* (Civ. App.) 187 S. W. 1091.

A new trial will not be granted for newly discovered evidence tending to establish agreement which was unenforceable for want of consideration. *Boerger v. Vandegrift* (Civ. App.) 188 S. W. 948.

36. — **Cumulative evidence.**—Ordinarily newly discovered cumulative evidence will not require new trial. *Qualls v. Fowler* (Civ. App.) 186 S. W. 256; *Missouri, K. & T. Ry. Co. of Texas v. Dellmon* (Civ. App.) 171 S. W. 799; *Grayson v. Boyd* (Civ. App.) 185 S. W. 651.

Evidence of a subsequent judgment covering a phase of the litigation held newly discovered evidence entitling him to a new trial, not being cumulative of evidence at trial as to materials furnished by the materialman. *Harlan v. Texas Fuel & Supply Co.* (Civ. App.) 160 S. W. 1142.

Denial of a motion for a new trial for newly discovered evidence held not shown to have been an abuse of the trial court's discretion; the evidence being only corroborative and diligence not being shown. *Deggs v. Loving* (Civ. App.) 162 S. W. 9.

A new trial will not be granted for newly discovered evidence which is cumulative in its character, and which would probably not have changed the result. *Houston & T. C. R. Co. v. Barlett* (Civ. App.) 162 S. W. 1039.

Refusal of new trial for newly discovered, cumulative evidence held not an abuse of discretion. *Garrett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 172 S. W. 187.

Newly discovered evidence of a witness of an accident, who was more advantageous-

ly placed to see it, held sufficient on which to grant a new trial, though there was other evidence relating to the same matter. *Tarrant County Traction Co. v. Bradshaw* (Civ. App.) 185 S. W. 951.

37. — **Impeachment of witness.**—Ordinarily newly discovered evidence, designed merely for impeachment, will not require new trial. *Qualls v. Fowler* (Civ. App.) 186 S. W. 256; *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

Where, in an action for realty claimed by adverse possession, plaintiff's manager testified that, when defendant told him that he would not claim the land, H. was present, alleged newly discovered evidence that, if any such conversation occurred between the manager and defendant, H. did not hear it held not ground for a new trial. *Allison v. Arlington Heights Realty Co.* (Civ. App.) 164 S. W. 1033.

In an action to try title by wife, with her husband, against vendees claiming more land conveyed than grantors intended, admissions by the husband, not in wife's presence, after the conveyance, as to the acreage deemed conveyed, would merely tend to discredit the husband. *Qualls v. Fowler* (Civ. App.) 186 S. W. 256.

Ordinarily, alleged newly discovered testimony of a cumulative and impeaching character cannot form the basis of a motion for new trial. *Kersh v. Matthews* (Civ. App.) 186 S. W. 783.

In an action for breach of marriage promise, newly discovered evidence, which tended to impeach plaintiff's testimony but also to establish that plaintiff had not given birth to a child, held sufficient to require the granting of a new trial. *Huggins v. Carey* (Sup.) 194 S. W. 133.

39. — **Credibility and probable effect.**—It was not an abuse of discretion to deny a motion for new trial for newly discovered evidence where it did not appear that the newly discovered evidence would have produced a different result. *House v. Filgo* (Civ. App.) 163 S. W. 373.

A new trial on the ground of newly discovered evidence will not be granted where such evidence could not change the result. *First Texas State Ins. Co. v. Hare* (Civ. App.) 180 S. W. 282.

In action for delay in delivering telegram, newly discovered evidence that time-table admitted in evidence was not in force was not ground for new trial, where plaintiff could have taken an earlier train, and did reach destination in time for funeral services shown to have taken place. *Mansell v. Western Union Telegraph Co.* (Civ. App.) 182 S. W. 1178.

New trial will not be granted for newly discovered evidence, unless it is likely that the evidence would produce a different result upon a new trial. *Brady v. Cope* (Civ. App.) 187 S. W. 678.

40. **Harmless error.**—In action on accident policy, where evidence as to cause of death was conflicting, though letters in evidence contained expressions as to the cause of death, and as to sending a small draft in full for all claims which were not strictly admissible, held, that such expressions were not sufficiently prejudicial to require a new trial. *Commonwealth Bonding & Casualty Co. v. Hendricks* (Civ. App.) 168 S. W. 1007.

### III. RIGHT TO NEW TRIAL AND PREREQUISITES TO GRANTING THEREOF

42. **Estoppel.**—The sufficiency of the evidence to warrant the submission of the question of negligence to the jury cannot be questioned on motion for new trial, where the defendant requested a charge defining negligence at the trial of the case. *Bee Candy Mfg. Co. v. Maibaum* (Civ. App.) 158 S. W. 575.

After judgment in accordance with verdict, losing party is not precluded from moving for new trial on ground of the insufficiency of evidence because previously to verdict he made an unsuccessful attempt to have a judgment rendered contrary to it. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

43. **Diligence.**—Where a deposition had long been on file and disclosed the names of the witnesses whose affidavits were relied upon to show false testimony in the depositions, a motion for a new trial for newly discovered evidence was properly denied for want of diligence. *Ft. Worth & R. G. Ry. Co. v. Keith* (Civ. App.) 163 S. W. 142.

Denial of a new trial for newly discovered evidence held not an abuse of discretion, where it did not appear that it could not have been found before by ordinary diligence. *Schramm v. P. J. Owens Lumber Co.* (Civ. App.) 163 S. W. 1016.

New trial for newly discovered evidence, consisting of testimony of witness, held properly denied, where it did not appear what effort the moving party made to find the witness, or that he could not have found him before the trial if he had tried. *Id.*

A motion for new trial for alleged newly discovered evidence was properly denied, where defendant knew of the evidence before the trial but did not produce it, and his only excuse was that it "slipped" his memory. *Clemmons v. Johnson* (Civ. App.) 167 S. W. 1103.

Defendant is not entitled to a new trial on the ground of newly discovered evidence, a deed of trust, of which the circumstances put him on inquiry. *Ablon v. Wheeler & Motter Mercantile Co.* (Civ. App.) 179 S. W. 527.

This article and art. 2023, requiring motions to set aside judgments and for new trials to be made within two days after rendition of judgments, are directory only, and it is within the court's discretion to grant a motion thereafter. *First Nat. Bank of Ft. Worth v. Henwood* (Civ. App.) 183 S. W. 5.

New trial on the ground of newly discovered testimony held properly denied for want of due diligence to procure the testimony for the trial. *Kansas City, M. & O. Ry. Co. v. Cole* (Civ. App.) 183 S. W. 137.

New trial will not be granted for newly discovered evidence except upon showing of good reason why the evidence was not discovered prior to trial and produced thereon. *Brady v. Cope* (Civ. App.) 187 S. W. 678.

Where the materiality of facts could not be anticipated before the trial because of change of claim of the successful party after the trial began, newly discovered evidence

of such facts entitled the unsuccessful party to new trial. *Delano v. Delano* (Civ. App.) 189 S. W. 972.

In action against railroad for damages to automobile in crossing collision, held, that for want of diligence trial court properly overruled defendant's motion for new trial for newly discovered evidence. *Texas & N. O. R. Co. v. Cummins* (Civ. App.) 193 S. W. 161.

#### V. REVIEW BY APPELLATE COURTS

**55. Review of discretion of trial court.**—The refusal of new trial for newly discovered evidence will not be reversed, unless an abuse of discretion is shown. *Kersh v. Matthews* (Civ. App.) 186 S. W. 783; *House v. Filgo* (Civ. App.) 163 S. W. 373.

The trial judge's action on a motion for a new trial for newly discovered evidence will not be reviewed unless it affirmatively appears that he has abused his discretion. *Feagins v. Texas Machinery & Supply Co.* (Civ. App.) 185 S. W. 961.

Where the evidence was conflicting as to whether the jury were influenced, by improper motives, a finding by the trial court that they were not, is conclusive on appeal. *San Antonio, U. & G. R. Co. v. Hagen* (Civ. App.) 188 S. W. 954.

**56. Necessity of motion for new trial.**—Under Rev. Civ. St. 1911, art. 4645, relating to appeals from decrees granting temporary injunctions, a motion for a new trial is not a necessary prerequisite to such an appeal. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

Court of Civil Appeals Rules 24, 25 (142 S. W. xii), providing that a ground of error not distinctly set forth in the motion for new trial will be deemed waived unless fundamental, and District and County Courts Rule 71a (145 S. W. vii), requiring a motion for new trial except where the statute does not require it, require a motion for new trial in all cases except where the statute does not require it. *Cooney v. Dandridge* (Civ. App.) 158 S. W. 177.

A party could not complain of the trial of a cause at the term to which it was continued, although the time of holding such term was changed without his knowledge, where he did not move for a new trial, or to set aside the judgment on a showing of the reasons for his absence, and that his defense was meritorious. *Guerra v. Guerra* (Civ. App.) 158 S. W. 191.

Under court rules 24 and 25 (142 S. W. xii) and 71a (145 S. W. vii), requiring specification of errors and motion for new trial to perfect an appeal, the filing of such a motion is a prerequisite to the consideration of assignments of error complaining that the judgment is contrary to the law and the evidence. *Moore v. Moore* (Civ. App.) 159 S. W. 896.

In the absence of a statement of fact, bills of exception, and motion for new trial, a judgment will be affirmed, unless fundamental error appears on the face of the record proper. *National Aeroplane Co. v. McCormick* (Civ. App.) 161 S. W. 375.

The fundamental objection that a judgment does not determine the issues of the suit is not waived by failure to raise it on motion for new trial. *Campbell Banking Co. v. Hamilton* (Civ. App.) 173 S. W. 1012.

Notice of appeal in the court below and a motion for a new trial therein are not required, where the case is brought up by petition and writ of error. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

If a judgment could not properly have been rendered as it was rendered, the error was fundamental, and could not be waived by failure to assign it as error in a motion for new trial. *Hayes v. G. A. Stowers Furniture Co.* (Civ. App.) 180 S. W. 149.

In an action for specific performance, where the pleadings alleged a written contract, submission to the jury of whether plaintiff was entitled to recover on a verbal contract is fundamental error, which can be reviewed, though not set up in the motion for new trial. *Loop Land & Irrigation Co. v. Ogburn* (Civ. App.) 180 S. W. 914.

Motion for new trial held not necessary to review fundamental errors. *Smith v. Texas & P. Ry. Co.* (Civ. App.) 180 S. W. 920.

Where the record contained no assignment of error, motion for new trial, or bill of exceptions, and no fundamental error is suggested or observed, the judgment will be affirmed. *Simpson v. International & G. N. R. Co.* (Civ. App.) 183 S. W. 10.

Sufficiency of service will not be considered on appeal where not raised in the motion to set aside a default nor in the answer. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

Plea of privilege to be sued in county of defendant's residence held not waived by failure in motion for new trial to reserve the right to insist on such plea if the motion were granted. *Johnson v. Waggoner* (Civ. App.) 190 S. W. 835.

Errors not brought to attention of trial court in motion for new trial cannot be considered, unless they are fundamental errors apparent from record. *Vaky v. Phelps* (Civ. App.) 194 S. W. 601; see, also, notes under arts. 1523, 1524, 1612, 1991, 2075.

**57. — Trial by court.**—A motion for a new trial is not a prerequisite to an appeal, where the case was tried by the court and conclusions of fact and law were prepared and filed. *Moore v. Rabb* (Civ. App.) 159 S. W. 85; *Cooney v. Dandridge* (Civ. App.) 158 S. W. 178.

Under Rev. Civ. St. 1911, art. 2023, and District Court Rule 71a (145 S. W. vii), where the trial court filed its conclusions of fact and law in term time, and in time to permit appellant to allege error therein by a motion for a new trial, his failure to include such objections in his motion was fatal to their review. *Head v. Altman* (Civ. App.) 159 S. W. 135.

Under Acts 33d Leg. c. 136 (Vernon's Sayles' Ann. Civ. St. 1914, art. 1612), requiring assignments of error to be filed, and making the assignments of error in a motion for a new trial the assignments on appeal, held, that where findings of fact and conclusions of law were not filed by the trial court, and plaintiff in error did not file a motion for a new trial therein, there were no assignments of error which could be considered. *Pollard v. Allen & Sims* (Civ. App.) 171 S. W. 302.

Rule 24 of the Supreme Court (142 S. W. xii) must be construed together with other court rules, including 71a (145 S. W. vii), and when so construed does not require a mo-

tion for a new trial in cases tried to the court, nor does the right to have an appeal considered in such cases, without filing a notice for new trial, depend upon filing by the trial judge of his conclusions of fact or law. *Craver v. Greer* (Sup.) 179 S. W. 862, answering certified questions (Civ. App.) 178 S. W. 699, and answer conformed to (Civ. App.) 182 S. W. 368.

Where a case is tried without a jury, motion for new trial is not prerequisite to perfection of appeal. *Rockdale Mercantile Co. v. Brown Shoe Co.* (Civ. App.) 184 S. W. 281.

**58. — Sufficiency and scope of motion.**—Under District Court Rule 71a (145 S. W. vii), requiring a motion for a new trial as a prerequisite to an appeal or a writ of error, an error will not be reviewed where it is not set forth in the motion, unless it arose after it was too late to file the motion. *Head v. Altman* (Civ. App.) 159 S. W. 135.

The purpose of Courts of Civil Appeals rules 24 and 25 (142 S. W. xii) was to confine appellant to the grounds of error set up in the motion for new trial. *Sallaway v. Grand Lodge, A. O. U. W.* (Civ. App.) 164 S. W. 1041.

**60. — Review of rulings on pleadings.**—A motion for a new trial is not necessary to present error in the sustaining of exceptions to the answer. *May v. Waniger* (Civ. App.) 164 S. W. 1106.

The objection that a divorce petition was insufficient for failure to deny charges of infidelity alleged will not be considered on appeal, where not raised either in pleadings or motion for new trial. *Hill v. Hill* (Civ. App.) 193 S. W. 726.

**61. — Review of rulings on admissibility of evidence.**—Objection to description in power of attorney offered in evidence, not presented in motion for new trial, cannot be considered on appeal. *Keppeler v. Texas Lumber Mfg. Co.* (Civ. App.) 184 S. W. 353.

**63. — Review of rulings on instructions.**—Under arts. 2061, 2062, providing that error in instructions shall be regarded as excepted to in all cases, and that, where error appears otherwise of record, a bill of exceptions is not necessary, the Court of Civil Appeals rule 24 (142 S. W. xii), providing that error not set forth in the motion for new trial should be considered waived, does not require that a ruling in giving or refusing instructions be included in the motion for new trial. *Brewer v. A. M. Blythe & Co.* (Civ. App.) 158 S. W. 786; *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied, 106 Tex. 160, 160 S. W. 471.

A ruling giving or refusing instructions need not be included in the motion for new trial to preserve the ruling for review. *Lee v. Moore* (Civ. App.) 162 S. W. 437; *Houston Oil Co. of Texas v. Drumwright* (Civ. App.) 162 S. W. 1011.

Plaintiff cannot complain on appeal of a special charge given for defendant, where it was not excepted to or assigned as error in the motion for new trial. *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

Where no objections are urged against an instruction when it is given, or on motion for new trial, its propriety will not be reviewed on appeal. *Witt v. Young* (Civ. App.) 194 S. W. 1019.

**64. — Review of sufficiency of evidence and verdict on findings.**—Where a party desires review of the judge's conclusion, he should call attention to alleged insufficiency of evidence in a motion for new trial. *North American Ins. Co. v. Jenkins* (Civ. App.) 184 S. W. 307.

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1990, providing for entry of judgment on special verdicts, article 1991, authorizing appeals without a statement of facts upon noting exceptions on the record in the judgment entry, and Supreme Court rule 71a (145 S. W. vii), requiring motions for new trial except where not required by statute, a motion for new trial is unnecessary on appeal from judgment entered on a special jury verdict. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

**65. — Review of amount of recovery and the awarding of costs.**—Error in rendering judgment for the purchaser in an executory contract for the difference between the contract price and the market value, on failure of title is reviewable without motion for new trial. *Yzaguirre v. Garcia* (Civ. App.) 172 S. W. 139.

Where the pleadings allege a cause of action justifying judgment for some amount, the fact that the judgment was for an amount greater or less than facts required, or was rendered for that sum because of improper evidence, presents no fundamental error which would warrant a reversal, in absence of specifications of error in motion for new trial. *Levy v. Engle Bros. Co.* (Civ. App.) 192 S. W. 548.

**66. Exceptions and objection in trial court.**—The objection that the statement of a newly discovered witness attached to a motion for new trial was acknowledged, but not sworn to, which was not raised in the trial court or in the brief in the Court of Appeals, cannot be raised in Supreme Court. *Huggins v. Carey* (Sup.) 194 S. W. 133.

## VI. OPENING DEFAULT JUDGMENTS

**68. Right to vacation in general.**—To justify the court in setting aside a judgment by default, the defendant's motion therefor must negative the want of diligence on its part, and show that he had a good defense to plaintiff's demand. *Order of Aztecs v. Noble* (Civ. App.) 174 S. W. 623.

A default judgment, reciting that there was proof of the matters alleged in plaintiff's petition, without any record showing that it was rendered without proof thereof, will not be set aside as rendered without proof. *Id.*

Where trial was not actually delayed, a default taken for defendant's failure to file its answer within time should be set aside; defendant's counsel having made an effort to have the answer filed, though the diligence was very slight. *International Travelers' Ass'n v. Peterson* (Civ. App.) 183 S. W. 1196.

Motion to set aside default judgment by defendants, arriving at court a few minutes after judgment was entered, held to show diligence, and hence motion should have been granted. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

A petition to open default stating that defendant held a release of plaintiff's claim, and that in telephone conversation with parties claiming to be attorneys of plaintiff they

stated the case would go no further, held good against a general demurrer. *Keller v. Young* (Civ. App.) 186 S. W. 405.

A judgment by default when an answer was on file will not be set aside, where the defendant did not call the trial court's attention to the answer or move to set the judgment aside during the term at which it was rendered. *Wood v. Love* (Civ. App.) 190 S. W. 235.

A default judgment cannot be set aside for lack of proper service if a person of ordinary prudence would have discovered the judgment in time to have filed a motion for new trial during the same term of court. *Kimmell v. Edwards* (Civ. App.) 193 S. W. 363.

Default judgment will not be disturbed unless clearly shown that a party has been prevented by fraud, accident, or the opposite party's acts from making a valid defense. *Martin v. Clements* (Civ. App.) 193 S. W. 437.

**70. Discretion of court and review.**—Refusal to set aside a default judgment on the ground of the absence of defendant's attorney held within the court's discretion. *Commonwealth Bonding & Casualty Ins. Co. v. Stearns* (Civ. App.) 182 S. W. 1197.

Setting aside a judgment by default is largely within the discretion of the court, but an appellate court will revise exercise of court's discretion when it is clear it has been abused, although a stronger case, showing abuse of discretion, is required for reversal than where trial on merits has been denied. *Combination Fountain Co. v. Rogers* (Civ. App.) 186 S. W. 407.

**71. Excuses for default.**—A default judgment cannot be set aside unless there is a good excuse for failure to answer at the proper time. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

A corporation, seeking to vacate a default judgment rendered against it, held not to have excused its failure to present its defense in time. *Id.*

Where defendants were induced not to appear by the misstatement of their attorneys that the case was settled and either had or would be dismissed, such misrepresentation, whether due to mistake or fraud, was not mere negligence on the part of the attorneys, but constituted fraud in law entitling defendants to have a default judgment entered against them set aside in equity, and where, at the appearance term in an action against nonresidents, plaintiff changed the proceedings from one in personam to an action in rem by attaching land within the court's jurisdiction, and at the appearance term took judgment by default without notice, defendants were relieved of the imputation of negligence in permitting such default. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

Evidence of a statement of the district judge to one of the complainants held not to justify complainants in refusing to come to court in response to the summons of their counsel so as to justify the vacation of a default judgment in equity. *Irvin v. Johnson* (Civ. App.) 170 S. W. 1059.

In a suit to set aside a default judgment, any evidence having a tendency to establish mental weakness on complainant's part such as would excuse his failure to appear at the time the case was called was admissible. *Id.*

A defendant cannot procure the setting aside of a default judgment for failure of his attorney to perform the services for which he was employed. *Shipp v. Anderson* (Civ. App.) 173 S. W. 598.

Where defendants not only showed a meritorious defense, but offered an excuse for default in filing their answer, the default should be set aside and a new trial granted, where they agreed to go to trial at once. *R. R. Dancy & Co. v. Rosenberg* (Civ. App.) 174 S. W. 831.

Absence of defendants' counsel at the time he had requested trial, by reason of engagement in unfinished case, held excusable, so that denial of new trial on judgment by default for adverse party was error. *Hovey v. Halsell-Arledge Cattle Co.* (Civ. App.) 176 S. W. 897.

On motion for new trial on ground of absence of defendant's counsel when case was called for trial as agreed, held, that the absence was excusable and to entitle defendant to new trial after default judgment. *Kansas City, M. & O. Ry. Co. of Texas v. Imboden* (Civ. App.) 176 S. W. 900.

Where no legal service is had upon defendants, a default judgment may be set aside without showing a sufficient excuse for failure to appear. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

Where a default judgment which is not void is sought to be vacated, an excuse for failure to answer on the original suit must be shown. *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

Whenever a plaintiff or his attorney, by an act or agreement, causes defendant to relax diligence, which is otherwise required, the failure of defendant to present a defense cannot be urged as a sufficient reason for denying opening of judgment entered upon such default. *Keller v. Young* (Civ. App.) 186 S. W. 405.

Trial court did not abuse discretion in vacating default judgment against defendant, taken because an attorney requested to represent him, failed to understand the request. *Combination Fountain Co. v. Rogers* (Civ. App.) 186 S. W. 407.

Where defendant on account of misunderstanding with his attorney and owing to father's fatal illness was defaulted, a new trial was properly refused; no fraud or undue advantage being shown. *Martin v. Clements* (Civ. App.) 193 S. W. 437.

**72. Meritorious cause of action or defense.**—A default judgment will not be set aside unless there is a meritorious defense. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

On direct attack of a default judgment, as based on a defective citation, defendants need not allege the nature of their defense to the action; the rule of meritorious defense being confined to collateral attacks. *McCaulley v. Western Nat. Bank* (Civ. App.) 173 S. W. 1000.

Denial of motion to vacate default judgment not void on the face of the record, which did not show diligence and a meritorious defense, was proper. *Western Lumber Co. v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 180 S. W. 644.

To set aside a default judgment the motion must show a meritorious defense as well as a sufficient excuse for failure to appear and answer. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

Where no legal service is had upon defendants, a default judgment may be set aside without showing a meritorious defense. *Id.*

Where a default judgment which is not void is sought to be vacated, facts showing a meritorious defense must be shown. *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

#### VII. OPENING AND VACATING JUDGMENTS

**74. Authority of court.**—The trial court may during term time set aside a decree of divorce and grant a new trial. *Linxwiler v. Linxwiler* (Civ. App.) 175 S. W. 1128.

A judgment being void, because the case was not regularly before the court, sufficient time not having elapsed after the service, the court could after the term so decree it. *Gulf, C. & S. F. Ry. Co. v. Wilshire* (Civ. App.) 178 S. W. 43.

**76. Judgments which may be vacated.**—A judgment of the county court awarding a right of way or easement to revert to the owner of the fee if not used within two years, could not be reopened by motion to declare a reversion on the ground of nonuser, since such motion was in the nature of an independent action to determine title to the easement, dependent upon a future contingency, and not involved in the original suit. *St. Louis Southwestern Ry. Co. of Texas v. Temple Northwestern Ry. Co.* (Civ. App.) 170 S. W. 1073.

**77. Venue.**—Error in rendering judgment against a minor, not represented by guardian not appearing on the face of the record can be availed of only by a proceeding to set aside the judgment in the court rendering it. *Kelly v. Kelly* (Civ. App.) 178 S. W. 686.

**79. Persons entitled to relief.**—Judgment against husband in favor of creditor was final judgment forever determining that husband was indebted to creditor, so far as they or their privies were concerned, and wife, stranger to suit, could not in direct proceeding have judgment set aside and cause retried. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

Wife who obtained divorce before judgment divesting husband of title to land was rendered, held not entitled to claim land as against his pendens purchaser in whose favor judgment was rendered. *Gabb v. Boston* (Sup.) 193 S. W. 137.

**80. Persons against whom relief may be granted.**—In an action to set aside a partition judgment for fraud in procuring it, and want of service on infant defendants, the rights of the holders of notes given in part payment of the land at the partition sale, who were not parties to the action, cannot be determined. *Dean v. Dean* (Civ. App.) 165 S. W. 90.

While, if citation was not served upon minor defendants in partition, the judgment would be invalid on direct attack as to the parties to the judgment, bona fide purchasers from such parties will be protected where the judgment recites service, though the judgment be invalid for want of service. *Id.*

**81. Failure to resort to other remedies.**—Equity will not set aside judgment where, after rendition, there was a compromise and settlement, and, in violation thereof, execution issued and judgment was satisfied by sale to a third person; the remedy then being by an action at law for damages for the wrongful taking. *Steger Lumber Co. v. McSwain* (Civ. App.) 184 S. W. 292.

**82. Laches.**—Where no application to set aside a judgment for fraud was made until after the expiration of 12 years, the debtor's application will not be entertained without a sufficient explanation of the delay. *Patrucio v. Selkirk* (Civ. App.) 160 S. W. 635.

Where complainant, on being served with process and petition seeking to charge him personally with the payment of vendor's lien notes, filed a general denial and paid no further attention to the suit, he was guilty of negligence and could not maintain a suit to set aside a judgment recovered against him on the ground that he was not personally liable. *Fisher v. Hemming* (Civ. App.) 164 S. W. 913.

Neither lapse of time nor laches affect the right to sue to vacate a judgment void on its face. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

**83. Grounds for relief in general.**—Where intervention was filed in a suit to foreclose a chattel mortgage to assert the superiority of intervenor's lien on the property, plaintiff having recovered judgment without reference to the plea of intervention, the judgment would not be set aside on a bill of review to determine the question of priority. *Nocoma Nat. Bank v. Goin* (Civ. App.) 159 S. W. 189.

A judgment is conclusive between the parties, except on appeal, unless the judgment debtor establishes grounds for equitable relief, and shows that it was through no fault or lack of diligence on his part that the grounds on which he bases his claim to vacate the judgment were not presented at the trial. *Patrucio v. Selkirk* (Civ. App.) 160 S. W. 635.

It is no ground for relief against a judgment recovered against a party that it was obtained by reason of a mistake or negligence of his attorney; such mistake or negligence being imputed to the client. *Fisher v. Hemming* (Civ. App.) 164 S. W. 913.

In a suit to set aside a judgment at a subsequent term, complainants are entitled to relief on showing a meritorious defense which they were prevented from establishing by accident, fraud, or mistake, and not by their fault or neglect. *Irvin v. Johnson* (Civ. App.) 170 S. W. 1059.

Allegations of motion to have a judgment foreclosing a vendor's lien and the sale made thereunder set aside held, as against a general demurrer, to state a cause of action entitling the moving party to have the judgment set aside. *Smith v. McDaniel* (Civ. App.) 170 S. W. 1070.

An agreement by plaintiff's attorney to dismiss held within the scope of his authority, so that defendant could have a judgment thereafter obtained without notice vacated. *Texas & P. Ry. Co. v. Miller* (Civ. App.) 171 S. W. 1069.

Though the refusal of a district court to permit the filing of a motion for a new trial and to hear the same could not be adequately presented on appeal, it would furnish cause for direct proceeding to set aside the judgment. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

A judgment must be set aside, where the record shows that the court was without jurisdiction of defendant, without showing as to a good defense. *San Bernardo Townsite Co. v. Hocker* (Civ. App.) 176 S. W. 644.



Before a judgment against defendant in divorce on two grounds, entered on appearance day in the absence of his counsel, should be set aside, defendant must show a meritorious defense, setting up the facts upon which each of the defenses rests, and show that a different result would be reached on another trial. *Wade v. Wade* (Civ. App.) 180 S. W. 643.

That judgment was obtained in violation of an oral agreement for postponement, held ground for equitable relief. *Medlin v. Commonwealth Bonding & Casualty Ins. Co.* (Civ. App.) 180 S. W. 899.

A party prevented from prosecuting his suit or making his defense by mistake can bring an equitable action after close of term to reopen and dispose of the case on its merits. *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

If judgment is rendered by a court of competent jurisdiction, error therein does not render it void, or subject to be set aside, except for fraud, accident, or mistake, though the amount in controversy is so small as to prevent appeal. *Kalmans v. Baumbush* (Civ. App.) 187 S. W. 697.

A judgment will not be set aside for defects or insufficiency in the pleadings, especially where the alleged defect was amendable or had been waived by joining issue and by going to trial. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

When judgment attacked is valid on its face, party seeking its annulment must show, not only want of citation or appearance, but a good defense. *Walker v. Chatterton* (Civ. App.) 192 S. W. 1085.

Where judge who dismissed cause was disqualified by having acted as counsel, motion filed at subsequent term to set aside judgment should have been granted. *Kruegel v. Williams* (Civ. App.) 194 S. W. 683.

**84. Fraud, perjury, or other misconduct.**—A party prevented from prosecuting his case or making his defense by fraud can bring an equitable action after the close of the term to reopen and dispose of the case on its merits. *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

Court of equity will not set aside judgment obtained through accident, fraud, or mistake, unless defendant in judgment has meritorious defense to action, which must be fully set forth and clearly proved. *First Nat. Bank v. Hartzog* (Civ. App.) 192 S. W. 363.

In an action to set aside a decree of divorce which made a division of community property on agreement of parties and for divorce or to set aside division of property, held, that if testimony in divorce action was false, plaintiff's failure to testify was act of neglect leaving her in no position to ask that portion of decree granting divorce be set aside; but where false testimony as to the amount of community property was willfully given by husband, and the wife was not chargeable with negligence in failing to prevent a decree being rendered on such testimony, the courts will entertain a suit to set aside such decree, for rule that where a party fails to appear and answer he cannot subsequently maintain an action to set aside a judgment obtained upon false and perjured testimony does not apply. *Swearingen v. Swearingen* (Civ. App.) 193 S. W. 442.

**85. Evidence.**—On a direct attack on a judgment, as for want of service, etc., it may be shown by extrinsic evidence that one part of the record contradicts another part, so that a recital of service or want of service in a judgment may be contradicted by producing the original summons and return. *Dean v. Dean* (Civ. App.) 165 S. W. 90.

Equity should not set aside a judgment for lack of service of process upon defendant, except on clear, satisfactory, and convincing proof of lack of such service, and plaintiff's testimony contradicted by testimony of the constable serving the process and another does not warrant awarding relief. *Pierce-Fordyce Oil Ass'n v. Staley* (Civ. App.) 190 S. W. 814.

### Art. 2020. [1371] [1369] Motion for new trial, etc., requisites of.

Cited, *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387.

**Motion for new trial.**—The trial court cannot amend or reform a judgment on motion for new trial so as to make it conform to new facts then presented; its only right being to grant a new trial in case the newly discovered evidence is such that there would probably be a different result on the second trial. *Swan v. Price* (Civ. App.) 162 S. W. 994.

Where complainant had obtained a decree reforming a deed to his wife, since deceased, as her separate property, on the ground that the consideration in fact was community property, a petition for a new trial, alleging on information and belief only that the consideration was in fact the wife's separate property, held insufficient. *Strickland v. Baugh* (Civ. App.) 169 S. W. 181.

Defendants' motion for new trial held properly refused, where it was improperly verified, stated no meritorious defense, and was made so late in term that its granting would have made necessary a continuance. *Cunningham v. Gaines* (Civ. App.) 176 S. W. 148.

Motion for new trial alleging defendant's reliance on his attorney to file answer was defective for not showing employment was effective. *Martin v. Clements* (Civ. App.) 193 S. W. 437.

Allegations of motion for new trial may be controverted and evidence heard as to their truth. *Id.*

— **Specification of errors.**—Under district and county court rule 68, grounds of motion for new trial that the verdict is contrary to the law, that it is not supported by the evidence, and that it is contrary to the great preponderance of the evidence are too general to be considered by the district court. *Alexander v. Louisiana & Texas Lumber Co.* (Civ. App.) 154 S. W. 235.

A motion for new trial on the ground that the verdict is excessive under the undisputed evidence must specify wherein the verdict is excessive. *Peacock v. Coltrane* (Civ. App.) 156 S. W. 1087.

Statements of a ground of a motion for new trial that the verdict and judgment are contrary to the law and evidence, in that they were excessive as to the complaining defendant, in that the verdict found against it in larger proportion than justified by the evidence or the law applicable to the facts proved, was insufficient for failure to specify wherein the evidence was insufficient to justify the verdict. *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427.

Errors assigned in sustaining general and special demurrers to the petition need not be incorporated in a motion for new trial, particularly where the errors are fundamental. *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.* (Civ. App.) 159 S. W. 1013.

If the statement of facts will not support the findings and judgment, the motion for new trial must point out wherein the statement is insufficient. *Edwards v. Youngblood* (Civ. App.) 160 S. W. 238.

Under this article and rule 68 (142 S. W. xxii), a motion for new trial because court erred in directing a verdict for plaintiff for any amount held too general to require consideration. *Harlingen Land & Water Co. v. Houston Motor Co.* (Civ. App.) 160 S. W. 628.

Plaintiff's motion for new trial, "because on the face of the pleadings and the undisputed testimony plaintiff was entitled to recover," and "in finding that the facts and evidence in the case were not such as to estop the defendant to deny the amount claimed," held too general to support assignments of error. *Sallway v. Grand Lodge, A. O. U. W.* (Civ. App.) 164 S. W. 1041.

Statements in the motion for new trial that the judgment was contrary to the evidence and the law are too general. *Stevens v. Marshall* (Civ. App.) 178 S. W. 972.

— **Joint application.**—Where defendants filed a joint motion for a new trial, claiming that the verdict is against the weight of the evidence, the motion will be overruled, if the evidence supports the verdict as to any of the defendants. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

— **Amended and supplemental motions.**—The filing of an amended motion for new trial has the effect of eliminating the original motion, and no part of it not in the amended motion can be considered. *Walter v. Rowland* (Civ. App.) 189 S. W. 981.

— **Affidavits and other evidence.**—On motion for new trial, testimony of witnesses presented therewith held to show probable merit in defense so as to entitle defendant to new trial, if the absence of its attorney was excusable. *Kansas City, M. & O. Ry. Co. of Texas v. Imboden* (Civ. App.) 176 S. W. 900.

Where on appeal from a judgment overruling a motion for a new trial, the record shows no testimony taken as to facts not supported by affidavits accompanying the motion, it will be presumed that the court was correct in overruling the motion. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Allegations of fact, in a motion for a new trial supported by affidavit, need not be answered or denied, and will not be taken as confessed. *Id.*

A motion for a new trial on the ground of newly discovered evidence, not accompanied by the affidavit of the witness stating what his testimony would be, was insufficient. *Cherbonnier v. Shirley* (Civ. App.) 185 S. W. 641.

Affidavit for new trial on the ground of newly discovered evidence held sufficient to show due diligence. *Tarrant County Traction Co. v. Bradshaw* (Civ. App.) 185 S. W. 951.

Motion for new trial based on affidavits of jurors that if they had known effect of answers to certain questions they would have answered differently was properly refused. *McIntosh v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 192 S. W. 285.

— **Hearing on motion.**—A motion for new trial, not involving a trial upon the merits of the case, is properly disposed of in a summary manner, either upon the face of the record or upon affidavits of the parties and their supporting witnesses. *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

— **Irrelevant matter.**—Trial court, while authorized to eliminate from motion for a new trial, any irrelevant and scurrilous matter, held not authorized, by reason of such matter, to strike out the entire motion. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

**Opening default.**—On motion to open default, held, that answer filed therewith, though verified on information and belief, might be considered in determining whether it showed a meritorious defense. *Miller v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 184 S. W. 614.

## Art. 2021. [1371] [1369] Misconduct of jury, etc., as ground of motion; evidence.

**Disqualification of jury.**—That juror misstated he had never been represented by attorney for plaintiff was not ground for setting aside verdict for plaintiff or for granting new trial, in absence of some showing that defendant was injured by accepting the juror. *Galveston Electric Co. v. Hanson* (Civ. App.) 187 S. W. 533.

**Misconduct of jury.**—That a jury, examining a public record book, considered a second deed of trust on the property in controversy, which had not been introduced in evidence, and which the parties did not know was recorded in the book, held error requiring a new trial. *South Texas Mortgage Co. v. Dozier* (Civ. App.) 153 S. W. 1051.

A new trial will be granted where a juror receives testimony from a secret and unlawful source. *R. G. Andrews Lumber Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 158 S. W. 1194.

In an action against a railway company for the negligent firing of plaintiff's sawmill, held, that a new trial should be granted where a juror received information to the effect that plaintiff's witnesses testified falsely. *Id.*

Where jurors were not told not to visit a railway crossing involved in the action, and in so doing did not intend to disobey any order, or violate any rule of decorum, held, that their verdict should not be set aside merely to rebuke them and enforce discipline. *St. Louis Southwestern Ry. Co. of Texas v. Waits* (Civ. App.) 164 S. W. 870.

Under this article, it is unnecessary for the court, in determining whether a verdict was the result of misconduct, to hear evidence, where the facts alleged as misconduct did not constitute impropriety. *Galveston, H. & S. A. Ry. Co. v. Boshier* (Civ. App.) 165 S. W. 93.

A showing that jurors agreed to the verdict because of the argument of other jurors as to the amount of the attorney's fees held to entitle defendant to a new trial. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 171 S. W. 1091.

Right to object to misconduct of jurors held waived, where plaintiff knew of such alleged misconduct and failed to call same to the court's attention. *Williams v. Phelps* (Civ. App.) 171 S. W. 1100.

Jurors who, during the deliberations of the jury, narrated their personal experience, and one of them exposed his leg to show the effects of a disease thereon, held guilty of misconduct. *Galveston, H. & S. A. Ry. Co. v. Brassell* (Civ. App.) 173 S. W. 522.

Jurors in a personal injury action, who while deliberating discussed plaintiff's liability for attorney's fees and awarded greater damages by reason thereof, held guilty of misconduct. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 173 S. W. 937.

Where there was no agreement that quotient should be the verdict, and it was not in fact adopted, division of aggregate of amounts fixed on by individual jurors held not to require new trial. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

Under this article, a verdict will not be set aside on the ground that it was determined by lot in the absence of an agreement beforehand to abide by the result. *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822.

It is misconduct of the jury in a personal injury case to discuss or consider the fees of plaintiff's attorney. *San Antonio, U. & G. R. Co. v. Vivian* (Civ. App.) 180 S. W. 952.

It is not improper conduct for a juror to remark to the jury that he had friends on both sides, and therefore wanted the ballot to be secret, where it did not appear that the verdict was in any way improper. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

During deliberations as to alleged false representations, the statement of one juror to the others of his knowledge of a "bogus check law," as bearing upon the deliberations, which statement probably influenced the jury, is conduct necessitating reversal. *Pridgen v. Cook* (Civ. App.) 184 S. W. 713.

New trial should be granted for the taking into the jury room, contrary to Rev. St. art. 1957, of a pleading in another case, not in evidence, influencing one juror, at least, to agree to a higher award. *City of Ft. Worth v. Young* (Civ. App.) 185 S. W. 983.

An agreement by jurors to write upon separate papers the amount for which each juror desired to find and to use such papers merely as a working basis is not improper. *Andrews v. York* (Civ. App.) 192 S. W. 338.

Where jury agreed that each should state in writing amount of damages he thought plaintiff was entitled to recover, and that sum of amounts should be divided by 12, which was done, but jurors thereafter further discussed result and finally agreed upon amount as verdict, verdict was proper. *Marshall Traction Co. v. Harrington* (Civ. App.) 194 S. W. 1156.

**Burden of proof.**—Under this article, a litigant impeaching a verdict by the testimony of the jurors has the burden of showing, not only that the matters of which he complains amount to misconduct on the part of the jury, but also that they operated to his prejudice. *Kaker v. Parrish* (Civ. App.) 187 S. W. 517.

**Admissibility of evidence of misconduct or to impeach verdict.**—Assignments of error based upon affidavits given by jurors impeaching their verdict must be overruled. *Willingham v. Brown* (Civ. App.) 163 S. W. 107.

The verdict of the jury cannot be impeached by affidavits or evidence of the jurors that there was a mistake of fact entering into the verdict. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

Under a statute authorizing the trial court to consider misconduct of the jury as ground for a new trial and requiring proof thereof to be made in open court, ex parte affidavits of jurors cannot be considered. *Fox v. Houston & T. C. Ry. Co.* (Civ. App.) 186 S. W. 852.

**Sufficiency of proof.**—Testimony of jurors held insufficient to show that they arrived at a verdict for plaintiff before considering and answering questions submitted in the charge. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482.

Evidence held sufficient to sustain the order of the trial court refusing a new trial on the ground of misconduct of the jury. *Fox v. Houston & T. C. Ry. Co.* (Civ. App.) 186 S. W. 852.

Evidence of misconduct of jury in discussing improper issues during consideration of case held not sufficient to require a new trial. *Missouri, K. & T. Ry. Co. of Texas v. Cornelius* (Civ. App.) 188 S. W. 34.

Where one juror stated at the hearing on the motion for new trial that the jury agreed to render a quotient verdict, but his statement was denied by the other eleven jurors, there was no error in overruling a motion for new trial. *Andrews v. York* (Civ. App.) 192 S. W. 338.

**Discretion of court and review.**—Review of the trial court's discretion under this article in denying new trial for misconduct of jury is confined to cases where it clearly appears the rights of the parties have been disregarded. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 194 S. W. 458; *Virginia Fire & Marine Ins. Co. v. St. Louis Southwestern Ry. Co.* (Civ. App.) 173 S. W. 487; *Kaker v. Parrish* (Civ. App.) 187 S. W. 517.

The determination of a motion for new trial requested on the ground of the misconduct of a juror is not conclusive, unless an abuse of discretion be shown, even though this article authorizes the trial court to exercise its discretion in granting such motions. *R. G. Andrews Lumber Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 158 S. W. 1194.

Under this article, denial of new trial because jurors visited premises involved held not reviewable where the record did not show whether the court heard evidence in support of the motion or, if so, what the evidence showed. *City of Ft. Worth v. Curry* (Civ. App.) 160 S. W. 134.

Discretion in granting or refusing a new trial for misconduct of the jury under this article, is of the same nature as the discretion vested in the trial court in other cases, and that court can reach a safer conclusion on the question by examining the jurors than can the appellate court from the record. *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145.

The denial of a new trial on the ground that one of the jurors disclosed material facts which had not been introduced upon the trial will not be reviewed on appeal where the trial court heard evidence in accordance with this article, and no abuse of its discretion appears. *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28.

Under this article, ruling on motion for new trial, because jury visited scene of acci-

dent, held not to be set aside, except for abuse of discretion. *St. Louis Southwestern Ry. Co. of Texas v. Waits* (Civ. App.) 164 S. W. 870.

Where the foreman of the jury, after it had retired, was entertained over night by a defendant, plaintiff was entitled to new trial, notwithstanding this article, relating to the discretion of the court. *First Nat. Bank v. Hix* (Civ. App.) 164 S. W. 1035.

Since this article changes the common-law rule, the appellate court will not disturb the discretion of the trial court in denying a new trial asked on that ground, unless there was clearly an abuse of discretion. *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387.

Denial of new trial for misconduct of jurors in making adverse comments on plaintiff's witnesses, not founded on the evidence, held not an abuse of discretion. *Virginia Fire & Marine Ins. Co. v. St. Louis Southwestern Ry. Co.* (Civ. App.) 173 S. W. 487.

Assignment, on overruling motion for new trial for improper communication to jury, will be overruled, where record contains affidavit attached to motion setting forth communication made, but there is no bill of exceptions showing that evidence was heard on motion, as required by this article, and setting forth such evidence. *Texas & P. Ry. Co. v. Tucker* (Civ. App.) 183 S. W. 1188.

The discretion of the trial court to refuse a new trial for documents not in evidence being taken into the jury room is subject to revision. *City of Ft. Worth v. Young* (Civ. App.) 185 S. W. 933.

Under a statute giving a trial court discretion to set aside a verdict and allow a new trial for misconduct of jury, the action of the court will not be reviewed unless there has been an abuse of discretion. *Fox v. Houston & T. C. Ry. Co.* (Civ. App.) 186 S. W. 852.

In action for breach of marriage promise, held that a juror's statement that he thought defendant was the man who had ruined another woman was not so prejudicial as to make the refusal of new trial an abuse of trial court's discretion, nor was fact that jury discussed how much plaintiff would have to pay as lawyer's fees, etc., such misconduct as made the trial court's refusal of a new trial an abuse of its discretion. *Kaker v. Parrish* (Civ. App.) 187 S. W. 517.

A verdict by lot for an amount substantially the same as that awarded held not such misconduct as to make the refusal of a new trial on that ground an abuse of the trial court's discretion. *Id.*

Where trial court fully investigates alleged misconduct of jury, and finds it was not such as influenced the jury in returning verdict, his action in overruling motion for new trial for such alleged misconduct will not be disturbed. *Galveston Electric Co. v. Hanson* (Civ. App.) 187 S. W. 533.

In lineman's action for injuries, refusal of new trial on ground of alleged misconduct of jury in fixing the amount of the verdict held not an abuse of trial court's discretion. *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289.

In servant's action for injuries, trial court held not to have abused discretion in denying defendant's motion for new trial on ground of jury's misconduct in returning larger verdict because defendant was insured and plaintiff's attorneys were entitled to part of recovery. *Marshall Mill & Elevator Co. v. Scharnberg* (Civ. App.) 190 S. W. 229.

The determination whether misconduct of juries vitiates their verdicts rests in the discretion of the trial judge, and, unless an abuse of such discretion appears, the appellate courts have no authority to interfere therewith. *Andrews v. York* (Civ. App.) 192 S. W. 338.

Under this article, refusal to grant a new trial because jury saw plaintiff in a swoon after they had retired to deliberate, and one of the jurors said he knew her, and that she was injured as she claimed to be, is not an abuse of discretion where jurors testify that they considered only evidence adduced at trial in arriving at their verdict. *Houston Electric Co. v. Pearce* (Civ. App.) 192 S. W. 558.

## Art. 2022. [1452] [1448] New trials granted where damages too small, etc.

See notes under arts. 707, 4694, 6648.

Wrongful sequestration, see art. 7097 and notes.

**Power of court.**—Where the trial court believed that the verdict was excessive, he had jurisdiction to grant a new trial on account thereof. *Western Union Telegraph Co. v. Goodwin* (Civ. App.) 173 S. W. 1164.

A verdict cannot be set aside because excessive, unless it appears that passion or prejudice influenced the jury. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 191 S. W. 374.

**Inadequacy or excessiveness.**—Personal injury damages held not excessive. *Missouri, K. & T. Ry. Co. of Texas v. Whitsett* (Civ. App.) 185 S. W. 406; *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909; *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445; *Houston & T. C. R. Co. v. Menefee* (Civ. App.) 162 S. W. 1038; *Southwestern Telegraph & Telephone Co. v. Coffey* (Civ. App.) 163 S. W. 112; *Galveston, H. & S. A. Ry. Co. v. Linney* (Civ. App.) 163 S. W. 1035; *St. Louis Southwestern Ry. Co. of Texas v. Waits* (Civ. App.) 164 S. W. 870; *Angelina & N. R. R. Co. v. Due* (Civ. App.) 166 S. W. 918; *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545; *La Grange & Lockhart Compress Co. v. Hart* (Civ. App.) 169 S. W. 373; *Chicago, R. I. & G. Ry. Co. v. Pemberton* (Civ. App.) 170 S. W. 108; *Kirby Lumber Co. v. Hamilton* (Civ. App.) 171 S. W. 546; *Pierce-Fordyce Oil Ass'n v. Farrow* (Civ. App.) 173 S. W. 1007; *Texas Traction Co. v. Scoggins* (Civ. App.) 175 S. W. 1128; *McKinney Ice, Light & Coal Co. v. Montgomery* (Civ. App.) 176 S. W. 767; *Atchison, T. & S. F. Ry. Co. v. Hargrave* (Civ. App.) 177 S. W. 509; *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607; *Consumers' Lignite Co. v. Grant* (Civ. App.) 181 S. W. 202; *Stockey & White v. Mears* (Civ. App.) 181 S. W. 774; *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412; *Galveston, H. & S. A. Ry. Co. v. Marti* (Civ. App.) 183 S. W. 846; *Young Men's Christian Ass'n v. Jasse* (Civ. App.) 183 S. W. 867; *International & G. N. Ry. Co. v. Logan* (Civ. App.) 184 S. W. 301; *Paris & G. N. Ry. Co. v. Atkins* (Civ. App.) 185 S. W. 306; *San Antonio Brewing Ass'n v. Gerlach* (Civ. App.) 185 S. W.

316; Texas Midland R. Co. v. Sikes (Civ. App.) 185 S. W. 412; Galveston, H. & S. A. Ry. Co. v. Brassell (Civ. App.) 186 S. W. 428; Wichita Falls Traction Co. v. Berry (Civ. App.) 187 S. W. 415; Gulf States Telephone Co. v. Evetts (Civ. App.) 188 S. W. 289; Consolidated Kansas City Smelting & Refining Co. v. Dill (Civ. App.) 188 S. W. 439; Baker v. Ives (Civ. App.) 188 S. W. 950; Burrell Engineering & Construction Co. v. Grisier (Civ. App.) 189 S. W. 102; Texas & Pac. Ry. Co. v. Elliott (Civ. App.) 189 S. W. 737; Marshall Mill & Elevator Co. v. Scharnberg (Civ. App.) 190 S. W. 229; Galveston, H. & S. A. Ry. Co. v. Miller (Civ. App.) 191 S. W. 374; Houston Electric Co. v. Pearce (Civ. App.) 192 S. W. 558; Kirby Lumber Co. v. Youngblood (Civ. App.) 192 S. W. 1106; Kampmann v. Cross (Civ. App.) 194 S. W. 437; Marshall Traction Co. v. Harrington (Civ. App.) 194 S. W. 1156.

Personal injury damages held excessive. San Antonio Traction Co. v. Crisp (Civ. App.) 162 S. W. 422; Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 172 S. W. 750; Galveston, H. & S. A. Ry. Co. v. Harris (Civ. App.) 172 S. W. 1129.

Verdict of \$1,000 for detaining plaintiff, accusing him of taking a pin, taking him to another floor, and searching him, held excessive and to require a reversal unless plaintiff filed a remittitur of \$500. S. H. Kress & Co. v. Lawrence (Civ. App.) 162 S. W. 448.

The maxim, "De minimis non curat lex," is applicable to the allowance of \$2.50 excessive damages. Missouri, K. & T. Ry. Co. v. Kirkpatrick (Civ. App.) 165 S. W. 500.

In an action against a railroad company for the destruction of plaintiff's building and the fixtures therein by fire, evidence held to support a verdict for \$1,050, even though the plaintiff had rendered the lot and the improvements thereon for taxation at \$150. Missouri, K. & T. Ry. Co. of Texas v. Mitchell (Civ. App.) 166 S. W. 126.

That verdict for damages to cattle was for greater amount than damages estimated by one of plaintiff's witnesses held not conclusive that it was excessive. Texas Midland R. R. v. Becker & Cole (Civ. App.) 171 S. W. 1024.

Verdict of \$1,000 in action against testamentary trustee for services in caring for a beneficiary during her last illness, held not excessive. McLean v. Breen (Civ. App.) 183 S. W. 394.

Verdict for \$75 exemplary damages for the tenant for wrongful suing out of a distress warrant by the landlord held not excessive under the evidence. Streetman v. Lassater (Civ. App.) 185 S. W. 930.

Where plaintiff was 40 years of age, earning \$125 a month, as general manager of a telephone company, and had been recently reduced from \$175 a month, because company was not making money, verdict of \$8,500 held not excessive. Kansas City, M. & O. Ry. Co. of Texas v. Durrett (Civ. App.) 187 S. W. 427.

Verdict for \$400 as actual damages for wrongful issuance of writ of sequestration held not excessive. Garlington v. Cotten (Civ. App.) 189 S. W. 294.

In an action for breach of warranty of a silo, evidence held insufficient to warrant the jury's finding \$240 for damaged ensilage. Texas Kalamazoo Silo Co. v. Alley (Civ. App.) 191 S. W. 774.

It being impossible to say as matter of law that conclusions reached in a moderate verdict for mental suffering from a wrongful ejection, approved by denial of new trial, were wrong, they will not be disturbed on appeal. Gulf, C. & S. F. Ry. Co. v. Darrah (Civ. App.) 193 S. W. 253.

A \$10,000 verdict does not indicate prejudice and passion on jury's part requiring reversal because exceeding amount claimed by \$19.50. Houston Chronicle Pub. Co. v. Lemmon (Civ. App.) 193 S. W. 347.

A verdict, fixing the damages to the land not taken, held not so excessive as to indicate prejudice, though it was for nine times the amount of the award by the commissioners. Jefferson County Traction Co. v. Wilhelm (Civ. App.) 194 S. W. 448.

Where there was sufficient evidence to support a verdict of \$200 for plaintiff's personal injuries, it will not be disturbed as inadequate. Morris v. Galveston Electric Co. (Civ. App.) 194 S. W. 490.

Where no accurate rule of damages exists, and no improper motive in estimating amount is shown, and amount awarded does not indicate such fact, a verdict will not be disturbed for being excessive. Kansas City, M. & O. Ry. Co. of Texas v. Starr (Civ. App.) 194 S. W. 637. See, also, notes under articles relating to particular matters.

### Art. 2023. [1373] [1371] Time of making motion.

**In general.**—Under this article, and District Court Rule 71a (145 S. W. vii), where the trial court filed its conclusions of fact and law in term time, and in time to permit appellant to allege error therein by a motion for a new trial, his failure to include such objections in his motion was fatal to their review. Head v. Altman (Civ. App.) 159 S. W. 135.

A motion for a new trial, filed, without any affidavits, on the day before the court closed, held not to give the opposite party an opportunity to answer so that it might be overruled on that ground. Glover v. Pfeuffer (Civ. App.) 163 S. W. 984.

There is no statutory authority for granting a new trial after the term. Rogers v. Dickson (Civ. App.) 176 S. W. 865.

Failure to file motion for a new trial within 2 days after verdict being an informality relating to the manner of appeal which was waived by not filing the motion within 30 days after the filing of the transcript, the motion for a new trial, even if filed too late in the court below, is in the record for consideration for all purposes. Winnsboro Cotton Oil Co. v. Carson (Civ. App.) 185 S. W. 1002.

Notwithstanding Vernon's Sayles' Ann. Civ. St. 1914, arts. 1986, 1990, as to conclusiveness of special verdict on parties and court, such special findings may, in view of this article, art. 1612, Court of Civil Appeals rule 24 (142 S. W. xii), and rule 71a for district and county courts (145 S. W. vii), be attacked on motion for new trial, and its refusal reviewed on appeal. Hale County v. Lubbock County (Civ. App.) 194 S. W. 678.

**Discretion of court.**—Refusal of a motion to set aside a default, not filed within the two days required by statute, was within the court's discretion. Southern Benev. League v. English (Civ. App.) 174 S. W. 659.

This article and art. 2019, requiring motions to set aside judgments and for new trials to be made within two days after rendition of judgments, are directory only, and it is

within the court's discretion to grant a motion thereafter. *First Nat. Bank of Ft. Worth v. Henwood* (Civ. App.) 183 S. W. 5; *Head v. Altman* (Civ. App.) 159 S. W. 135.

No sufficient excuse being shown why defendants were not represented on the trial or why they did not file their motion for new trial in the two days prescribed by statute, there is no abuse of discretion in denying the motion. *Wisenhunt v. Park* (Civ. App.) 189 S. W. 287.

**Petition or bill of review.**—The petition in a suit in the nature of a bill of review to set aside the judgment in an action, relying on matters known at the time of, but not alleged in, the motion for new trial in the action, which was denied, held subject to general demurrer. *McKenzie v. Connery* (Civ. App.) 163 S. W. 342.

A losing litigant may obtain a rehearing after the term when it is shown that the judgment was obtained by fraud, mistake, or accident, that he has a meritorious cause of action or defense, and that he was not negligent in failing to present his case, and that, unless the judgment be set aside, he will sustain irreparable injury. *Smith v. McDaniel* (Civ. App.) 170 S. W. 1070.

Function of bill of review is to review cases in the trial court when judgment is the result of fraud, accident, or mistake, and is no greater where judgment is rendered against a minor legally served and represented by guardian ad litem regularly appointed; the remedy against a judgment voidable because against a minor not represented by a guardian ad litem, the fact of infancy appearing on the face of the record, being by writ of error, and not bill of review. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

A bill of review based on fraud must allege facts supporting the charge of fraud, show that, if true, complainant would have had judgment in the original action but for fraud of his adversary, and explain the failure to urge at the trial the falsity of allegations or testimony. *Id.*

On bill of review it will be presumed the judgment was based on the one of two facts alleged which would support it, and that it was established by evidence. *Id.*

### Art. 2025. [1374] [1372] Determined when.

**Time for hearing and decision in general.**—Under this article, a Court of Civil Appeals has no authority or jurisdiction to require a district court to hear a motion for new trial after the term of court in which judgment was entered has expired. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

Judgments may be modified or set aside after the term only in a separate suit, in the nature of a bill of review, and a motion for a new trial, not acted upon during the term at which judgment is rendered, is by operation of law overruled by the expiration of such term, so that a judgment in partition suit confirming commissioners' report was final as to rights of parties, and the court erred in setting it aside, continuing the question of confirmation, and retrying the cause at a subsequent term. *Rogers v. Dickson* (Civ. App.) 176 S. W. 865.

The trial court properly refused to consider a motion to set aside a default judgment rendered at a previous term, and where it was in error in setting aside a default judgment after term, properly vacated the order on motion, leaving the default judgment as rendered at the previous term stand as originally entered. *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

This article is mandatory. *Grubbs v. Marple* (Civ. App.) 185 S. W. 597.

### Art. 2026. [1375] [1373] Bill of review in suits by publication.

Cited, *Brazoria County v. Padgitt* (Civ. App.) 160 S. W. 1170; *Mabee v. McDonald* (Sup.) 175 S. W. 676.

**Applicability of statute in general.**—A bill of review does not lie to set aside a judgment where the judgment defendant neglected to make use of a legal remedy to vacate the judgment. *Ferguson v. Sanders* (Civ. App.) 176 S. W. 782.

Judgments may be modified or set aside after the term only in a separate suit, in the nature of a bill of review. *Rogers v. Dickson* (Civ. App.) 176 S. W. 865.

**Parties.**—Joinder of codefendants served with process in a previous suit held unnecessary in bill of review, brought under this article. *Wiseman v. Cottingham* (Sup.) 174 S. W. 281, affirming judgment (Civ. App.) 141 S. W. 817.

**Cumulative remedy.**—Under this article, remedy given is cumulative or additional to an appeal. *Davenport v. Rutledge* (Civ. App.) 187 S. W. 988.

**Grounds for relief.**—This article merely extends the time within which a motion for a new trial may be made; "good cause" being largely within the discretion of the court governed by rules which control similar motions filed within the term. *Strickland v. Baugh* (Civ. App.) 169 S. W. 181.

Award of new trial, under this article, held justified, where defendants could have defeated plaintiff's claim by tender of the amount due on the note given by their ancestor in payment for land. *Wiseman v. Cottingham* (Sup.) 174 S. W. 281, affirming judgment (Civ. App.) 141 S. W. 817.

Satisfactory showing of injury to complaining party and rendition of judgment by fraud, accident, or mistake, or the act of the opposite party, held necessary to support modification or vacation of judgment after the term. *Rogers v. Dickson* (Civ. App.) 176 S. W. 865.

Under this article, defendant was entitled to a bill of review and to be heard upon merits of an action in a justice court against her on service by publication requiring her to appear at the second term, in which judgment was rendered by default at first term, although she had actual notice of pendency of suit, and facts might warrant another judgment. *Davenport v. Rutledge* (Civ. App.) 187 S. W. 988.

## CHAPTER EIGHTEEN

## COSTS AND SECURITY THEREFOR

Art.	Art.
2031. Each party liable for costs incurred by him.	2035. Successful party to recover.
2033. May put bill of costs with officer for collection, when; same has force of execution; appeal not to prevent execution for costs.	2038. Costs of motions.
2034. Levy for costs; costs demanded of attorney; fees for collecting, when allowed.	2041. Costs of several suits, etc.
	2042. Where demand reduced by payment, etc.
	2046. On appeals and certiorari.
	2047. The same.
	2048. Court may otherwise adjudge costs.

**Article 2031. [2491] [2427] Each party liable for costs incurred by him.**

Cited, *Brazoria County v. Padgitt* (Civ. App.) 160 S. W. 1170.

In general.—Under this article and arts. 2032–2034, the clerk of the district court cannot, before the final disposition of the appeal, issue execution against an appellant to collect for the furnishing of a transcript after the perfection of his appeal. *Connellee v. Blanton* (Civ. App.) 163 S. W. 407.

In civil cases the general rule is that, when an appellant obtains judgment on the merits, he also obtains judgment for all the costs; but, if no costs can be collected from the adverse party, the appellant is liable to court officials for costs incurred by him. *Doss v. Chambers* (Civ. App.) 188 S. W. 296.

**Art. 2033. [1423] [1420b] May put bill of costs in hands of officer for collection, when. Same to have force of execution. Appeal not to prevent issuance of execution for costs.**

Execution, issuance of.—Under this article and arts. 2031, 2032, 2034, the clerk of the district court cannot, before the final disposition of the appeal, issue execution against an appellant to collect for the furnishing of a transcript after the perfection of his appeal. *Connellee v. Blanton* (Civ. App.) 163 S. W. 407.

**Art. 2034. [1424] [1420c] Officer to levy for costs, when. Costs demanded of attorney when. Fees for collecting costs, when allowed.**

Execution for costs.—Under this article and arts. 2031–2033, the clerk of the district court cannot, before the final disposition of the appeal, issue execution against an appellant to collect for the furnishing of a transcript after the perfection of his appeal. *Connellee v. Blanton* (Civ. App.) 163 S. W. 407.

**Art. 2035. [1425] [1421] Successful party to recover of his adversary.**

Cited, *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 158 S. W. 564.

2. **Persons entitled to costs.**—Where in trespass to try title to certain surveys, defendant admitted plaintiff's title to such surveys, but denied that a fence was on the boundary and the jury found that the fence was not on the boundary, costs held properly taxed to plaintiff. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

The award of costs in favor of the widow of an employé of a railroad company who ultimately recovered judgment under the federal Employers' Liability Act, as his personal representative, held not improper though the railroad company prevailed in an action instituted by the widow as such. *St. Louis, S. F. & T. Ry. Co. v. Smith* (Civ. App.) 171 S. W. 512.

Where plaintiff recovered against only one of the defendants, the costs of the successful defendant should be assessed against plaintiff. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

Where defendant recovered both in respect to the general partnership set up by plaintiff and the special partnership set up by himself, he was entitled to recover all costs, though plaintiff recovered some items in controversy in the accounting. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

Under this article, the successful party is entitled to costs. *Thornton v. Goodman* (Civ. App.) 185 S. W. 926.

3. — **Stakeholder.**—In a suit by certain employés and materialmen against a railroad subcontractor, the railway company and the contractor are not entitled to attorney's fees as stakeholders, where they did not pay into court, but contested, the amount found due from them to the subcontractor. *Texas Bldg. Co. v. Collins* (Civ. App.) 187 S. W. 404.

4. **Persons and funds liable for costs in general.**—Where, in trespass to try title by married woman's grantee, he sought a recovery against the husband and wife on the warranty of title, and they offered to rescind, judgment for plaintiff for title and possession held to have properly awarded him costs as against the husband and wife. *Morton v. Calvin* (Civ. App.) 164 S. W. 420.

A grantee of land subject to vendor's lien notes held liable for costs of the suit foreclosing the lien. *Jones v. Gough* (Civ. App.) 175 S. W. 1107.

Where plaintiff promised his grantor to pay vendor's lien notes on the land he was primarily liable, and, in a suit to foreclose the notes, costs might be awarded against him. *Id.*

Taxation to defendants of costs incurred by unsuccessful plaintiffs held error. *Ayers v. Snowball* (Civ. App.) 181 S. W. 827.

Where the only relief given plaintiffs in trespass to try title was not prayed for, defendant being unaware that it was demanded, and the only issue being decided for him by the jury, and plaintiffs not requesting the submission of others, the adjudging of costs against defendant was erroneous. *Dewees v. Nicholson* (Civ. App.) 182 S. W. 396.

Where case is abated in district court upon hearing of defendant's plea in abatement after reversal and remand by the Court of Civil Appeals on plaintiffs' appeal, costs in district court will be taxed against plaintiffs. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

In action against several carriers for damages to shipment of live stock, all the costs of trial could not be charged against the defendant against whom judgment was had, in the event that other defendants were dismissed from the cause. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 189 S. W. 765.

**8. — Injunction.**—Where an injunction was finally denied, having already been modified on motion, held improper, under this article and art. 2048, to tax costs up to the time of modification against defendant in the injunction suit. *Cohen v. Strange* (Civ. App.) 175 S. W. 1107.

**13. Tender.**—Where plaintiffs, suing on notes, did not admit as correct the amount defendants claimed to be due, there having been no tender thereof before suit, plaintiffs could recover costs, though admitting a small credit, and so recovering less than sued for. *Bybee v. Austin & Riley* (Civ. App.) 180 S. W. 287.

**14½. What constitute costs in general.**—Expenses incident to litigation, which are properly attributable thereto, are always considered as costs. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

**15. Attorney's fees as costs.**—Plaintiff in garnishment held not entitled to recover attorney's fees against the garnishees; the only attorney's fees allowable being those authorized by statute to the garnishee. *Waggoner v. Briggs* (Civ. App.) 166 S. W. 50.

A fraternal insurer, which paid the proceeds of a certificate into court and required the claimants to interplead, is entitled to reimbursement for attorney's fees so expended. *Wright v. Grand Lodge K. P., Colored* (Civ. App.) 173 S. W. 270.

An insurer, which, when sued in the county court, paid the money into court and asked that court to determine the owner, held not entitled to attorney's fees for the filing of a bill of interpleader in the circuit court. *Id.*

Bank which delivered to M. money and notes placed with it in escrow on his guaranty against loss held properly allowed an attorney's fee when sued with M., notwithstanding the guaranty. *American Nat. Bank v. Warner* (Civ. App.) 176 S. W. 863.

**23. Apportionment of costs.**—Under this article and art. 2048, it is not an abuse of discretion for the trial court to award costs in the proportion which the recovery bears to the claim, where the recovery was less than asked for. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 181 S. W. 756.

**24. Discretion and review.**—Under this article and art. 2048, in action for accounting, the court properly exercised its discretion in taxing all costs against defendant partner who fraudulently or negligently had kept books so that appointment of an auditor was necessary to determine amount of personal funds defendant had mingled with firm funds. *Navarro v. Lamana* (Civ. App.) 179 S. W. 922.

#### **Art. 2038. [1428] [1424] Costs of motions.**

**Appeal from justice court.**—Appellant, attempting to appeal to the county court from a judgment of a justice's court void and not appealable, held the losing party, liable to the costs of appeal, which the county court, under this article, might award him. *Parker v. Watt* (Civ. App.) 178 S. W. 718.

#### **Art. 2041. [1431] [1427] Costs of several suits, etc.**

**Multiplicity of suits.**—A multiplicity of suits is not favored. *Dollar v. Lockney Supply Co.* (Civ. App.) 164 S. W. 1076.

#### **Art. 2042. [1432] [1428] Where demand reduced by payments, etc.**

**Reduction by set-off.**—Under this article, where the judgment in the county court was reduced by set-off to \$78.30 and costs, with foreclosure of a mortgage lien, the defendant, on motion, should have been allowed his costs. *Tatum v. Small* (Civ. App.) 186 S. W. 244.

#### **Art. 2046. [1436] [1432] On appeal and certiorari.**

Cited, *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

**Costs on appeal or writ of error in general.**—The court, awarding costs otherwise than as prescribed by this article, must, as required by art. 2048, state in the record the grounds for its action, and its failure so to do renders the judgment as to costs irregular, necessitating a reversal. *Nail v. Wolfe City Nat. Bank* (Civ. App.) 158 S. W. 1166.

The costs of a former appeal, determined at a time when a corporation alone was defendant in the action, cannot be taxed against the stockholders, who were subsequently joined as defendants. *Staaacke v. Routledge* (Civ. App.) 175 S. W. 444.

A successful appellant, having the case reversed and remanded, is entitled to recover the costs of such appeal in a proper proceeding in a proper tribunal. *Houston & T. C. R. Co. v. Montgomery* (Civ. App.) 189 S. W. 350.

Where petition to enjoin sale of realty under execution presents a good cause of action, at least as against a general demurrer, the costs of the trial court should be adjudged, on appeal, against defendants in that court, but where erroneous order of nonresident district judge, continuing injunction against execution until modified or vacated by further order of his court, justified prosecution of appeal, costs on appeal would be adjudged against appellee. *Wooten v. Odell* (Civ. App.) 191 S. W. 721.



**Amount of recovery as affecting right to costs.**—A plaintiff, obtaining a judgment in the county court for a sum less than in justice court, held not entitled to all the costs against defendant. *St. Louis Southwestern Ry. Co. of Texas v. Kelly* (Civ. App.) 173 S. W. 540.

In action against administrator on claim, where plaintiffs had judgment below, with costs, and on appeal to county court plaintiffs had judgment for a smaller amount, this article, and not article 3451, applies, and defendant was entitled to recover costs of county court. *Morrison v. Brooks* (Civ. App.) 189 S. W. 1094.

**Affirmance as affecting costs.**—Although a judgment was affirmed after allowing a remittitur not filed until after appeal, costs of the appeal will be taxed against the appellee. *Pecos & N. T. Ry. Co. v. McMeans* (Civ. App.) 188 S. W. 692.

**Modification as affecting costs.**—Where, after appeal, appellee remitted damages improperly awarded, the judgment, under art. 2014, will be affirmed, though the costs will be taxed against the appellee. *Atchison, T. & S. F. Ry. Co. v. Boyce* (Civ. App.) 171 S. W. 1094.

Where through errors in computation a judgment for plaintiff was too large, and all of the excess except 30 cents was cured by remittitur, costs of appeal by defendant will be taxed against him, though appellate court reduces judgment. *Fatherree v. Pickens* (Civ. App.) 188 S. W. 947.

Where the judgment was reformed and affirmed and appellees recovered a less amount than in lower court, costs were adjudged against appellees. *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804.

**Reversal as affecting costs.**—Plaintiff, in an action to foreclose vendor's lien notes, who was not in any way responsible for an adjudication that two parties defendant take nothing by their respective cross-actions against each other, should not on reversal of that part of the judgment be charged with the costs of a defendant's writ of error. *Swift v. Beemer* (Civ. App.) 160 S. W. 989.

**Acts or omissions of parties affecting right.**—In specific performance, where the decree erroneously failed to require the vendor to return the purchaser a deposit, costs of the appeal will not be allowed the purchaser who was unsuccessful below, where the motion for new trial did not call that error to the attention of the lower court. *Burnett v. Mitchell* (Civ. App.) 158 S. W. 800.

Where a party appeals to the county court from a judgment of the justice of the peace rendered against him at his own request, the costs in the county court should be taxed against the appellant, even though he is successful in that court. *Cage v. King* (Civ. App.) 159 S. W. 174.

Where plaintiff purposely failed to prove a case before a justice and appealed to the county court, where he was successful, the costs of the latter court should have been taxed against him. *Houston & T. C. R. Co. v. King* (Civ. App.) 160 S. W. 647.

Where appellant made no effort in the trial court to obtain correction of the judgment, which was erroneous only as to two items amounting to \$6.50, it would not be relieved of costs on appeal by reason of the correction of such error. *St. Louis, B. & M. Ry. Co. v. Gould* (Civ. App.) 165 S. W. 13.

Under this article and art. 2048, the county court could, on appeal from the justice court, adjudge all costs to appellant though its judgment was less than that of the justice court, where the difference was due to a miscalculation by the justice, and the error was not called to his attention. *Hartford Fire Ins. Co. v. Pires* (Civ. App.) 165 S. W. 565.

Where modification of a judgment did not result from sustaining of any assignment of error but from the voluntary offer of appellee, all costs of appeal would be taxed against appellants. *Chicago, R. I. & G. Ry. Co. v. Bell* (Civ. App.) 168 S. W. 396.

Where a judgment is reformed and affirmed, the costs on appeal will be taxed against appellant when the objectionable feature would doubtless have been corrected by the trial court had its attention been called thereto. *Soto v. State* (Civ. App.) 171 S. W. 279.

The costs of an appeal on which only a portion of the judgment for plaintiffs was reversed must be assessed against them, where they did not correct the error after new trial. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

Though judgment was reformed as to computation as it could have been corrected in the court below under arts. 2016 and 2017, costs will be taxed against plaintiff in error, who was not otherwise successful. *Raike v. Clayton* (Civ. App.) 175 S. W. 498.

Where appellant, in his motion for new trial, failed to point out the particular error for which the judgment was reformed on appeal, and such error was so patent as that it would probably have been corrected if pointed out, he must pay costs on appeal. *Gulf, C. & S. F. Ry. Co. v. Moore* (Civ. App.) 188 S. W. 24.

**Expenses of record.**—Under Rules 84, 85, for the District Courts (142 S. W. xxiii), providing what the record on appeal shall include, the original and amended petitions, which were subsequently amended, need not be set out in the statement of facts, if they appear in the transcript, even though introduced in evidence, and although error was assigned to overruling a motion to dismiss the suit on the changed cause of action in the amended petitions, nor need the motion to dismiss, which is set out in full in the bill of exceptions, be copied in the transcript. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 153 S. W. 564.

Rule 85 for the District Courts (142 S. W. xxiii), providing that counsel may agree upon the omission of unnecessary papers in the record, requires appellant to endeavor to make such an agreement. *Id.*

The fact that the appellees agreed to a statement of facts does not estop them from asserting that it was unnecessarily prolix. *Id.*

**Taxation of costs on appeal or error.**—Where appellees, in a motion for rehearing, after the costs had been taxed against them, did not object to the items, a motion to re-tax the costs made after adjournment of the term at which the case was decided and the rehearing denied will not be considered. *Zarate v. Villareal* (Civ. App.) 159 S. W. 873.

### Art. 2047. [1437] [1433] Same subject.

Cited, *Lyon-Gray Lumber Co. v. Dunbar* (Civ. App.) 158 S. W. 1167.

**Art. 2048. [1438] [1434] Court may otherwise adjudge costs.**

Cited, *Lyon-Gray Lumber Co. v. Dunbar* (Civ. App.) 158 S. W. 1167.

**Power of court in general.**—The court, awarding costs otherwise than as prescribed by article 2046, must, as required by this article, state in the record the grounds for its action, and its failure so to do renders the judgment as to costs irregular, necessitating a reversal. *Nail v. Wolfe City Nat. Bank* (Civ. App.) 158 S. W. 1166.

Where, after a sworn answer is filed showing changed conditions that no longer entitle complainant to the temporary restraining order, it is dissolved, costs so far as necessary to give complainant the relief to which she is entitled may be taxed against defendant. *Ross v. Veltmann* (Civ. App.) 161 S. W. 1073.

Under this article and art. 2046, the county court could, on appeal from the justice court, adjudge all costs to appellant though its judgment was less than that of the justice court, where the difference was due to a miscalculation by the justice, and the error was not called to his attention. *Hartford Fire Ins. Co. v. Fires* (Civ. App.) 165 S. W. 565.

Under this article and art. 1942, where the court appointed a guardian ad litem for infant defendants, the court could, without further representation or service on them, allow compensation to the guardian and tax the same as costs against the successful infant defendants. *Simmons v. Arnim* (Civ. App.) 172 S. W. 184.

Where an injunction was finally denied, having already been modified on motion, held improper under this article and art. 2035 to tax costs up to the time of modification against defendant in the injunction suit. *Cohen v. Strange* (Civ. App.) 175 S. W. 1107.

Taxation of costs of an appeal to Court of Civil Appeals is within the discretion of the court, and Supreme Court will not reverse it where not inequitable. *Houston & T. C. Ry. Co. v. Walker* (Sup.) 177 S. W. 954, granting motion to retax costs (Sup.) 173 S. W. 208, reversing judgment (Civ. App.) 167 S. W. 199.

Under this article and art. 2035, it is not an abuse of discretion for the trial court to award costs in the proportion which the recovery bears to the claim, where the recovery was less than asked for. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 181 S. W. 756.

The matter of taxing costs is ordinarily one of discretion with the trial court not subject to review unless abused. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

The matter of taxing costs is ordinarily one of discretion with the trial court. *Id.*

**Apportionment of costs.**—Under this article and art. 2035, in action for accounting, the court properly exercised its discretion in taxing all costs against defendant partner who fraudulently or negligently had kept books so that appointment of an auditor was necessary to determine amount of personal funds defendant had mingled with firm funds. *Navarro v. Lamana* (Civ. App.) 179 S. W. 922.

The costs of a suit necessary to determine the interest of devisees and for the benefit of all parties alike will be adjudged against all parties in the proportion of their interests in the property affected. *Cox v. George* (Civ. App.) 184 S. W. 326.

In suit to foreclose vendor's lien, prior mortgagees, ordered to set up their claims, held improperly required to pay share of costs of receivership in excess of the cost of independent suits, nor were their rights affected by facts that they received money distributed among mortgagor's creditors under arrangement between mortgagor and the mortgagor's grantee, and that a considerable portion of the costs was for taxes. *Hooven-Owens-Rentschler Co. v. T. Schriver & Co.* (Civ. App.) 184 S. W. 359.

Where plaintiff, in action to recover cotton seed, was decreed possession thereof, but required to pay bank, claiming account against him, amount of such claimed account, which he had refused to pay, thus requiring suit and interpleading of other parties, adjudging costs incurred by the bank against it and all other costs against the plaintiff was not unjust. *Guitar v. First State Bank of Hermleigh* (Civ. App.) 191 S. W. 860.

**DECISIONS RELATING TO SUBJECT IN GENERAL**

**Objections to allowance for review on appeal.**—The allowance to witnesses of certain fees and mileage could not be reviewed on appeal, where it was not called to the attention of the trial court by a motion to retax the costs, or otherwise. *Guerra v. Guerra* (Civ. App.) 158 S. W. 191.

Where the improper allowance of costs was not raised by motions for new trial or to retax costs, it cannot be raised on appeal. *Dupont v. Texas & N. O. R. Co.* (Civ. App.) 158 S. W. 195.

In a proceeding to foreclose a mortgage, in which property was sequestered, plaintiff cannot complain that the costs of the sequestration were assessed against him, where there was no motion to retax the costs, and the record showed that the only sequestration had was sued out by plaintiff. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

## CHAPTER NINETEEN

## BILLS OF EXCEPTIONS AND STATEMENTS OF FACTS

Art.	Art.
2058. Exceptions to rulings taken, when.	2071. Transcript for party appealing without bond; affidavit; falsity; punishment.
2059. Requisites of bill of exceptions.	
2060. May refer to statement of facts.	2072. Laws repealed; not to prevent preparation of statements of fact by parties.
2061. Charges regarded as approved unless excepted to.	2073. Time for preparing and filing statements of facts and bills of exceptions; judge may extend, provided, etc.
2062. No bill of exceptions where ruling appears of record.	2074. Statement of facts not filed in time, when considered by court.
2063. Bill to be presented to the judge.	2075. Time for judge to file conclusions, etc.
2064. Submitted to opposing counsel, etc.	2076. Where term of office expires before adjournment, etc.
2065. If found incorrect.	
2067. Bystander's bill, how obtained.	
2068. Statement of facts, how prepared.	
2069. When the parties disagree.	
2070. Statement of facts prepared from transcript of official shorthand reporter, when and how, etc.; in duplicate; filed; original sent up; reporter to prepare on request, etc., fees, proviso.	

**Article 2058. [1360] [1358] Exception to rulings taken, when.**

Cited, *Texas & N. O. R. Co. v. Francis* (Civ. App.) 165 S. W. 40; *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 177 S. W. 137 (in dissenting opinion); *Loeb v. Texas & N. O. R. Co.* (Civ. App.) 186 S. W. 378.

1. **Reservation of exceptions.**—In the absence of fundamental error, errors assigned cannot be considered on appeal unless promptly called to the attention of the trial court with exception taken in the proper manner. *Goodhue v. Fuller* (Civ. App.) 193 S. W. 170.

3. **Office of bill of exceptions.**—The findings of the trial judge cannot be contradicted or affected by oral declarations of the judge, though such declarations are embodied in a bill of exceptions, in view of Rev. Civ. St. 1911, art. 1990. *Long v. Smith* (Civ. App.) 162 S. W. 25.

The office of a bill of exceptions is to make that a part of the record which otherwise would not be. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

5. **Necessity of bill of exceptions, statement of facts, or conclusions of law and facts**—**Bill of exceptions or statement of facts.**—Where an order overruling a plea of privilege recited that evidence relating thereto was heard, it will be presumed, in the absence of any bill of exceptions or statement of facts, that the evidence was insufficient to establish such plea. *Guerra v. Guerra* (Civ. App.) 158 S. W. 191.

In the absence of a statement of fact, bills of exception, and motion for new trial, a judgment will be affirmed, unless fundamental error appears on the face of the record proper. *National Aéroplane Co. v. McCormick* (Civ. App.) 161 S. W. 375.

Exception to admission of evidence need not be preserved by bill of exceptions, but by art. 2060, may be reserved and noted in the statement of facts. *Houston E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619.

In the absence of any bills of exception or statement of facts in the record, the denial of an extension of time for filing bills of exception and statement of facts cannot be reviewed. *Baugh v. Baugh* (Civ. App.) 175 S. W. 725.

Where there was no statement of facts or bill of exceptions showing the request, an affidavit that appellant requested findings of fact did not present the request as part of the record. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

That no statement of facts or bills of exceptions are brought up with record precludes reversal of judgment except for fundamental errors appearing on face of record, but does not affect right to appeal. *Lauraine v. Masterson* (Civ. App.) 193 S. W. 708; *Same v. Vaughn* (Civ. App.) 193 S. W. 712.

8. — **Conclusions of law and facts.**—Where the rights of the parties may have depended on whether a deed by an administrator passed title to the grantee, and, if so, whether defendants were bona fide purchasers, the court's failure, to make findings of fact within the statutory time was prejudicial error. *Houston Oil Co. of Texas v. Ragley-McWilliams Lumber Co.* (Civ. App.) 162 S. W. 1183.

Where the court filed no findings of fact and conclusions of law, the judgment for a party relying on two grounds will not be disturbed unless unsupported on either ground. *Whitaker v. Shenault* (Civ. App.) 172 S. W. 202.

In the absence of findings of fact by the trial court, the special findings cannot be reviewed. *Morris v. Burrows* (Civ. App.) 180 S. W. 1108.

9. **Decisions not reviewable without bill of exceptions**—**In general.**—Where bills of exception have been stricken out so that there are no exceptions in the record to support the assignments, the court is without power to consider such assignments. *Cotton v. Thompson* (Civ. App.) 159 S. W. 455.

An assignment of error that the judgment appealed from was void because a judge was disqualified could not be sustained where there was no bill of exceptions in the record showing disqualifying facts. *Waggoner v. Briggs* (Civ. App.) 166 S. W. 50.

Under rules 54 and 55 for the district and county courts (142 S. W. xxi), no objection to the refusal to appoint a physician to examine the plaintiff in injury action can be reviewed, where the matter is not presented by a bill of exceptions. *Weatherford, M. W. & N. W. Ry. Co. v. Smith* (Civ. App.) 170 S. W. 133.

Assignments of error complaining of rulings of the court to which there is no bill of exceptions in the record will not be considered. *Norton v. Lea* (Civ. App.) 170 S. W. 267.

An exception to refusal to consolidate actions, on the answer or motion of party complaining, must be preserved, or the ruling will not be reviewed on appeal. *Trabue v. Guaranty State Bank* (Civ. App.) 173 S. W. 612.

Where the judgment was within the court's jurisdiction and within the pleadings, error, to be available, must have been called to the court's attention. *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974.

Where the statement of facts and bills of exception were stricken from the record, assignments challenging the sufficiency of the evidence or the propriety of the charge cannot be considered. *Cook v. Hardin* (Civ. App.) 174 S. W. 633.

In the absence of a bill of exception to action of court in considering a plea of want of jurisdiction or in taking the issue from the jury, the ruling cannot be considered. *Day v. Mercer* (Civ. App.) 175 S. W. 764.

Under rules 53, 55 (142 S. W. xxi) for district and county courts, held that an order overruling a motion to quash an affidavit in a garnishment could not be considered on appeal without a bill of exceptions. *Dixon v. Cooper* (Civ. App.) 178 S. W. 695.

Where a codefendant was not cited as to a cross-action and did not appear thereto, the question of jurisdiction was fundamental, and might be considered on appeal, though not raised below. *Ivey v. Davis* (Civ. App.) 178 S. W. 972.

The overruling of exceptions is not subject to review, unless it is excepted to at the proper time. *Pierce-Fordyce Oil Ass'n v. Woods* (Civ. App.) 180 S. W. 1181.

Where the record contained no assignment of error, motion for new trial, or bill of exceptions, and no fundamental error is suggested or observed, the judgment will be affirmed. *Simpson v. International & G. N. R. Co.* (Civ. App.) 183 S. W. 10.

In the absence of a bill of exceptions challenging the finding of the trial court that no evidence was offered by either party and that plaintiffs' counsel demanded judgment upon the pleadings without evidence, such finding must be accepted as true. *A. G. Schwab & Co. v. Norwood* (Civ. App.) 183 S. W. 807.

11. — **Rulings as to pleadings.**—If plaintiff desired to amend his motion against a sheriff before the court sustained defendant's demurrer thereto, he should have requested court's permission to amend, and upon refusal should have reserved a bill of exception. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

12. — **Denial of plea of privilege.**—An order overruling a plea of privilege, though noting an exception, is not reviewable in the absence of a bill of exceptions disclosing the facts on which the court acted. *United Benevolent Ass'n of Texas v. Lawson* (Civ. App.) 166 S. W. 713.

14. — **Interlocutory proceedings.**—Where a motion to reinstate a case was not verified, and there is no statement of facts or bill of exception showing that evidence to sustain its averments was offered, a judgment overruling motion will be affirmed. *Chat-tanooga Medicine Co. v. Ligon* (Civ. App.) 191 S. W. 571.

To review ruling on merits of plea in abatement, all evidence before trial court, upon which it ruled on the plea, should appear in record either by proper bill of exception or in statement of facts. *Southwestern Gas & Electric Co. v. Duke* (Civ. App.) 194 S. W. 1010.

15. — **Denial of continuance.**—Error in denying continuance cannot be considered in the absence of a bill of exceptions showing the ruling on the application. *American Nat. Ins. Co. v. Bird* (Civ. App.) 174 S. W. 939; *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170.

Under court rule 55 (142 S. W. xxi), providing that the rulings upon motions for continuance can be reviewed only when exception is reserved and presented in a proper bill, the overruling of a motion for a continuance cannot be considered, where it was only preserved in the minutes of the court. *Darby v. White* (Civ. App.) 165 S. W. 481.

Where not presented by bill of exceptions, as required by rule 70 (142 S. W. xxii) for the county and district courts, the question of the denial of a continuance cannot be reviewed. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

Unless the denial of defendant's motion for continuance is presented by an appropriate bill of exceptions, the matter will not, under rule 55 for district and county courts, be reviewed on appeal. *Texas City Terminal Co. v. Thomas* (Civ. App.) 178 S. W. 707.

17. — **Rulings regarding jurors.**—Assignment, on overruling motion for new trial for improper communication to jury, will be overruled, where record contains affidavit attached to motion setting forth communication made, but there is no bill of exceptions showing that evidence was heard on motion, as required by Rev. St. 1911, art. 2021, and setting forth such evidence. *Texas & P. Ry. Co. v. Tucker* (Civ. App.) 183 S. W. 1188.

18. — **Conduct of trial.**—Where there was no bill of exceptions reserved to the misconduct of spectators during the trial, and nothing to verify the unsworn allegation thereof in the motion for new trial, the matter could not be reviewed. *Buckingham v. State*, 73 Cr. R. 101, 164 S. W. 4.

Where no bill of exceptions was reserved covering a comment of the court in excluding evidence, an assignment of error to such comment could not be considered. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

Where improper argument was not preserved by bill of exceptions, and only the pleadings containing reflections on appellants were before the appellate court, the matter cannot be reviewed on appeal, as it could not be determined by the pleadings. *Broussard v. Le Blanc* (Civ. App.) 182 S. W. 78.

Assignments complaining of improper argument of counsel cannot be reviewed, where the argument was not shown by bills of exception or the record proper. *Clampitt v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 185 S. W. 342.

19. — **Rulings on evidence.**—Assignments to the admission of testimony will not be considered, unless preserved by bill of exceptions. *Thomas v. Barthold* (Civ. App.) 171 S. W. 1071; *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666; *Richard Cocke & Co. v. New Era Gravel & Development Co.* (Civ. App.) 168 S. W. 988; *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180; *Nunez v. McElroy* (Civ. App.) 174 S. W. 829; *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465; *St. Louis*

Southwestern Ry. Co. of Texas v. Hassell (Civ. App.) 177 S. W. 518; Allen v. Reed (Civ. App.) 179 S. W. 544; Texas & P. Ry. Co. v. Baker (Civ. App.) 184 S. W. 664; Kersh v. Matthews (Civ. App.) 186 S. W. 733; Eubank v. Bostick (Civ. App.) 194 S. W. 214.

An assignment of error complaining of the rejection of evidence cannot be reviewed on appeal, where the evidence was not preserved by a proper bill of exceptions. Houston Transp. Co. v. San Jacinto Rice Co. (Civ. App.) 163 S. W. 1023.

An assignment of error as to a ruling on evidence must be overruled, where the bill of exception preserving the objection is not contained in the record, and it does not appear from the record that the objection was preserved and shown in the statement of facts. Malcolm v. Sims-Thompson Motor Car Co. (Civ. App.) 164 S. W. 924.

Error in excluding evidence cannot be reviewed on appeal, where appellants' brief fails to show that the ruling has been preserved by bill of exceptions. First State Bank & Trust Co. v. Southwestern Engineering & Construction Co. (Civ. App.) 170 S. W. 860.

The court, in reviewing rulings on evidence, is confined to the objections in the bill of exceptions. Brown v. Southern Gas & Gasoline Engine Co. (Civ. App.) 176 S. W. 73.

Refusal to admit parol testimony to vary provisions of trust deed will, though not presented by bill of exceptions, be reviewed as fundamental error. McLeod v. McCall (Civ. App.) 180 S. W. 293.

Plaintiff can take advantage of the court's refusal to permit him to introduce evidence in support of his case only by excepting to such refusal at the time, which exception must be shown by a bill of exceptions, duly approved by the trial judge, and properly filed in the trial court. A. G. Schwab & Son v. Norwood (Civ. App.) 183 S. W. 807.

The action of the court, upon motion to strike out evidence, should be presented by bills of exception in order to be reviewed. Crews v. Powers (Civ. App.) 184 S. W. 363.

The action of the court in excluding answers to questions except on cross-examination will not be reviewed in the absence of the bill of exceptions showing what the answers would have been. Fox v. Houston & T. C. Ry. Co. (Civ. App.) 186 S. W. 852.

20. — **Depositions.**—Alleged error in admitting a deposition cannot be reviewed where the contents thereof are not preserved in bill of exceptions or otherwise under Supreme Court rule 62a (149 S. W. x), confining reversals to errors probably causing an improper judgment. Varley v. Nichols-Shepard Sales Co. (Civ. App.) 191 S. W. 611.

21. — **Submission of issues.**—Unless preserved in bill of exceptions in accordance with this article, the denial of special interrogatories to the jury will not be reviewed. Texarkana & Ft. S. Ry. Co. v. Casey (Civ. App.) 172 S. W. 729.

22. — **Instructions.**—Where the record shows a special charge and the refusal thereof, but does not show an exception at the time, the ruling cannot be reviewed in view of this article and art. 2061. Heath v. Huffhines (Civ. App.) 168 S. W. 974; City of Ft. Worth v. Morgan (Civ. App.) 168 S. W. 976; Taylor v. Butler (Civ. App.) 168 S. W. 1004.

Error assigned as to a question alleged to have been propounded by the jury to the court, and answered, not supported by bill of exceptions taken as provided by law, cannot be considered. Copeland v. Porter (Civ. App.) 169 S. W. 915.

Under arts. 1972, 2058-2060, and Practice Act 1913, amending articles 1971, 1974, 2061, giving and refusal of instructions held not reviewable, where exception was not reserved. International & G. N. Ry. Co. v. Bland (Civ. App.) 181 S. W. 504.

Under Rev. St. 1911, arts. 2058-2060, and article 2061, assignments of error, complaining of charge, cannot be considered, though plaintiff in error filed objections when charge was submitted in accordance with art. 1971, but reserved no bills of exception. Loeb v. Texas & N. O. R. Co. (Civ. App.) 186 S. W. 378. See, also, arts. 1974, 2061.

23. — **Verdict or findings.**—Where a finding that plaintiff in an action for negligence in delivering a telegram was not guilty of contributory negligence was not challenged, the contention that judgment for him was erroneous because he was guilty of contributory negligence would be overruled. Western Union Telegraph Co. v. Johnson (Civ. App.) 164 S. W. 903.

In action for breach of a building contract, finding and conclusion of trial court that no material change from the contract was made, to which no objection was taken, held conclusive. Title Guaranty & Surety Co. v. Barnwell (Civ. App.) 178 S. W. 694.

In absence of bill of exception or statement of facts showing evidence before trial court on hearing of motion for new trial, asking that judgment by default against defendant be set aside because citation was served in less than ten days before return day, it must be assumed court found and was warranted in finding service was perfect, as shown by return. Dawson v. George (Civ. App.) 193 S. W. 495.

26. — **Failure to file conclusions of law and fact.**—An appellant, who failed to secure a bill of exceptions and assign error upon the failure of the court to file findings of fact and conclusions of law within the time prescribed, is not entitled to a reversal for such failure. Bliss v. San Antonio School Board (Civ. App.) 173 S. W. 1176.

In the absence of a bill of exceptions, it will be presumed that the trial judge was not aware of a request for findings and conclusions. Hamilton v. Eiland (Civ. App.) 181 S. W. 260.

Where no bill of exceptions was taken to court's refusal of defendant's timely request for conclusions of fact and law, and there was no verified statement in record that defendant or his counsel were misled or prevented from presenting bill of exceptions, defendant may not have case reversed because no conclusions of fact and law were filed. Ainsworth v. Dorsey (Civ. App.) 191 S. W. 594.

27. — **Motions for new trial.**—The denial of a motion for a new trial cannot be reviewed, where the record does not contain the evidence nor any bills of exceptions. Jackson v. State (Cr. App.) 159 S. W. 846.

28. **Substitutes for bill of exceptions.**—A recital in the judgment that defendant excepted to the overruling of his application for a continuance will not take the place of a proper bill of exceptions. Texas City Terminal Co. v. Thomas (Civ. App.) 178 S. W. 707.

29. **Reserving exceptions in statement of facts.**—That bills of exception are included in the statement of facts, and not brought up in the record thereof, does not prevent consideration of the assignments of error. Ware v. Perkins (Civ. App.) 178 S. W. 846.

A statement of fact approved by the trial court, of presentation of objections and of

exceptions, relative to requested instructions, all before submission of the general charge, is sufficient to constitute proper exceptions, as well as a bill of exceptions. *Chicago, R. I. & G. Ry. Co. v. Whorton* (Civ. App.) 188 S. W. 949.

**30. Requisites, contents, and sufficiency of bill.**—In an action for negligence, where defendant objected and reserved a bill of exceptions to plaintiff's testimony that defendant said he had insurance, he was not required to ask that the cause be withdrawn from the jury and continued. *Carter v. Walker* (Civ. App.) 165 S. W. 483.

An exception embodied in an order overruling a motion for a new trial is sufficient to authorize a review of the judgment, without a special exception to the judgment. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

Certain exceptions in a statement of facts, together with an order entered on the minutes, held not to constitute a "bill of exceptions" to the charge given. *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 171 S. W. 1097.

Under arts. 2058–2060, 2062–2067, bill of exceptions to a refusal of the court to submit special issues to the jury held sufficient. *Shaw v. Garrison* (Civ. App.) 174 S. W. 942.

**33. Waiving absence of bill of exceptions.**—Under rules 40 and 41 for Courts of Civil Appeals (142 S. W. xiv), held that, where a party did not object, in his brief or before motion for rehearing, that there were no bills of exception in the record to the action of the court complained of in the assignments, he would be deemed to have waived such objection. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

### Art. 2059. [1361] [1359] Requisites of bills of exceptions.

Cited, *Texas & N. O. R. Co. v. Francis* (Civ. App.) 165 S. W. 40; *Loeb v. Texas & N. O. R. Co.* (Civ. App.) 186 S. W. 378; *International & G. N. R. Co. v. Bartek* (Civ. App.) 177 S. W. 137 (in dissenting opinion).

**Requisites and sufficiency of bill of exceptions—In general.**—Under Courts of Civil Appeals rules 39, 41 (142 S. W. xxi), a bill of exceptions complaining of the argument of counsel, which sets forth the argument and the exceptions thereto, and the failure of the court to take any action thereon, is sufficient to raise the point on appeal. *American Express Co. v. Parcarello* (Civ. App.) 162 S. W. 926.

In a proceeding to enforce a claim to property attached as the property of claimant's brother, an exception as to the court's remark about the testimony of their mother held not sufficient to require a review of alleged error in excluding her testimony. *Taylor v. Butler* (Civ. App.) 168 S. W. 1004.

An exception complaining that an instruction did not charge the law raising the issue of "assumed risk as developed by the evidence," held insufficient to present the objection that the court failed to specifically instruct on the issue of assumed risk. *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 809.

Objection that a charge permits a double recovery is not presented by an exception: "It is not the law; there is no pleading and no evidence to support the issue." *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

Bill of exceptions, together with statement of facts, to an argument of counsel, held sufficient to present the error to the court as ground for reversal. *Kansas City, M. & O. Ry. Co. v. Cave* (Civ. App.) 174 S. W. 872.

The bill of exceptions held insufficient to show error in refusal to permit a physician to examine for defendant, outside the courtroom and the presence of the jury, plaintiff's alleged injury. *Houston & T. C. R. Co. v. Bukowsky* (Civ. App.) 175 S. W. 477.

The concluding recital of a bill of exceptions that counsel excepts thereto, held by necessary implication an exception to the action of the court complained of. *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979.

Where bill of exceptions did not show whether an order admitted in evidence was as the bill recited, and there was no citation to statement of facts identifying order as that recited in bill, assignment of error to its admission and to admission of notice of such election and levying of tax therefor will be overruled. *Clark v. State* (Civ. App.) 189 S. W. 84.

In view of art. 1612, bill of exceptions on which was based an assignment of error complaining of remarks in presence of jury held sufficient to show that remarks were made in presence of jury. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

A bill of exceptions to the admission of parol testimony changing written contract between parties, which did not show particular testimony objected to or that court had an opportunity to determine whether it was subject to objection made, was insufficient. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

— **Certainty and definiteness.**—An assignment of error complaining of the admission in evidence of certain instruments held not reviewable, where it did not appear from the bills of exception or otherwise that instruments were objected to. *Roibal v. Giron* (Civ. App.) 158 S. W. 798.

Under this article, a bill of exceptions which referred to charges requested by the defendant by number, which request was marked "Refused" by the judge and filed with the clerk so as to become a part of the record under art. 1974 is sufficient. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Bill of exceptions complaining of argument of plaintiff's counsel held too uncertain and indefinite to support an assignment of error. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

Under this article and art. 2061, an exception to an instruction that defendant "in open court excepted and here now excepts" held too general to support an assignment of error. *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822.

In a personal injury action, exceptions to the court's definition of reasonable care, on the ground that it was not correct, and that charge presented plaintiff's theory of the case, but excluded defendant's theory, are too general to warrant consideration. *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17.

— **Scope and contents in general.**—Where a bill of exceptions to the admission of opinion evidence fails to state facts showing want of qualification of the witness, it will be presumed on appeal that the witness was qualified. *Kelley v. Fain* (Civ. App.) 168 S. W. 869.

A bill of exceptions, by which appellant complained that the court failed to prepare and read its charge to the jury before argument as required by statute, held not defective in failing to show that appellant did not waive the provisions of the statute. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

Where bill of exceptions showed exclusion of opinion of defendant's witness as to damages, it could not be assumed that the court would have excluded competent testimony to prove damages. *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739.

In the absence of statements to the contrary in the bill of exceptions, it will be presumed that the court by proper inquiries satisfied itself as to the competency of witnesses before allowing them to give expert testimony. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

Where it does not appear from bill of exceptions that defendant was not notified to produce original check, or that he did not have such check in court, assignment of error that plaintiff had, over objection, been permitted to testify as to the check, will not be considered. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

Where a bill of exceptions contained no statement that the grounds of objection to incorporation of school district were in fact true, the presumption will be to the contrary. *Clark v. State* (Civ. App.) 189 S. W. 84.

— **Showing prejudice to appellant.**—In an action against a sheriff and his bondsmen for damages in failing to file a record of attachment, exception to exclusion of the writ and amended return held not to show the materiality of the excluded evidence, so that it would not be considered. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

Error, if any, in excluding testimony of plaintiff's manager as to value of piano covered by policy and as to plaintiff's profit, held not reviewable error, where bill of exceptions showed that manager did not know what plaintiff gave for piano, and did not show that he could or would have stated the profit. *Fireman's Ins. Co. v. Jesse French Piano & Organ Co.* (Civ. App.) 187 S. W. 691.

In action to enjoin illegal sale of liquor, admitting evidence that temporary injunction against defendant was in force is harmless error where bill of exceptions does not show upon what grounds it was procured. *Ætna Club v. State* (Civ. App.) 193 S. W. 1106.

— **Setting forth objections and exceptions.**—A bill of exceptions to the exclusion of evidence which does not state what the objection to the evidence was will not be considered. *Autrey v. Collins* (Civ. App.) 161 S. W. 413; *First Nat. Bank v. Smith* (Civ. App.) 160 S. W. 311; *St. Louis Southwestern Ry. Co. of Texas v. Matthews* (Civ. App.) 164 S. W. 1092; *George W. Saunders Live Stock Commission Co. v. Kincaid* (Civ. App.) 168 S. W. 977; *Solomon v. Merchants' & Planters' Nat. Bank* (Civ. App.) 168 S. W. 1029; *Fuller v. El Paso Live Stock Commission Co.* (Civ. App.) 174 S. W. 930; *M. Alexander & Co. v. Fletcher & Whitfield* (Civ. App.) 177 S. W. 514; *Hall v. Ray* (Civ. App.) 179 S. W. 1135; *First Nat. Bank of Snyder v. Patterson* (Civ. App.) 185 S. W. 1018.

A bill of exceptions complaining of the admission of testimony must state the grounds of the objection. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397; *Baker v. Robertson* (Civ. App.) 163 S. W. 326; *Denton v. English* (Civ. App.) 171 S. W. 248; *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

A bill of exceptions, complaining of the admission in evidence of a letter, is insufficient to present for review the admission of parol evidence. *Standard Milling Co. v. Imperial Rice Co.* (Civ. App.) 160 S. W. 637.

An assignment of error to the exclusion of evidence, not supported by the bill of exceptions applicable to the assignment, does not raise any question on appeal. *Ellerd v. Campfield* (Civ. App.) 161 S. W. 392.

Where the bills of exception fail to disclose an objection to evidence, the action of the trial court in relation thereto cannot be reviewed. *Gaal v. Camp* (Civ. App.) 164 S. W. 1070.

Upon a bill of exceptions to evidence admitted, only such objections as were presented in the trial court and as stated in the bill will be considered on appeal, and this applies as well to evidence excluded. *Houston & T. C. R. Co. v. Corsicana Fruit Co.* (Civ. App.) 170 S. W. 849.

Bills of exception to the giving and refusal of charges held to present matters for review, though grounds of objection are not stated, where the trial court understood the grounds of objection. *Eaton v. Klein* (Civ. App.) 174 S. W. 331.

Objections, in an assignment of error, which the bill of exceptions does not show were made on the trial, are not reviewable on appeal. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

Under arts. 1971, 1972, 1974, 2058–2061, giving and refusal of instructions held not reviewable, where exception was not reserved. *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504.

— **Incorporating evidence in general.**—Where bills of exception to the admission of evidence merely show that the defendant objected to certain medical witnesses testifying in the case as to the condition of plaintiff, but do not show what the evidence objected to was, there is nothing for the court to consider. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639.

Error could not be predicated upon the admission of the testimony of witnesses claimed to be inadmissible under the pleadings, where neither the brief nor the bill of exceptions showed what the witnesses testified. *Underwood v. Jordan* (Civ. App.) 166 S. W. 88.

Bills of exceptions complaining of the admission of testimony, not showing what testimony was objected to, were too indefinite to be considered. *Stone & Webster Engineering Corporation v. Goodman* (Civ. App.) 167 S. W. 10.

In disposing of assignment of error complaining of admission of testimony, appellate court is confined to testimony as stated in bill of exceptions. *Boerger v. Vandergrift* (Civ. App.) 188 S. W. 948.

— **Setting forth evidence excluded.**—A bill of exceptions to the exclusion of evidence must show, what the witness would have testified if permitted to do so. *Woods*

v. Eberling (Civ. App.) 169 S. W. 932; McFarland v. Lynch (Civ. App.) 159 S. W. 303; Miller v. Campbell (Civ. App.) 171 S. W. 251; J. W. Carter Music Co. v. Evans (Civ. App.) 177 S. W. 1014; Caffarelli Bros. v. Bell (Civ. App.) 190 S. W. 223; Kennedy v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 192 S. W. 1114.

Where a bill of exceptions complained of the exclusion of testimony "offered to prove" certain facts, it was not fatally defective on the ground that it did not show that the witnesses would have testified to the matters "offered to be proved." Hartfield v. Greber (Civ. App.) 160 S. W. 603.

A statement in the bill of exceptions, to the exclusion of evidence, that "defendant offered to prove" the facts stated is equivalent to a statement that witness would have testified according to the offer, so that the bill is not objectionable on the ground that it does not state what the witness would have testified. Northern Irr. Co. v. Dodd (Civ. App.) 162 S. W. 946.

A bill of exceptions to the exclusion of testimony contained in an offer of proof should show the proof that exceptant could have made, had he been permitted to do so. Edwards v. McGuire (Civ. App.) 165 S. W. 477.

Where offered testimony as to damages was not set out in the bill, its exclusion cannot be reviewed. Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton (Civ. App.) 172 S. W. 739.

Where a bill of exceptions stated that one party offered to prove certain things by a witness, that was sufficient as an allegation that the witness would have so testified. Thatcher v. Matthews (Civ. App.) 183 S. W. 810.

A bill of exceptions to the exclusion of evidence, reciting merely what the evidence would have been, is insufficient, where it fails to show the materiality of the testimony, which is apparently unconnected with the issues. Lester v. Hutson (Civ. App.) 184 S. W. 268.

Assignments to sustaining of objections to questions on direct examination will not be considered where the bills of exceptions do not show the testimony to be elicited, but the rule that bills of exceptions must show the testimony expected to be elicited does not apply to questions on cross-examination or to motion to strike testimony. Yeatts v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 184 S. W. 636.

— **Necessity of specific exception.**—Where a bill of exceptions to the admission of evidence did not show that declarations of the testator, including an inadmissible statement subject to a distinct objection, were separately objected to, but merely disclosed an objection to the entire declarations, there was no reversible error in receiving the inadmissible testimony; but such rule did not apply to entire declarations, subject only to single objection. Scott v. Townsend, 166 S. W. 1138, 106 Tex. 322, reversing judgment (Civ. App.) 159 S. W. 342.

A bill of exception to evidence not separating the inadmissible from the admissible, evidence will be overruled. Lester v. Hutson (Civ. App.) 167 S. W. 321.

One general exception to the refusal to give several requested instructions held not entitled to consideration on appeal, where any one of them was properly refused. Hovey v. Sanders (Civ. App.) 174 S. W. 1025.

Where bill of exceptions does not point out any specific testimony to which definite objection was applied, error in the admission of evidence is not reviewable. Burnett v. Continental State Bank of Alto (Civ. App.) 191 S. W. 172.

— **Insertion of documents.**—Where error was assigned to the overruling of a motion to dismiss the suit on the ground of changed cause of action in the amended petitions, the original and amended petitions should be set out in the transcript, but need not be in the bill of exceptions. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 158 S. W. 564.

An order denying a motion for a continuance cannot be reviewed, where plaintiff's bill of exceptions did not contain the application, nor the substance thereof, and it could not be ascertained from the bill itself whether the application was sufficient. Smith v. Huff (Civ. App.) 164 S. W. 429.

The bill of exceptions to admission of a copy of a letter not setting it out, and the brief not referring to the statement of facts showing its admission, the matter is not properly presented for consideration. Gulf, C. & S. F. Ry. Co. v. Graham (Civ. App.) 175 S. W. 472.

— **Operation and effect of bill.**—Where the bill of exceptions as approved by the trial judge expressly based the exclusion of evidence on the ground that it was a self-serving declaration, although reciting other reasons which might have been urged for exclusion, it will be inferred that the trial court found that other objections were not sufficient. Houston Oil Co. of Texas v. Drumwright (Civ. App.) 162 S. W. 1011.

### Art. 2060. [1362] [1360] May refer to statement of facts.

Cited, Texas & N. O. R. Co. v. Francis (Civ. App.) 165 S. W. 40; Loeb v. Texas & N. O. R. Co. (Civ. App.) 186 S. W. 378.

**Reference to statement of facts.**—Evidence which is set out in full in the bill of exceptions need not be repeated in the statement of facts, under this article, and it is the appellant's duty to try to obtain a written agreement for the omission of such evidence from the statement. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 158 S. W. 564.

Agreed statement of facts, not approved by the trial judge or referred to in the bill of exceptions approved by him, held not entitled to consideration in connection with the bill of exceptions. Jones v. Doty (Civ. App.) 165 S. W. 15.

Exception to admission of evidence need not be preserved by bill of exceptions, but, by provision of this article, may be reserved and noted in the statement of facts, but one relying on the right, under this article, to have his objections and exceptions noted in the statement of facts, must present the grounds of his objections clearly. Houston E. & W. T. Ry. Co. v. Cavanaugh (Civ. App.) 173 S. W. 619.

The bill of exceptions to admission of a copy of a letter not setting it out, and the brief not referring to the statement of facts showing its admission, the matter is not properly presented for consideration. Gulf, C. & S. F. Ry. Co. v. Graham (Civ. App.) 175 S. W. 472.



Under Rev. St. 1911, arts. 1971, 1972, 1974, 2058-2061, giving and refusal of instructions held not reviewable, where exception was not reserved. *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504.

Bill of exceptions must stand or fall by its recitals, and reference to statement of facts is not permissible. *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

### Art. 2061. [1363] [1361] Charges regarded as approved unless excepted to.

Cited, *St. Louis & S. F. R. Co. v. White* (Civ. App.) 160 S. W. 1128; *Missouri, K. & T. Ry. Co. of Texas v. Hendricks* (Civ. App.) 160 S. W. 1158; *Texas & O. R. Co. v. Francis* (Civ. App.) 165 S. W. 40; *Missouri, K. & T. Ry. Co. of Texas v. Churchill* (Civ. App.) 171 S. W. 517; *Darden v. Southern Traction Co.* (Civ. App.) 172 S. W. 200; *Wickizer v. Williams* (Civ. App.) 173 S. W. 288; *King County v. Martin* (Civ. App.) 173 S. W. 960; *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974; *King v. Gray* (Civ. App.) 175 S. W. 763; *Texarkana & Ft. S. Ry. Co. v. Brass* (Civ. App.) 175 S. W. 778; *McCullough v. Hurt* (Civ. App.) 175 S. W. 781; *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 177 S. W. 137; *Crum v. Thomason* (Civ. App.) 181 S. W. 803; *Beaty v. Missouri, K. & T. Ry. Co. of Texas* (in dissenting opinion) (Civ. App.) 185 S. W. 293; *Glens Falls Ins. Co. v. Walker* (Civ. App.) 187 S. W. 1036; *Western Union Tel. Co. v. Huffstutler* (Civ. App.) 188 S. W. 455; *Rabinowitz v. Smith Co.* (Civ. App.) 190 S. W. 197; *Terrell v. Middleton* (Sup.) 191 S. W. 1138; *Terrell v. Middleton* (Sup.) 193 S. W. 139 (in dissenting opinion); see, also, arts. 1972, 1974 and notes thereunder.

**Necessity in general.**—Under arts. 1970-1972, complaining party can have error considered by appellate court without reserving formal bill of exceptions to the general charge; for art. 1972, providing that the charge, after presentation of objections, shall constitute part of record and be regarded as excepted to and subject to revision without necessity of bill of exceptions, was not repealed by implication by Acts 33d Leg. c. 59, amending this article and art. 1974, since such act refers only to requested instructions. *Gulf, T. & W. Ry. Co. v. Dickey* (Sup.) 187 S. W. 184.

Noncompliance with this article and art. 1971 does not affect right to review of rulings on requested instructions; trial being before the act took effect. *Fidelity-Phoenix Fire Ins. Co. v. O'Bannon* (Civ. App.) 178 S. W. 731.

Statutory provision as to objections to charge and failure to charge held one the Legislature had a right to enact, and one which the courts can neither ignore nor emasculate. *Vinson v. State* (Cr. App.) 179 S. W. 574.

Although the Court of Appeals considers exceptions to rulings on requested instructions necessary, yet an assignment of error without such exception will be considered where the Supreme Court's action in granting writs of error renders the necessity of exceptions doubtful. *Hill v. Staats* (Civ. App.) 187 S. W. 1039.

Assignments of error to the giving and refusal of charges cannot be reviewed, in the absence of exceptions. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.) 173 S. W. 273; *Ross v. Jackson* (Civ. App.) 165 S. W. 513; *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925; *Lester v. Hutson* (Civ. App.) 167 S. W. 321; *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21; *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465; *Texas & P. Ry. Co. v. Brown* (Civ. App.) 168 S. W. 866; *Heath v. Huffhines* (Civ. App.) 168 S. W. 974; *Texas Cent. R. Co. v. Mallard* (Civ. App.) 168 S. W. 994; *Texas & P. Ry. Co. v. Tomlinson* (Civ. App.) 169 S. W. 217; *Gulf, C. & S. F. Ry. Co. v. Battle* (Civ. App.) 169 S. W. 1048; *Texas & P. Ry. Co. v. Beard* (Civ. App.) 169 S. W. 1050; *Same v. Moody* (Civ. App.) 169 S. W. 1057; *Same v. Hubbard* (Civ. App.) 169 S. W. 1058; *Weatherford, M. W. & N. W. Ry. Co. v. Smith* (Civ. App.) 170 S. W. 133; *J. H. W. Steele Co. v. Dover* (Civ. App.) 170 S. W. 899; *International & G. N. R. Co. v. Tate* (Civ. App.) 170 S. W. 1061; *Conn v. Houston Oil Co. of Texas* (Civ. App.) 171 S. W. 520; *O'Neil Engineering Co. v. City of San Augustine* (Civ. App.) 171 S. W. 524; *St. Louis Southwestern Ry. Co. of Texas v. Mathews* (Civ. App.) 171 S. W. 797; *Elser v. Putnam Land & Development Co.* (Civ. App.) 171 S. W. 1052, rehearing denied 171 S. W. 1200; *Anderson & Day v. Darsey* (Civ. App.) 171 S. W. 1089; *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 171 S. W. 1097; *Williams v. Phelps* (Civ. App.) 171 S. W. 1100; *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180; *Garrett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 172 S. W. 187; *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188; *Scarborough v. Wheeler* (Civ. App.) 172 S. W. 196; *Houston E. & W. T. Ry. Co. v. Houston Packing Co.* (Civ. App.) 176 S. W. 749; *Darden v. Southern Traction Co.* (Civ. App.) 172 S. W. 200; *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482; *Capps v. Johnson* (Civ. App.) 174 S. W. 294; *Franklin v. International & G. N. Ry. Co.* (Civ. App.) 174 S. W. 333; *James v. Golson* (Civ. App.) 174 S. W. 688; *Sands v. Sedwick* (Civ. App.) 174 S. W. 894; *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170; *Bohn v. Burton-Lingo Co.* (Civ. App.) 175 S. W. 173; *Dees v. Crane* (Civ. App.) 175 S. W. 468; *Gulf, C. & S. F. Ry. Co. v. Graham* (Civ. App.) 175 S. W. 472; *Waterman Lumber & Supply Co. v. Phelps* (Civ. App.) 175 S. W. 742; *Western Union Telegraph Co. v. Holcomb* (Civ. App.) 175 S. W. 750; *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 175 S. W. 1106; *Houston East & West Texas Ry. Co. v. Houston Packing Co.* (Civ. App.) 176 S. W. 63; *Houston B. & T. Ry. Co. v. Lewis* (Civ. App.) 176 S. W. 68; *Rotge v. Simmler* (Civ. App.) 176 S. W. 614; *Chicago, B. & Q. R. Co. v. Wilson* (Civ. App.) 176 S. W. 619; *Missouri, O. & G. Ry. Co. of Texas v. Black* (Civ. App.) 176 S. W. 755; *Moore v. Decker* (Civ. App.) 176 S. W. 816; *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 177 S. W. 137; *Nelson v. Boggs* (Civ. App.) 177 S. W. 1005; *Cleveland v. Stanley* (Civ. App.) 177 S. W. 1181; *Slaughter v. Crisman & Nesbit* (Civ. App.) 178 S. W. 1; *Bankers' Trust Co. v. Franks* (Civ. App.) 178 S. W. 602; *Gillespie v. Williams* (Civ. App.) 179 S. W. 1101; *Holcomb v. Blankenship* (Civ. App.) 180 S. W. 918; *International & G. N. Ry. Co. v. Bland* (Civ. App.) 181 S. W. 504; *Galveston, H. & S. A. Ry. Co. v. Brune* (Civ. App.) 181 S. W. 547; *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412; *West Texas Supply Co. v. Dunivan* (Civ. App.) 182 S. W. 425; *Bennett v. Rio Grande Canal Co.* (Civ. App.) 182 S. W. 713; *Loeb v. Texas & N. O. R. Co.* (Civ. App.) 186 S. W. 378; *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728; *Hawks v. Longbotham* (Civ. App.) 188 S. W. 734; *Thorne v. Dashiell* (Civ. App.) 189 S. W. 986; *Roscoe, S. & P. Ry. Co. v.*

Taylor (Civ. App.) 191 S. W. 1175; Houston Belt & T. Ry. Co. v. Price (Civ. App.) 192 S. W. 359; Cameron v. First Nat. Bank (Civ. App.) 194 S. W. 469; Vaky v. Phelps (Civ. App.) 194 S. W. 601.

Where the record contains no bills of exceptions required as a prerequisite to consideration of objections to the charge and refusals to charge, the assignments of error relating thereto are not reviewable. Ft. Worth & R. G. R. Co. v. Paxton (Civ. App.) 175 S. W. 720; Quanah, A. & P. Ry. Co. v. Galloway (Civ. App.) 165 S. W. 546; Saunders v. Thut (Civ. App.) 165 S. W. 553; Johnson v. Hoover & Lyons (Civ. App.) 165 S. W. 900; National Novelty Import Co. v. Griffin & Griffin (Civ. App.) 168 S. W. 85; King v. Hutson (Civ. App.) 168 S. W. 401; Heath v. Huffhines (Civ. App.) 168 S. W. 974; City of Ft. Worth v. Morgan (Civ. App.) 168 S. W. 976; Taylor v. Butler (Civ. App.) 168 S. W. 1004; Crow v. Childress (Civ. App.) 169 S. W. 927; International & G. N. Ry. Co. v. Feldman (Civ. App.) 170 S. W. 133; W. R. Case & Sons Cutlery Co. v. Folsom (Civ. App.) 170 S. W. 1066; Texas Midland R. R. v. Becker & Cole (Civ. App.) 171 S. W. 1024; Galveston, H. & S. A. Ry. Co. v. Kellogg (Civ. App.) 172 S. W. 180; Gunter v. Merchant (Civ. App.) 172 S. W. 191, rehearing denied 173 S. W. 260; Gulf, C. & S. F. Ry. Co. v. Texas Packing Co. (Civ. App.) 172 S. W. 195; Texas Midland R. R. v. Fogleman (Civ. App.) 172 S. W. 558; Elliott v. Clark (Civ. App.) 172 S. W. 560; Stephenville, N. & S. T. Ry. Co. v. Wheat (Civ. App.) 173 S. W. 974; Texas & P. Ry. Co. v. Graham & Price (Civ. App.) 174 S. W. 297; St. Louis, B. & M. Ry. Co. v. Dawson (Civ. App.) 174 S. W. 850; Bundick v. Moore-Cortes Canal Co. (Civ. App.) 177 S. W. 1030; Thompson v. Richardson (Civ. App.) 186 S. W. 275; Fireman's Ins. Co. v. Jesse French Piano & Organ Co. (Civ. App.) 187 S. W. 691; Goodson v. Houston & T. C. R. Co. (Civ. App.) 189 S. W. 82; Fred Mercer Dry Goods Co. v. Fikes (Civ. App.) 191 S. W. 1178; Yates Mercantile Co. v. Farmers' Guaranty State Bank of Jacksonville (Civ. App.) 194 S. W. 1157.

Court of Civil Appeals rule 24 (142 S. W. xiii), providing that a ground of error not distinctly set forth in the motion for new trial shall be waived, unless fundamental, held in conflict with this article and art. 2062, so that assignments of error to rulings apparent of record are to be considered, whether a motion for rehearing is filed including them. Benton v. Kuykendall (Civ. App.) 160 S. W. 438.

Under the substantially direct provisions of this article and art. 1974, in absence of exceptions in the appellate record to the refusal of instructions, the trial court's action thereon is deemed approved. Mutual Life Ins. Ass'n of Donley County v. Rhoderick (Civ. App.) 164 S. W. 1067.

Though art. 1974 provides that, when a request is given, the court shall note the same, subscribe his name thereto, and it shall be filed with the clerk and constitute a part of the record of the cause, yet, under the express provisions of this article, it must be excepted to, or it will be regarded as approved. Quanah, A. & P. Ry. Co. v. Galloway (Civ. App.) 165 S. W. 546.

Where no objection was made and no exception taken to a charge, the giving of the charge must, as required by this article, be regarded as approved, and appellant cannot complain thereof. Texas Cent. R. Co. v. McCall (Civ. App.) 166 S. W. 925.

This article refers to the articles of the chapter relating to bills of exceptions, and not to the foregoing articles of the amendatory law, amending articles 1970, 1971, 1973, 1974, of chapter 13, relating to instructions and objections; and the articles as amended govern the exceptions to instructions and refusal of instructions. Heath v. Huffhines (Civ. App.) 168 S. W. 974.

Under Acts 33d Leg. c. 59, defining the time and manner of submitting instructions and making exceptions thereto, the rulings on instructions must be proved by a proper bill of exceptions taken at the time. George W. Saunders Live Stock Commission Co. v. Kincaid (Civ. App.) 168 S. W. 977.

Under this article and arts. 1971-1973, plaintiff, not excepting to refusal of his requested special charges, and whose only objection was filed after judgment, held to have approved the charge. Moore v. Cooper Mfg. Co. (Civ. App.) 171 S. W. 1034.

The court's action upon oral objections to a charge should be presented on appeal by a bill of exceptions, as required by rule 55 for district and county courts (142 S. W. xxi). Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton (Civ. App.) 172 S. W. 739.

Where no exception was presented to a charge which affirmatively excluded a recovery upon the issue of discovered peril, plaintiff, under this article, will be held to have approved such instruction. St. Louis, S. F. & T. Ry. Co. v. West (Civ. App.) 174 S. W. 287.

Trial court's refusal of appellant's special charge must be treated as approved by him, where he failed to except thereto as required by this article, so that his assignment of error thereon would be overruled. Orand v. Whitmore (Civ. App.) 185 S. W. 347.

There being no formal bill of exceptions, and the record showing merely that when the case was called appellant presented to the court certain written objections to the charge, and requested a special charge, and the court indorsed on both documents his signature after the word "refused," held, under the act of 1913 (Acts 33d Leg. c. 138), that appellant waived his objection to the charge and the refusal. St. Louis Southwestern Ry. Co. v. Texas v. Downs (Civ. App.) 186 S. W. 864.

Under this article defendants in trespass to try title who had failed to except to court's charge and to its refusal to give their special charges held to have acquiesced in such rulings, and to be bound thereby. Hume v. Carpenter (Civ. App.) 188 S. W. 707.

In view of this article and art. 1971, where plaintiff did not except to refusal of instructions, he is in attitude of having approved rulings at trial, and hence assignments of error based thereon will be overruled. Cummens v. Owen Bros. Const. Co. (Civ. App.) 192 S. W. 792.

— **Peremptory instructions.**—Acts 33d Leg. c. 59, declaring that objections or exceptions to the charge of the court not made in the trial court shall be deemed to be waived, held not to apply to peremptory instructions, such as the direction of a verdict. Owens v. Corsicana Petroleum Co. (Civ. App.) 169 S. W. 192.

Erroneous giving of peremptory instruction held fundamental error, reviewable without an exception, notwithstanding the act of the Thirty-third Legislature (Acts 33d Leg. c. 59). Henderson & Grant v. Gilbert (Civ. App.) 171 S. W. 304.

In the absence of a proper bill of exceptions, a defendant is presumed to have ap-

proved of a peremptory instruction fixing its liability, and cannot complain of the refusal of requested instructions tending to exonerate it. *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 173 S. W. 967.

Under Acts 33d Leg. c. 59, error in giving a peremptory instruction, even if fundamental, is waived by failure to except in the manner prescribed. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

This article applies to a peremptory instruction for one of the parties, which was given in writing. *Id.*

Under Act March 29, 1913 (Acts 33d Leg. c. 59), error as to the granting of peremptory instruction will not be considered in the absence of exception taken below. *King v. Gray* (Civ. App.) 175 S. W. 763.

Under Act March 29, 1913 (Acts 33d Leg. c. 59), where appellant had failed to preserve exceptions to a peremptory instruction, assignments that the judgment was not sustained by the evidence and was contrary to the undisputed facts could not be considered. *Id.*

An assignment of error complaining of refusal of a peremptory instruction not excepted to cannot be considered. *Denison Cotton Mill Co. v. McAmis* (Civ. App.) 176 S. W. 621.

Under this article and art. 1971, a defendant, to have the giving of a peremptory instruction reviewed, must except before it is submitted to the jury. *Walker v. Haley* (Civ. App.) 181 S. W. 559.

An assignment of error in giving a peremptory instruction will not be considered where the record fails to show that an objection was made and exception reserved in the trial court, as required by the statute. *Donaldson v. McElroy* (Civ. App.) 184 S. W. 1100.

Where a record fails to show that a bill of exceptions was taken to a peremptory instruction as required by this article, or that appellant's objections thereto were overruled, or that exception was taken by appellant to such overruling, the instruction will not be reviewed. *Strong v. Harwell* (Civ. App.) 185 S. W. 676.

The giving of a peremptory charge does not present a fundamental error, or one apparent on the face of the record, which can be reviewed without a sufficient bill of exceptions. *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Civ. App.) 185 S. W. 979.

— **Fundamental errors.**—The giving of an instruction on an issue not raised by the pleadings is fundamental error which can be reviewed, though the appellant did not reserve his exceptions in the trial court as required by Acts 33d Leg. c. 59. *Cooper & Jones v. Hall* (Civ. App.) 168 S. W. 465.

There being evidence and pleading to support the verdict and judgment, rendition of the judgment presents no error in law apparent on the face of the record, or fundamental error, requiring reversal, though not assigned, and though no exception was taken to the peremptory charge. *Dees v. Crane* (Civ. App.) 175 S. W. 468.

Under this article, the action of the court in granting certain special charges, in the absence of objection and exception thereto, could not be considered as fundamental error. *Woodruff v. Deshazo* (Civ. App.) 181 S. W. 250.

Though the matter was not presented by appropriate exceptions to the refusal of a special charge that a lease contract by a railroad company was void, held, that the contention that it was void as interfering with trade and stifling competition presents fundamental error which may be considered. *Stephenson v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 181 S. W. 568.

Where not presented by bills of exception, errors in charge, though they be fundamental, cannot, under this article, be considered on appeal, unless jurisdictional. *Loeb v. Texas & N. O. R. Co.* (Civ. App.) 186 S. W. 378.

— **Special issues.**—Under this article, an objection that the submission of a special defense was error could not be considered, where defendant did not except to the instructions or request an instructed verdict. *Elser v. Putnam Land & Development Co.* (Civ. App.) 171 S. W. 1052, rehearing denied *Id.* 1200.

Error could not be predicated on refusal of instructions submitting an issue, where no proper bill of exceptions was taken to the charge on the issue of defendant's liability. *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 171 S. W. 1097.

Where the record did not contain a bill of exceptions, as required by the amendments to the Practice Act, enacted by Acts 33d Leg. c. 59, presenting the trial court's refusal to submit the issue of res judicata, such refusal could not be reviewed. *Missouri, K. & T. Ry. Co. of Texas v. Hood* (Civ. App.) 172 S. W. 1120.

Error as to a specific issue held not reviewable, where requested generally with immaterial issues, and rejected as a whole without exceptions. *Foster v. Bennett* (Civ. App.) 178 S. W. 1001.

The law, requiring reservation of exceptions to the charge and to the giving or refusing of charges, does not apply to the action of the court in submitting, or refusing to submit, special issues of fact to the jury. *Tomson v. Simmons* (Civ. App.) 180 S. W. 1141.

Under this article, appellant cannot complain of the refusal of a special issue which it tendered, where no exceptions were taken below. *First Nat. Bank of Garner, Iowa, v. Smith* (Civ. App.) 183 S. W. 862.

Under this article, failure of court to submit an issue will not be considered on appeal in absence of an exception to the charge for failure to submit such issue. *Hill v. Hill* (Civ. App.) 193 S. W. 726.

**Motion for new trial.**—Under this article and art. 2062, the Court of Civil Appeals rule 24 (142 S. W. xii), providing that error not set forth in the motion for new trial should be considered waived, does not require that a ruling in giving or refusing instructions be included in the motion for new trial. *Brewer v. A. M. Blythe & Co.* (Civ. App.) 153 S. W. 786; *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 155 S. W. 183, rehearing denied, 106 Tex. 160, 160 S. W. 471; *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170.

Where a refused instruction was not excepted to, as provided by art. 1974, it would be presumed to have been approved under this article, and it was not sufficient that the refusal was assigned for error in defendant's motion for a new trial, and that the denial

of such motion was duly excepted to. *Missouri, O. & G. Ry. Co. of Texas v. Love* (Civ. App.) 169 S. W. 922.

Under this article and art. 1971, providing exceptions to charge not made before it is read are waived, exceptions first made in an amended motion for new trial are insufficient. *Jones v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 193 S. W. 373.

**Sufficiency of exceptions.**—Under this article and art. 1971, only such objections can be considered on appeal as were made at the trial in the manner specified, and then only when preserved by bill of exceptions. *St. Louis Southwestern Ry. Co. of Texas v. Wad-sack* (Civ. App.) 166 S. W. 42.

An assignment complaining of the giving of a special charge could not be considered, where the bill of exceptions did not show that the charge was in fact given and failed to point out the particulars in which it was objectionable. *Cleburne St. Ry. Co. v. Dickey* (Civ. App.) 168 S. W. 475.

In a bill of exceptions complaining of error in a portion of the main charge, a certificate of the trial judge which did not show what ruling the court made when the objection was presented, is insufficient under this article and arts. 1984a, 1954, 1970, 1971, 1973, 1974. *Texas & P. Ry. Co. v. Hall* (Civ. App.) 173 S. W. 548.

Notation in bill of exceptions that instructions were requested in accordance with the statutes, and that the defendant duly excepted, etc., held sufficient to show request made and exceptions reserved before charge was read to the jury. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

A bill of exceptions as to the refusal of eight requested charges held sufficient to show an exception to the refusal of a specific charge so as to comply with the requirements of Act of 33d Legislature. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 177 S. W. 528.

Where an instruction is erroneous, appellant need not request a correct charge, but under the statutes the party aggrieved need only except, pointing out the defects and reserve objection by proper bill of exceptions. *Kansas City, M. & O. Ry. Co. v. Russell* (Civ. App.) 184 S. W. 299.

A statement of facts approved by the trial court, of presentation of objections and of exceptions, relative to requested instructions, all before submission of the general charge, is sufficient to constitute proper exceptions, as well as a bill of exceptions. *Chicago, R. I. & G. Ry. Co. v. Whorton* (Civ. App.) 188 S. W. 949.

Where appellant submitted specific grounds embodied in a peremptory charge why it should be submitted to the jury, and asserted a proposition on appeal to sustain charge upon another and different ground not presented in the trial court, it would not be considered. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

Portions of the charge, to which no exceptions are taken and preserved by bill, as required by the statute, cannot be reviewed. *Bullock v. Galveston, H. & H. R. Co.* (Civ. App.) 178 S. W. 826.

A charge not having been excepted to as authorizing a double recovery, objection to it on that account is waived under the law with reference to charges as amended by Acts 33d Leg. c. 59. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

Where an instruction embodies several propositions of law, some of which are accurate and not subject to objection, a general exception is insufficient to raise the propriety of a particular portion of the instruction. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

Where bills of exception to the refusal of special charges recite that "at the proper time" such charges were presented to the trial judge, the recital is sufficient to show that they were presented before the main charge was read to the jury, as required by art. 1971. *Hawks v. Longbotham* (Civ. App.) 188 S. W. 734.

Where the bills of exception did not show that the court's attention was called to objections to charges or requests offered, before the main charge was submitted, assignments based thereon will not be considered. *Heard v. Bowen* (Civ. App.) 184 S. W. 234.

Where exceptions were reserved to an order overruling objections to a charge, but the order failed to show that the objections were made before the charge was given, the propriety of the charge could not be considered on appeal. *Bennett v. Rio Grande Canal Co.* (Civ. App.) 182 S. W. 713.

Court's memorandum on defendants' bill of exception to the general charge held insufficient as not affirmatively showing that, as required by statute, the objections to the court's charge were presented before its reading to the jury, and before the arguments of counsel. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

Under Acts 33d Leg. c. 59, the fact that objections to the charge were made before it was read to the jury must be preserved by a bill of exceptions approved by the judge. *Ross v. State*, 75 Cr. R. 59, 170 S. W. 305.

A statement in the transcript embodying what purports to be exceptions and objections to the charge held not to show that objections were made before the charge was given, as required by this article and arts. 1971, 1973, and assignments of error to the charge cannot be considered. *Heath v. Huffhines* (Civ. App.) 168 S. W. 974.

Under this article and arts. 1970, 1971-1974, rulings on the giving and refusal of instructions are not reviewable, unless the bills of exceptions show that objections to the general charge and special charges refused were presented before the general charge was read. *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514.

Objections to a charge cannot be reviewed, where there is no approved fact in the record showing whether the objections were presented before or after the charge was given, and no preservation of exceptions to the overruling of such objections. *Roberds v. Laney* (Civ. App.) 165 S. W. 114.

Where a statute required exceptions to the action of the trial court in giving or refusing instructions, an indorsement by the court of defendant's objection on a requested instruction, and on a written objection to the charge, constituted substantial compliance. *St. Louis Southwestern Ry. Co. of Texas v. Ragsdale, Price & Co.* (Civ. App.) 185 S. W. 654.

Under this article and art. 2059, an exception to an instruction that defendant "in open court excepted and here now excepts" held too general to support an assignment of error. *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822.

A bill of exceptions to the court's charge which contains a certificate of the trial

judge showing the specific objections relied on only by reference to the motion for new trial is insufficient. *Texas & P. Ry. Co. v. Hall* (Civ. App.) 173 S. W. 548.

Under this article and Court of Civil Appeals rule 31 (142 S. W. xiii), requiring appellant's brief to contain references to the record, etc., an assignment of error not showing where the bill of exceptions to the charge complained of can be found in the record will not be considered. *Houston Chronicle Pub. Co. v. Lemmon* (Civ. App.) 193 S. W. 347.

**Effect of failure to except.**—Under this article, where in a will case proponents took no exception to a charge that execution of a revoking holographic will could be proved by less than two witnesses, they are estopped from contention on appeal that execution of subsequent will must be proved by two witnesses. *Palmer v. Logan* (Civ. App.) 189 S. W. 761.

A party who fails to except to an erroneous charge given, or to request a correct charge, acquiesces in the given charge, and cannot thereafter have the verdict set aside for insufficiency of the evidence which was sufficient under the given charge, although he moved for peremptory charge. *Western Union Telegraph Co. v. Huffstutler* (Civ. App.) 188 S. W. 455.

Where defendant, by not excepting to a charge, was to be considered as having approved it, as provided by art. 1971, he was in no position to ask an additional charge, presenting more fully the issues embraced in the charge given. *Roberts v. Houston Motor Car Co.* (Civ. App.) 188 S. W. 257.

Under this article, defendant, who did not except to an incorrect charge, cannot complain of the refusal of a correct charge which conflicted therewith. *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 177 S. W. 137.

Where defendant's requested instructions were refused, but no objection to the charge was made before it was given, under this article and arts. 1971, 1973, 1974, it is to be regarded as approved and as requested by defendant, as regards his right to complain of refusal of the instructions, within the rule that if one requests two different instructions, on the same issue, and one of them is given, he cannot complain of the refusal of the other. *Cleburne St. Ry. Co. v. Barnes* (Civ. App.) 168 S. W. 991.

In an action against connecting carriers for injury to cattle the failure of defendants to except to the refusal to give a request to apportion the damages was a waiver of an objection to the general charge on the same point, under this article. *Quannah, A. & P. Ry. Co. v. Galloway* (Civ. App.) 165 S. W. 546.

**Waiving statutory requirements.**—Agreements to waive the provisions of Acts 33d Leg. c. 59, governing objections and exceptions to the charge, should not be respected by the courts. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

**Art. 2062. [1364] [1362] No bill of exceptions where ruling appears of record.**

Cited, *St. Louis & S. F. R. Co. v. White* (Civ. App.) 160 S. W. 1128; *Missouri, K. & T. R. Co. of Texas v. Hendricks* (Civ. App.) 160 S. W. 1158; *Rabinowitz v. Smith Co.* (Civ. App.) 190 S. W. 197.

In general.—Court of Civil Appeals rule 24 (142 S. W. xii), providing that a ground of error not distinctly set forth in the motion for new trial shall be waived, unless fundamental, held in conflict with this article and art. 2061, so that assignments of error to rulings apparent of record are to be considered, whether a motion for rehearing is filed including them. *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438.

Under this article, rulings on demurrers and exceptions are sufficiently presented for review where shown in the judgments; but this does not preclude their presentation by bills of exceptions. *Childress v. Robinson* (Civ. App.) 162 S. W. 1172, denying rehearing *Mitchell v. Robinson*, 162 S. W. 443.

The ruling of the trial court upon defendant's plea of privilege being a part of the record could not, under rule 53 (142 S. W. xxi), governing procedure in the district and county courts, be shown by bill of exceptions. *Crowell Independent School Dist. v. First Nat. Bank* (Civ. App.) 163 S. W. 339.

Under arts. 1974 and 2061, and despite this article, the refusal of instructions cannot be reviewed on appeal, unless duly excepted to. *Gulf, C. & S. F. Ry. Co. v. Battle* (Civ. App.) 169 S. W. 1048.

Under this article and arts. 1827, 1830, 1832, 1833, 1903, and District Court Rules 53, 55 (142 S. W. xxi), bill of exceptions to overruling of plea of privilege held unnecessary. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

**Necessity of motion for new trial.**—Under this article and art. 2061, the Court of Civil Appeals rule 24 (142 S. W. xii), providing that error not set forth in the motion for new trial should be considered waived, does not require that a ruling in giving or refusing instructions be included in the motion for new trial. *Brewer v. A. M. Blythe & Co.* (Civ. App.) 158 S. W. 786; *Missouri, K. & T. Ry. Co. of Texas v. Beasley*, 106 Tex. 160, 165 S. W. 183, rehearing denied 106 Tex. 160, 160 S. W. 471.

Under rule 24 for Courts of Civil Appeals (142 S. W. xxi), and this article and art. 2061, held that it was not necessary to a review that an exception to sufficiency of petition be made ground of motion for new trial in court below. *American Nat. Life Ins. Co. v. Rowell* (Civ. App.) 175 S. W. 170.

**Art. 2063. [1365] [1363] Bill to be presented to the judge.**

Cited, *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

**Necessity of allowance and signature by judge.**—It is the duty of accused on appealing from a conviction to follow up his bills of exceptions and have the judge approve and sign them, and himself file them within the time prescribed by law, and he is not relieved from this duty by presenting them to the judge. *St. Clair v. State*, 72 Cr. R. 37, 160 S. W. 353.

Documents purporting to be bills of exception, not approved by the trial judge, will be stricken out on motion. *Gerrate v. State*, 71 Cr. R. 531, 160 S. W. 695.

Plaintiff in error's objection that he did not obtain a fair statement of facts could not be considered when presented by a bill of exceptions, which was refused by the trial court. *Austin Fire Ins. Co. v. Brown* (Civ. App.) 160 S. W. 973.

Under the statute only the judge who tried a criminal case could approve a bill of exceptions and statement of facts, and his successor could not do so. *Porter v. State*, 72 Cr. R. 71, 160 S. W. 1194.

Bills of exception to the charge of the court not filed until after adjournment present no question for review, not being presented to or approved by the trial judge. *Stoner v. State*, 72 Cr. R. 482, 162 S. W. 836.

Where matters of exception are presented in a motion for a new trial, exceptions to the charge, though not approved by the trial judge, are considered as grounds of the motion. *Lewis v. State*, 72 Cr. R. 377, 162 S. W. 866.

Bills of exceptions, not approved by the judge trying the case, but by his successor, cannot be considered on appeal. *Allen v. State*, 72 Cr. R. 277, 162 S. W. 868.

Bills of exceptions which were accepted with an indorsement of the trial court's refusal to approve them, without any attempt to prove up the bills, cannot be considered. *Daly v. State*, 72 Cr. R. 531, 162 S. W. 1152.

Denial of a motion for judgment nunc pro tunc will not be reviewed, where the record contains a bill of exception not approved by the trial judge. *Fitzgerald v. Fitzgerald* (Civ. App.) 168 S. W. 452.

Under this article, objections to the charge appearing in the record could not be treated as a bill of exceptions, where they did not appear to have been presented to the judge and there was nothing to show that the court's attention was ever called thereto. *International & G. N. R. Co. v. Tate* (Civ. App.) 170 S. W. 1061.

A paper, in the record on appeal, which purports to be exceptions, cannot be considered as a bill of exceptions when not approved or certified to by the trial judge. *Gunter v. Merchant* (Civ. App.) 172 S. W. 191, rehearing denied 173 S. W. 260.

Bills of exceptions taken to the exclusion of evidence could not be considered on appeal, where they were not signed by the presiding judge. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

An assignment of error must be overruled, the bill of exceptions not appearing in the record to have been approved by the trial judge, or to having been filed in trial court. *Houston E. & W. T. Ry. Co. v. Samford* (Civ. App.) 181 S. W. 857.

A bill of exceptions, not authenticated by the trial court's approval, cannot be considered. *Holloman v. Black* (Civ. App.) 188 S. W. 973.

Where bill of exceptions is not approved by trial judge, objection to consideration of assignment of error is valid. *Chicago, R. I. & G. Ry. Co. v. Faulkner* (Civ. App.) 194 S. W. 651.

Judgment held not to be reversed because death of trial judge deprived appellant of approved bill of exceptions, where no excuse appeared for failure to secure its approval before the judge's disability. *City of Henderson v. Fields* (Civ. App.) 194 S. W. 1003.

Under this article, alleged misconduct of counsel held not reviewable, where bill of exceptions complaining thereof was not approved. *Id.*

**Sufficiency of approval.**—Objections or mere statements of the ground of objection in the bill of exceptions is not a certificate of the judge that what is stated is true. *Best v. State*, 72 Cr. R. 201, 164 S. W. 996.

In a bill of exceptions complaining of error in a portion of the main charge, a certificate of the trial judge which did not show what ruling the court made when the objection was presented, is insufficient under Acts 33d Leg. c. 59. *Texas & P. Ry. Co. v. Hall* (Civ. App.) 173 S. W. 548.

**Conclusiveness of approved bill.**—A bill of exceptions accepted by the appealing party binds him, and statements therein as to the status of the pleadings must be taken as true. *Nacogdoches Compress Co. v. Hayter* (Civ. App.) 188 S. W. 506.

**Qualification or correction of bill.**—Litigant charged with the duty to reduce his bill of exceptions to writing under this article held not entitled to complain of the overruling of his motion to correct bill, in the absence of allegation in such motion that the bill was defective as the result of fraud, mistake, or imposition practiced upon his attorney or the judge. *Dunn v. Epperson* (Civ. App.) 175 S. W. 729.

Under this article and art. 2067, where plaintiff in error presents bill of exceptions, court has no right to qualify it, but must either sign it, or if not correct indorse his refusal to do so and file a proper bill, leaving plaintiff in error to his remedy of a bill by bystanders if not satisfied. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

#### **Art. 2064. [1366] [1364] Submitted to opposing counsel, etc.**

Cited, *St. Louis Southwestern Ry. Co. of Texas v. Wadsack* (Civ. App.) 166 S. W. 42; *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

#### **Art. 2065. [1367] [1365] If found incorrect.**

Cited, *Dennis v. Kendrick* (Civ. App.) 163 S. W. 693.

**Qualification of bill.**—Where appellant accepts a bill of exceptions as qualified by the trial judge, he is bound thereby. *Hiles v. State*, 73 Cr. R. 17, 163 S. W. 717; *Creech v. State*, 70 Cr. R. 229, 158 S. W. 277; *Boyd v. State*, 72 Cr. R. 521, 163 S. W. 67.

Where accused accepts a bill of exceptions with a qualification by the court which shows that the facts on which the objections are based are not true, the bill will not be reviewed. *Stanton v. State*, 70 Cr. R. 519, 158 S. W. 994.

The Court of Civil Appeals is bound by the trial court's statement of the circumstances set forth as a qualification to the bill of exceptions. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

The court could not qualify bills of exception by stating facts dehors the record; it being necessary that he testify to such facts like any other witness. *Graham v. State*, 72 Cr. R. 9, 160 S. W. 714.

In the absence of bills of exceptions proved as required by statute, only the bills as qualified by the trial judge will be considered. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

Qualifying statements, appended to bills of exceptions by the court when approving the same, are controlling as to the facts stated therein. *Texas, G. & N. Ry. Co. v. Berlin* (Civ. App.) 165 S. W. 62.

Where the qualifications of a witness as an expert were elicited before he was allowed to testify, it was not error to qualify a bill of exceptions to the admission of his testimony by setting forth the facts upon which the ruling allowing the witness to testify was based. *Texas Midland R. R. v. Ray* (Civ. App.) 168 S. W. 1013.

On the court's qualification of an assignment that the remark of counsel was not made in the hearing of the jury, it will be presumed that it was not made in their hearing. *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739.

Where a qualification by the court of a bill of exceptions to evidence states that the stenographer's record does not show an exception reserved, an assignment of error thereon will be overruled. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

Facts stated in trial court's qualification to bill of exceptions to exclusion of testimony must be taken by Court of Civil Appeals as correct. *Citizens' Nat. Bank of Plainview v. Slaton* (Civ. App.) 189 S. W. 742.

Statement by trial judge upon bill of exceptions that findings by him that claims of parties to action were simulated, etc., which rendered testimony immaterial, held not qualification, but an explanation by court of its ruling excluding the evidence. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

That court qualified bill of exceptions to exclusion of testimony by stating that it did not appear what witness would have testified does not prevent consideration of the ruling on appeal. *Walton v. Walton* (Civ. App.) 191 S. W. 188.

**Statement of judge relative to bill.**—Bill of exceptions held not impeachable by the trial judge's certificate that he was misled into signing it, but that the proper proceeding was to have the record corrected in the trial court. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

**Striking out bill.**—Under Courts of Civil Appeals rule 8 (142 S. W. xi), relating to the filing of motions, a motion to strike bills of exceptions contained in the transcript, not filed within 30 days after the transcript was filed, held waived. *Tyler v. Sowders* (Civ. App.) 172 S. W. 205; *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

The district court in vacation may entertain a motion to strike out bill of exceptions. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

**Necessity of filing bill.**—An assignment of error must be overruled, the bill of exceptions not appearing in the record to have been approved by the trial judge, or to having been filed in trial court. *Houston E. & W. T. Ry. Co. v. Samford* (Civ. App.) 181 S. W. 857.

#### Art. 2067. [1369] [1367] Bystanders' bill, how obtained.

Cited, *Dennis v. Kendrick* (Civ. App.) 163 S. W. 693.

**Bystanders' bill.**—Under this article, the term "bystander" defined, and held not to include attorneys for either party and hence that a bill attested by appellants' attorneys could not be considered. *Glover v. Pfeuffer* (Civ. App.) 163 S. W. 984.

Approval by bystanders of bill of exceptions disallowed by court held in compliance with the statute, and the bill to be taken as true where it was not contested as authorized by statute. *Hemphill v. State*, 72 Cr. R. 638, 165 S. W. 462, 51 L. R. A. (N. S.) 914.

Under this article, the bill must be prepared, sworn to, and filed at the time of the occurrence of the matters to which it relates. *Kenedy Mercantile Co. v. Western Union Telegraph Co.* (Civ. App.) 167 S. W. 1094.

When not contested by affidavits, as authorized by statute, a bystander's bill, prepared under this article, imports absolute verity and cannot be questioned otherwise. *Marshall v. State*, 76 Cr. R. 386, 175 S. W. 154.

Under this article and art. 2063, where plaintiff in error presents bill of exceptions, court has no right to qualify it, but must either sign it, or if not correct indorse his refusal to do so and file a proper bill, leaving plaintiff in error to his remedy of a bill by bystanders if not satisfied. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

#### Art. 2068. [1379] [1377] Statement of facts, how prepared.

Cited, *First Nat. Bank of Ft. Worth v. Henwood* (Civ. App.) 183 S. W. 5.

**1. Not repealed.**—This article and art. 2069, relative to making up of statement of facts, held not superseded or repealed by Acts 31st Leg. (1st Called Sess.) c. 39, notwithstanding the proviso which is incorporated in Rev. St. 1911, art. 2072. *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 816.

**5. Necessity of statement of facts—In general.**—Where there was no motion for new trial, and the record contains no statement of facts, the court on appeal can consider only fundamental matters. *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

**7. — Statement of facts or bill of exceptions.**—In the absence of any bills of exception or statement of facts in the record, the denial of an extension of time for filing bills of exception and statement of facts cannot be reviewed. *Baugh v. Baugh* (Civ. App.) 175 S. W. 725.

A bill of exceptions cannot supply the office of a statement of facts, however full its recital of the facts. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

Error in admission of evidence held not reviewable, in absence of bill of exceptions or statement of facts disclosing the evidence. *Allen v. Reed* (Civ. App.) 179 S. W. 544.

Where there was no statement of facts or bill of exceptions showing the request, an affidavit that appellant requested findings of fact did not present the request as part of the record. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

**8. Decisions not reviewable without statement—In general.**—In the absence of a statement of facts, it cannot be determined whether error was committed in the refusal to instruct a verdict for defendants, failure to submit, the issue of any consideration for the contract sued on, and that a paragraph of the charge did not correctly state the issues raised and was on the weight of the evidence. *C. A. Elmen & Co. v. Godsey* (Civ. App.) 166 S. W. 1178.

An alleged fatal variance cannot be reviewed in the absence of the statement of facts. *August v. Gamer Co.* (Civ. App.) 166 S. W. 1197.

Statement of defendant's counsel in his argument that plaintiff was a liar cannot be

said to be error in the absence of a statement of facts. *Pulkrabeck v. Griffith & Griffith* (Civ. App.) 179 S. W. 282.

Without a statement of facts approved by the trial judge, assignments of error cannot be considered. *San Antonio, U. & G. Ry. Co. v. Yarbrough* (Civ. App.) 179 S. W. 523.

Assignments of error attacking a verbal agreement for want of consideration, and answer of jury to special issues as against the evidence, and submission of special issues as irrelevant cannot be considered in absence of statement of facts. *Allen v. Reed* (Civ. App.) 179 S. W. 544.

9. — **Relating to venue.**—Error in overruling a plea of privilege by defendant to be sued in another county cannot be reviewed in the absence of statement of the evidence adduced on the hearing of such plea. *Mallow v. Raynes* (Civ. App.) 188 S. W. 23.

11. — **Rulings on pleadings.**—Without a statement of facts or finding of facts in the record, the appellate court cannot review alleged errors in overruling special exceptions to the pleadings. *Ajax-Grieb Rubber Co. v. Hubbard* (Civ. App.) 181 S. W. 568.

13. — **Interlocutory proceedings.**—To review ruling on merits of plea in abatement, all evidence before trial court, upon which it ruled on the plea, should appear in record either by proper bill of exception or in statement of facts. *Southwestern Gas & Electric Co. v. Duke* (Civ. App.) 194 S. W. 1010.

14. — **Admissibility of evidence.**—In the absence from the record of any statement of facts, error alleged in admission of testimony will not be reviewed, there being no way to determine whether the admission was error. *Hunter v. Hunter* (Civ. App.) 187 S. W. 1049.

15. — **Weight and sufficiency of evidence.**—In the absence of a statement of facts, an objection that the court's findings are not supported by the evidence will not be reviewed. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

In the absence of a statement of facts, it must be presumed on appeal that there was evidence sufficient to support the verdict. *Wedgworth v. Smith* (Civ. App.) 178 S. W. 641.

An assignment of error that the evidence was insufficient to support the judgment rendered cannot be considered where there is no statement of facts in the record. *Dixon v. Cooper* (Civ. App.) 178 S. W. 695.

An assignment of error that the judgment was unsupported by the evidence will be overruled where the record contains no statement of facts. *Hill v. Kincaid* (Civ. App.) 193 S. W. 185.

16. — **Questions involving evidence.**—A citation showing that one of the parties therein was not served and that one was dead held not evidence for the consideration of the Court of Civil Appeals, unless it came up in a proper statement of facts. *Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran* (Civ. App.) 171 S. W. 294.

Where the court heard evidence as to the reasonableness of compensation for garnishment wrongfully sued out, allowance will not be disturbed, in the absence of a statement of facts. *Heidemann v. Martinez* (Civ. App.) 173 S. W. 1166.

Assignments of error relating to the action of the court, the correctness of which depended upon the evidence, cannot be reviewed without a statement of facts. *Lingo Lumber Co. v. Garvin* (Civ. App.) 181 S. W. 561.

18. — **Submission of issues.**—In the absence of a statement of facts, an assignment of error to the ruling, withdrawing from the jury the issue raised by defendant's plea of limitations, must be overruled. *Maple v. Smith* (Civ. App.) 166 S. W. 1196.

Assignments of error to the manner in which the cause was submitted to the jury on special issues cannot be considered, where there are no bills of exception or statement of facts in the record and no showing of fundamental error. *Baugh v. Baugh* (Civ. App.) 175 S. W. 725.

19. — **Instructions.**—In the absence of a statement of facts, the appellate court could not pass on assignments complaining of instructions since, though the instructions are erroneous, it will be presumed that the evidence, if presented, would render such errors harmless. *Houston & T. C. R. Co. v. Hughston* (Civ. App.) 165 S. W. 42.

Even if a charge submitted a theory of plaintiff's case not authorized by the allegations of the petition, it cannot, in the absence of a statement of facts, be held this was "reasonably calculated to cause and probably did cause the rendition of an improper judgment," so as, under Court of Civil Appeals Rule 62 (149 S. W. x), to authorize a reversal. *C. A. Elmen & Co. v. Godsey* (Civ. App.) 166 S. W. 1178.

In the absence of a statement of facts, assignments complaining of the court's refusal to give requested charges will not be considered. *Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran* (Civ. App.) 171 S. W. 294.

Where the record contains no statement of facts, the correctness of instructions given or refused cannot be reviewed. *Wertheimer v. Hargreaves Printing Co.* (Civ. App.) 180 S. W. 282.

In absence of statement of facts, court cannot review alleged error in overruling motion for peremptory instruction for plaintiff or in refusing special charges, requested by plaintiff, propriety of which depended on evidence. *Bruns Kimball & Co. v. Amundsen* (Civ. App.) 188 S. W. 729.

20. — **Conclusions of law and fact.**—The conclusions of fact by the trial court are conclusive in the absence of a statement of facts. *Fallen v. Weatherford* (Civ. App.) 158 S. W. 1174; *West End Dock v. State* (Civ. App.) 173 S. W. 285; *Citizens' Water Co. v. McGinley* (Civ. App.) 175 S. W. 457.

A finding held conclusive as against objection that it was based on hearsay evidence, where there was no statement of facts in the record. *Martin v. Reid* (Civ. App.) 160 S. W. 1094.

Where it is desired to present on appeal the refusal of the trial court to file conclusions of law and fact as requested, the matter must be presented by an appropriate bill of exceptions. *Sewall v. Colby* (Civ. App.) 163 S. W. 694.

Findings of jury and additional findings of court held conclusive, in the absence of a statement of facts. *Castleberry v. Bussey* (Civ. App.) 166 S. W. 14.

Where a judgment appealed from is supported by the findings of the court and jury,



it will be assumed on appeal, in the absence of the statement of facts, that the findings are supported by evidence. *August v. Garner Co.* (Civ. App.) 166 S. W. 1197.

Objections to findings of law and fact by the trial judge and to his refusal to find additional facts, cannot be reviewed in the absence of a statement of facts. *Dickerson v. San Antonio, U. & G. Ry. Co.* (Civ. App.) 170 S. W. 1045.

Where all assignments of error relate to conclusions of law which are dependent upon the facts and there is no statement of facts or findings of facts in the record, the judgment must be affirmed. *Bliss v. San Antonio School Board* (Civ. App.) 173 S. W. 1176.

Without the evidence, a finding of the value of improvements put on land cannot be disturbed on appeal. *Bean v. Cook* (Civ. App.) 182 S. W. 1166.

The court on appeal cannot say that the conclusion reached by the trial judge was erroneous in the absence of a statement of facts. *North American Ins. Co. v. Jenkins* (Civ. App.) 184 S. W. 307.

Where there is no statement of facts in the record, the findings of fact filed by the trial judge are conclusive. *Lyon-Gray Lumber Co. v. Nocona Cotton Oil Co.* (Civ. App.) 194 S. W. 633.

21. — **Verdict or judgment.**—In absence of statement of facts, held, that the court could not determine that a judgment was erroneous because based on a finding on the theory of negligence submitted. *Martinez v. Medina Valley Irr. Co.* (Civ. App.) 171 S. W. 1035.

Without a statement of facts or finding of facts in the record, the appellate court cannot determine that a judgment on contested issues is erroneous. *Ajax-Grieb Rubber Co. v. Hubbard* (Civ. App.) 181 S. W. 568.

25. **Decisions reviewable without statement.**—In a switchman's action for personal injuries alleging a defective roadbed, a charge taking the question of negligence from the jury and declaring such condition to be negligent was so apparently erroneous as to leave no doubt but that it must have influenced the jury and was reviewable though the record contained no statement of facts. *Trinity & Brazos Valley Ry. Co. v. Lunsford* (Civ. App.) 160 S. W. 677.

To entitle a party to a review of rulings upon the admissibility of testimony, in the absence of a statement of facts, it must appear with reasonable certainty that error has been committed resulting in substantial injury and hence, in an action for the price of a traction engine, assignment of error in the exclusion of evidence as to a breach of warranty was entitled to consideration upon its merits. *Clark & Schaeffer v. Gaar-Scott & Co.* (Civ. App.) 163 S. W. 631.

26. **Form and contents of statement—in general.**—A statement of facts should be typewritten, but if the parties be unable to meet the expense of typewriting it must be prepared in neat chirographic form, and is insufficient when disfigured by erasures, interlineations, and pasters. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

It is the duty of appellant to see that the statement of facts is properly prepared. *Pugh v. Pugh* (Civ. App.) 167 S. W. 312.

A statement of facts should only contain the testimony that was admitted and the objections thereto, and evidence sought to be introduced, objections thereto, and the sustaining of the objections may be stricken on motion. *Id.*

A statement of facts, which contains excluded testimony, objections of counsel thereto, and arguments upon objections urged, will not be considered. *Dolsons v. Sheridan Stove Mfg. Co.* (Civ. App.) 178 S. W. 663.

The statement of facts need not show the value of the property in controversy when the trial court's judgment recites that fact. *Dunlap v. Squires* (Civ. App.) 186 S. W. 843.

31. — **Setting forth evidence in general.**—The Court of Civil Appeals is justified in refusing to reverse a cause where the plaintiff in error brings up a statement of facts which fails to show what the testimony actually was. *Thatcher v. Matthews* (Civ. App.) 183 S. W. 810.

33. — **Excluded evidence.**—In the bill of exceptions and not in the statement of facts, is the proper place to show that testimony was excluded, when the party complaining desires to have the ruling reviewed on appeal. *Pugh v. Pugh* (Civ. App.) 167 S. W. 312.

34. — **Agreement of parties as to evidence.**—Rule 85 for the District Courts (142 S. W. xxiii), providing that counsel may agree upon the omission of unnecessary papers in the record, requires appellant to endeavor to make such an agreement, nor does fact that the appellees agreed to a statement of facts estop them from asserting that it was unnecessarily prolix, and evidence set out in full in the bill of exceptions need not be repeated in the statement of facts, under art. 2060. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 158 S. W. 564.

Documents following the statement of facts preceded by an agreement that they should be considered as part of the statement of facts cannot be considered, where the agreement was not signed by one of the parties or any one for it, though approved by the trial judge. *Texas Cent. R. Co. v. Hoffman* (Civ. App.) 193 S. W. 1140.

35. — **Copying written instruments, etc.**—Under this article and art. 2070, and district court rules 72-74 (167 S. W. xxv), prescribing the manner of preparing statements of facts, instruments or parts of them bearing on a question presented should be copied into the statement of facts, and the original instrument should not be attached to it. *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925.

Exhibits of maps and photographs of the land in controversy called for by the statement of facts must be included, where the appellant desires a review of the sufficiency of the evidence. *Perrow v. San Antonio & A. P. Ry. Co.* (Civ. App.) 178 S. W. 973, rehearing denied 181 S. W. 496.

Where it is sought to review testimony consisting largely of references to maps, the statement of facts should show the maps in connection with the references thereto. *Kincheon v. Edwards* (Civ. App.) 183 S. W. 92.

Where both parties pleaded a special law by giving its title and the date of its approval, as authorized by art. 1823, and the entire act was before the court, it must be considered a part of the record on appeal, although not copied into the statement of facts. *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

Under district and county court rules 72-76 (142 S. W. xxii), it is unnecessary to copy deeds and acknowledgments in full in statement of facts, where there is no question as to validity or correctness in form or record of such instruments. *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.

**37. Sufficiency of statement in general.**—Bill of exceptions, together with statement of facts, to an argument of counsel, held sufficient to present the error to the court as ground for reversal. *Kansas City, M. & O. Ry. Co. v. Cave* (Civ. App.) 174 S. W. 872.

Under this article, the agreed statement of the parties used at trial cannot be considered as a statement of facts on appeal, though approved by the trial judge, the various instruments and exhibits introduced by agreement being brought up separately. *Lingo Lumber Co. v. Garvin* (Civ. App.) 181 S. W. 561.

Rule 46 for the Court of Civil Appeals (142 S. W. xv), relating to statement of facts where the case was tried on agreed facts, is invalid in so far as it may conflict with the statutes. *Id.*

**38. Execution and approval**—In general.—A statement of facts in the record will not be considered when not signed by the attorneys or approved by the court. *Mayer v. State*, 72 Cr. R. 381, 162 S. W. 520.

A paper purporting to be a statement of facts, but not signed by appellant's counsel or approved by the trial judge, cannot be considered as a statement of facts. *Humphries v. State*, 72 Cr. R. 298, 162 S. W. 522.

A purported statement of facts made up entirely of questions and answers, and not approved either by counsel or the trial judge, though certified to be correct by the official stenographer, cannot be considered. *King v. State*, 72 Cr. R. 394, 162 S. W. 890.

An instrument called a "statement of facts," not signed by counsel for plaintiff or approved by the court, cannot be regarded. *North American Ins. Co. v. Jenkins* (Civ. App.) 184 S. W. 307.

An unsigned document, purporting to be the statement of facts, included among the papers in the case, cannot be considered. *Ft. Worth & D. C. Ry. Co. v. Wells* (Civ. App.) 191 S. W. 815.

**39. — Signature of parties or attorneys.**—It was not necessary for certain defendants to sign the statement of facts, where their interest was not affected by the appeal, and appellant does not complain of the judgment as to them. *Amicable Life Ins. Co. v. Kenner* (Civ. App.) 166 S. W. 462.

A statement of facts not presented to a party's counsel on a date leaving sufficient time for examination of same could not be considered in so far as it related to such party. *Hermann v. Bailey* (Civ. App.) 174 S. W. 865.

**40. — Approval and signature of judge.**—A statement of facts not approved by the trial judge cannot be considered for any purpose. *Stewart v. State* (Cr. App.) 162 S. W. 517; *Green v. State*, 71 Cr. R. 415, 159 S. W. 1183; *Humphries v. State*, 71 Cr. R. 551, 160 S. W. 458; *Bradford v. State*, 72 Cr. R. 76, 160 S. W. 1185.

A purported statement of facts in the record signed by the attorneys, but not approved by the judge, cannot be considered. *Taylor v. State*, 73 Cr. R. 192, 164 S. W. 844; *First Nat. Bank of Ft. Worth v. Henwood* (Civ. App.) 183 S. W. 5.

A statement of facts which has neither been signed nor filed in the trial court should not be copied in the transcript. *St. Clair v. State*, 72 Cr. R. 37, 160 S. W. 353.

Document purporting to be a statement of facts, not approved by the trial judge, will be stricken out on motion. *Gerrate v. State*, 71 Cr. R. 531, 160 S. W. 695.

A statement of facts not approved by the judge trying the case, but by his successor, cannot be considered on appeal. *Allen v. State*, 72 Cr. R. 277, 162 S. W. 868.

The trial judge must sign the statement of facts. *Kaufman v. State* (2 cases) 72 Cr. R. 455, 163 S. W. 74.

Where counsel neither notified the trial judge, who was on his vacation, nor took the statement of facts to him for approval within 90 days and they were not approved within that time, held, that they could not be considered. *Jones v. State*, 74 Cr. R. 350, 163 S. W. 75.

Document purporting to contain a statement of facts but not approved by the trial court held not entitled to consideration, since no statement of facts can be considered unless so approved. *Graham v. State*, 73 Cr. R. 28, 163 S. W. 726.

An agreed statement in the trial court cannot, under this article and art. 1949, be considered as a statement of facts on appeal, where not showing the approval of the trial judge. *Lingo Lumber Co. v. Garvin* (Civ. App.) 181 S. W. 561.

**41. — Waiver of approval.**—Under Supreme Court rules 8 and 9 (142 S. W. xi), delay in filing motion to strike statement of facts held to waive informality in trial court's certification. *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

**43. — Mandamus to compel approval.**—A party can, by mandamus, compel the trial judge to approve a statement of facts when the judge wrongfully fails or refuses to approve it. *Houston & T. C. R. Co. v. Hughston* (Civ. App.) 165 S. W. 42.

A judge of an inferior court should not be compelled to prepare a statement of facts, unless it appears that it was the duty of such judge to prepare the statement. *Dobie v. Scott* (Civ. App.) 188 S. W. 286.

**50. Operation and effect of statement**—In general.—While statement of facts might be consulted to sustain judgment where issue had not been submitted to jury, it cannot be done where the issue was submitted. *Indiana Co-op. Canal Co. v. Gray* (Civ. App.) 184 S. W. 242.

Statement of facts prepared by court, counsel having failed to agree, cannot be called in question as not stating facts proven on trial. *Keppeler v. Texas Lumber Mfg. Co.* (Civ. App.) 184 S. W. 353.

**53. — Conflict with bill of exceptions.**—Matters appearing in the approved statement of facts control the bill of exceptions. *Coker v. Cooper's Estate* (Civ. App.) 176 S. W. 145; *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

The statement of a witness' testimony in the statement of facts controls in case of conflict between it and the bill of exceptions. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

Where the bill of exceptions stated that evidence, the admission of which was assigned as error, was admitted upon a witness's redirect examination, while the agreed statement of facts disclosed that it was developed upon his cross-examination, the agreed statement controlled. *Southwestern Casualty Ins. Co. v. Heisterman* (Civ. App.) 167 S. W. 1095.

Where bill of exceptions attacking refusal to allow witness to testify was contradicted by statement of facts which showed that witness did answer, statement will control. *Missouri, K. & T. Ry. Co. of Texas v. Washburn* (Civ. App.) 184 S. W. 580.

A statement of facts properly certified is conclusive as to what evidence was introduced upon trial, and cannot be modified by any bill of exceptions. *Teel v. Brown* (Civ. App.) 185 S. W. 319.

Where there was a bill of exceptions that the court erred in allowing plaintiff to offer parol testimony varying written contract, but agreed statement of facts does not disclose that any such evidence was offered, such statement of facts will control bill of exceptions. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

**59. Amendment or correction of statement.**—A supplemental statement of facts held not proper matter for consideration in addition to the statement of facts filed and approved in time. *Texas Fidelity & Bonding Co. v. Brown* (Civ. App.) 179 S. W. 1125.

The court, in exercising its inherent power to prevent fraud, might allow a motion to correct statement of facts, though not filed within 30 days. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 180 S. W. 928.

**60. Alterations of statement.**—Parties cannot, by agreement without the approval of the presiding judge, make any material change in the statement of facts approved by the judge. *Eaton v. Klein* (Civ. App.) 174 S. W. 331.

**61. Striking from record—In general.**—Appellee, who agrees to a statement of facts, is not thereby estopped from moving to strike it out for failure to comply with the law and the rules regulating statements of facts. *Pugh v. Pugh* (Civ. App.) 167 S. W. 312.

Under rule 8 (142 S. W. xi), statement of facts held to be considered, appellee having made no motion to strike it out or proper objection to its consideration. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

**62. — Grounds in general.**—Under this article, a statement of facts not signed through the inadvertence of the judge must be stricken, though appellant may, under article 2074, file a signed statement pending motion to strike, on showing excuse for not discovering the judge's failure. *Rea v. Fields* (Civ. App.) 172 S. W. 191.

**64. — Effect of striking out.**—Where the statement of facts and bills of exception were stricken from the record, assignments challenging the sufficiency of the evidence or the propriety of the charge cannot be considered. *Cook v. Hardin* (Civ. App.) 174 S. W. 633.

**66. Effect of absence of statement—In general.**—Under Rules 40 and 41 for Courts of Civil Appeals (142 S. W. xiv) where the record contained no statement of facts or evidence or briefs for appellees, court could decide case on issues presented by appellants' brief. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

Where the record contains nothing but the pleadings and the order denying the injunction, there being no statement of facts, etc., the question whether denial of a temporary injunction was warranted must be determined on the pleadings. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

In the absence of statement of facts, only assignments needing no reference to the facts for determination can be considered. *First State Ins. Co. v. Sharp* (Civ. App.) 192 S. W. 792.

In the absence of a statement of facts, the appellate court may consider only such matters as specifically appear from the record. *Webster v. International & G. N. Ry. Co.* (Civ. App.) 193 S. W. 179.

That no statement of facts or bills of exceptions are brought up with record precludes reversal of judgment except for fundamental errors appearing on face of record, but does not affect right to appeal. *Lauraine v. Masterson* (Civ. App.) 193 S. W. 708; *Lauraine v. Vaughn* (Civ. App.) 193 S. W. 712.

**68. — Presumptions.**—Where an order overruling a plea of privilege recited that evidence relating thereto was heard, it will be presumed, in the absence of any bill of exceptions or statement of facts, that the evidence was insufficient to establish such plea. *Guerra v. Guerra* (Civ. App.) 158 S. W. 191.

Where there was no statement of facts in the record, it will be presumed that proof was made that the plaintiff exercised its option to declare a note due for default in the payment of interest, if such proof were necessary to support the judgment. *Shearer v. Chambers County* (Civ. App.) 159 S. W. 999.

In the absence of a statement of facts, the appellate court must presume that in an action on a note the proof sufficiently described the note upon which the lower court rendered judgment. *Cox v. Thompson* (Civ. App.) 160 S. W. 604.

Where there is no statement of facts, every material allegation in the petition necessary to sustain the judgment is presumed to have been proven in plaintiff's favor. *Swift v. Beemer* (Civ. App.) 160 S. W. 989.

Where there was no statement of facts, it must be presumed that a judgment recital that defendants announced ready for trial was true, and that all the parties were before the court, to authorize judgment, as provided by law. *Bastrop & Austin Bayou Rice Growers' Ass'n v. Cochran* (Civ. App.) 171 S. W. 294.

Where there is no statement of facts in the record, the court on appeal will presume the facts necessary to the judgment and susceptible of proof on the pleadings to have been proved; but the rule does not apply where the record contains findings of fact and conclusions of law therefrom. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614.

In an action on an account, though the transcript disclosed an insufficient account, in the absence of a statement of facts, it must be presumed there was evidence sufficient to support the judgment. *Ahrep v. James A. Dick Co.* (Civ. App.) 181 S. W. 269.

Where there is no statement of facts in the record, it must be presumed that the evidence justified the verdict. *Missouri, K. & T. Ry. Co. of Texas v. Elias* (Civ. App.) 184 S. W. 312.

Where the record contains no statement of facts, the findings of the trial court must be taken as true. *Bonough v. Brown* (Civ. App.) 185 S. W. 47.

In absence of statement of facts, Court of Civil Appeals must presume trial court had before it sufficient facts to support its judgment. *Joachim v. Hamilton* (Civ. App.) 186 S. W. 251.

In absence of statement of facts, court must assume that the evidence raised the issues submitted by the trial court, and that no other issues, even if raised by the pleadings, were sustained by the proof. *Bruns Kimball & Co. v. Amundsen* (Civ. App.) 188 S. W. 729.

Upon appeal from judgment for plaintiff, where there is no statement of facts, necessary allegations of complaint will be presumed to have been established by proof. *Crews & Williams v. Gullett Gin Co.* (Civ. App.) 189 S. W. 793.

In absence of statement of facts, reviewing court will presume that the facts proven on trial support finding of jury and judgment. *Borton v. Borton* (Civ. App.) 190 S. W. 192.

Submitting to the jury a question whether defendant buyer knew of alleged defects in a tractor when he paid a purchase price note thereon is not reversible error in absence of a statement of facts, being presumably warranted by the evidence. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

Where contributory negligence was pleaded as proximately causing the injury and there was judgment for defendant upon answers to special issues, it will be presumed, in the absence of a statement of facts, that the fact that the contributory negligence proximately caused his injury was found by the court and supported by the evidence. *Behymer v. Mosher Mfg. Co.* (Civ. App.) 192 S. W. 1148.

In the absence of a statement of fact showing the evidence, it will be conclusively presumed on appeal that the evidence sustained the judgment. *Webster v. International & G. N. Ry. Co.* (Civ. App.) 193 S. W. 179.

In absence of bill of exception or statement of facts showing evidence before trial court on hearing of motion for new trial, asking that judgment by default against defendant be set aside because citation was served in less than ten days before return day, it must be assumed court found and was warranted in finding service was perfect, as shown by return. *Dawson v. George* (Civ. App.) 193 S. W. 495.

Where court has found that plaintiff was a bona fide resident entitling her to sue for divorce, it will be presumed on appeal, in absence of a statement of facts, that all jurisdictional allegations were sustained by ample proof. *Hill v. Hill* (Civ. App.) 193 S. W. 726.

Where there is neither a statement of facts nor findings of the trial judge, the appellate court should presume in favor of the judgment that every fact essential to its correctness was proved. *Cumby Light & Telephone Co. v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 194 S. W. 170.

In absence of statement of facts, every fact necessary to support judgment will be presumed, unless facts found and recited by judge indicate his judgment is erroneous. *Richards v. Hartley* (Civ. App.) 194 S. W. 478.

Where there is no statement of facts in the record, it will be presumed that everything which could have been legally proved in support of the judgment was so proved. *Buckholts State Bank v. Harris* (Civ. App.) 194 S. W. 961.

The absence of any statement of facts does not justify a presumption that facts were proved which were not pleaded, though recited in the judgment. *Id.*

**69. — Affirmance of judgment.**—In the absence of a statement of fact, bills of exception, and motion for new trial, a judgment will be affirmed, unless fundamental error appears on the face of the record proper. *National Aéroplane Co. v. McCormick* (Civ. App.) 161 S. W. 375.

Where a statement of facts cannot be considered, so as to make it appear that error complained of in appellant's brief was committed, the judgment must be affirmed. *Pugh v. Pugh* (Civ. App.) 167 S. W. 312.

Where there is no fundamental error nor statement of facts, the judgment will be affirmed. *Buffalo Bayou v. Lorentz* (Civ. App.) 175 S. W. 736.

Where a motion to reinstate a case was not verified, and there is no statement of facts or bill of exception showing that evidence to sustain its averments was offered, a judgment overruling motion will be affirmed. *Chattanooga Medicine Co. v. Ligon* (Civ. App.) 191 S. W. 571.

**71. Reversal because of inability to secure statement.**—Under Rule 62a for Courts of Civil Appeals (149 S. W. x), forbidding reversal except for error calculated to cause a wrong judgment, held that unexcused refusal of the trial judge to file conclusions of fact and law, as required by *Sayles' Ann. Civ. St. 1897, art. 1333*, was reversible error, though there was in the record a statement of facts agreed to by defendant's counsel. *Kyle v. Blanchette* (Civ. App.) 158 S. W. 796.

Where the attorney for defendant and the county attorney agree on a statement of facts and present it to the county judge, the judge should approve it if correct, and, if not, prepare and file one, and his failure to do so is ground for reversal. *Sims v. State*, 72 Cr. R. 533, 162 S. W. 1154.

Where appellant has been deprived of a statement of facts, material to his appeal, without fault or negligence of himself or counsel, he is entitled to reversal, but where it is apparent from affidavits filed by appellant and statements in his brief that he made no effort himself to prepare statement of facts under this article, upon stenographer's refusal to do so as for a pauper appellant, such stenographer having left state, appellant is not entitled to reversal because of stenographer's refusal. *Joachim v. Hamilton* (Civ. App.) 186 S. W. 251.

Affidavit filed in trial court held sufficient to show appellant and counsel did all possible to procure a statement of facts in accordance with statute, and were deprived of such statement by arbitrary action of trial judge, and appellant's remedy was mandamus to compel trial judge to discharge his statutory duty, and not to have judgment reversed on appeal. *First Nat. Bank v. Herrell* (Civ. App.) 190 S. W. 797.

**72. Scope of review on agreed statement.**—In an action for nondelivery of a telegram, the company cannot on appeal question its liability on the ground of a stipula-

tion limiting liability for an unrepeatable message, where such provision did not appear in the statement of facts. *Western Union Telegraph Co. v. Bailey* (Civ. App.) 184 S. W. 519.

73. **Use of statement in subsequent trial.**—On the second trial of an action, testimony of witness at former trial, since deceased, could not be proved by a certified copy of the statement of facts upon the former appeal, not shown to have been made up from stenographer's notes, and no other proof of its verity being made. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

### Art. 2069. [1380] [1378] When the parties disagree.

Cited, *Joachim v. Hamilton* (Civ. App.) 186 S. W. 251.

1. **Statement of facts prepared by judge—In general.**—Where the prosecuting officers failed to agree to a statement of facts in time, or return the same, defendant's counsel should present a statement to the judge and request that he prepare and file a statement, if the one presented was not correct. *Iovanovich v. State*, 72 Cr. R. 126, 161 S. W. 98.

Rev. St. 1911, arts. 2068, 2069, relative to making up of statement of facts, held not superseded or repealed by Acts 31st Leg. (1st Called Sess.) c. 39, notwithstanding the proviso which is incorporated in Rev. St. 1911, art. 2072. *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 816.

Under Rev. St. 1911, art. 2069, providing that, where parties cannot agree upon a statement of facts, the judge shall certify a correct statement from statements furnished by the parties and from his own knowledge, held, that a statement of facts in an injunction suit, based in part upon recollection of a bystander, is not reversible error, where the record contains a stipulation that the statement so prepared is correct. *Commissioners' Court of Trinity County v. Miles* (Civ. App.) 187 S. W. 378.

6. — **Form of statement.**—Recital in a judge's certificate to a statement of facts that he had prepared the same from the statements of the parties, the "stenographer's notes," and his own recollection held not a sufficient statement that an official stenographer served in the case. *Edwards v. Youngblood* (Civ. App.) 160 S. W. 289.

**Art. 2070. Statement of facts prepared from transcript of official reporter, when and how, etc.; in duplicate; original sent up; reporter to prepare on request, etc.; fees.**

Cited, *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 816; *J. B. Farthing Lumber Co. v. Illig* (Civ. App.) 179 S. W. 1092.

7. **Preparing statement from stenographer's report—In general.**—Under art. 1924, providing for an official transcript of testimony, this article, and art. 2072, permitting statements of facts to be made independent of the official transcript, held, that appellant could not require appellee to agree to a statement of facts prepared by him independently of the official transcript, which statement would not be considered as a statement of facts. *Buffalo Bayou Co. v. Lorentz* (Civ. App.) 170 S. W. 1052.

Under this article and arts. 1924 and 2072, an appellant may, without procuring the reporter's transcript of the proceedings, prepare a statement of facts, though the appellee did not consent thereto. *Ft. Worth Pub. Co. v. Armstrong* (Civ. App.) 175 S. W. 1113.

9. — **Preparing in duplicate.**—A statement of facts prepared by the trial judge, upon a disagreement between counsel in reference thereto, need not be prepared in duplicate but need only be filed with the clerk of the court, where the case was tried, as part of the record of the cause. *Austin Fire Ins. Co. v. Brown* (Civ. App.) 160 S. W. 973.

11. — **Execution and approval.**—Recital in a judge's certificate to a statement of facts that he had prepared the same from the statements of the parties, the "stenographer's notes," and his own recollection held not a sufficient statement that an official stenographer served in the case. *Edwards v. Youngblood* (Civ. App.) 160 S. W. 289.

12. — **Sufficiency.**—Where there were what purported to be two statements of facts, one marked "original" with only the certificate of the court stenographer and no agreement of the parties, or approval of the judge indorsed thereon, and the other not marked either "duplicate," or "original," with no certificate of the clerk, neither will be considered as a statement of the facts on appeal. *Hunker v. Estes* (Civ. App.) 159 S. W. 470.

13. — **Operation and effect.**—Under this article and arts. 1924 and 2072, where appellant had the official stenographer prepare a narrative form of a statement of facts from the shorthand notes, the reporter acted as appellant's agent, and the statement so prepared was a statement of facts, independent of the transcript of the reporter's notes, permitted by article 2072. *Canode v. Sewell* (Civ. App.) 170 S. W. 271.

14. **Condensation.**—Where testimony of jurors on motion for new trial was lengthy, held, that it should have been put in narrative form, agreed to by the attorneys, and approved by the judge. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

15. — **Questions and answers.**—A stenographic report of a trial, made out in the form of questions and answers and including the objections and argument of counsel on the objections, together with the rulings of the court, cannot be considered as a statement of facts. *Criner v. State*, 71 Cr. R. 369, 159 S. W. 1059.

Under this article and art. 1924, the statement of facts must be reduced to narrative form, and a statement in question and answer form cannot be sanctioned. *Mooney v. State*, 73 Cr. R. 121, 164 S. W. 828.

A statement of facts must be in narrative form, and must not consist of questions and answers as taken by the official stenographer. *Dolsons v. Sheridan Stove Mfg. Co.* (Civ. App.) 178 S. W. 663.

16. **Documentary evidence.**—Under this article and art. 2068, and district court rules 72-74 (167 S. W. xxv), prescribing the manner of preparing statements of facts, instruments or parts of them bearing on a question presented should be copied into the statement of facts, and the original instrument should not be attached to it. *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925.

19. **Filing and time for filing.**—Where no official county court stenographer is appointed, and the statement of facts is prepared by the litigants, the statutes do not require that a duplicate copy thereof shall be filed in the office of the county clerk. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 160 S. W. 108.

Until citation issues for defendant in error and service thereof is had, the case is improperly filed in a Court of Civil Appeals. *Rounds v. Coleman* (Civ. App.) 185 S. W. 640.

27. **Striking out statement.**—Where no official court stenographer was appointed, the omission of the duties of the official stenographer as to the manner of transcribing the evidence, making and certifying to the transcript, and filing the transcript and statement of facts in the trial court, is not ground for striking from the record the statement of facts prepared by the litigants. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 160 S. W. 108.

Under this article and art. 1924, a statement of facts prepared from the stenographer's notes, no transcript of which had been filed, should be stricken, where the parties have not agreed to a statement as authorized by article 2072. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 170 S. W. 859.

This article and arts. 1924 and 2072 must be construed together, and, where the parties on appeal have agreed to a statement of facts by virtue of article 2072, they lose the right to object that this article and art. 1924 have not been complied with. *Id.*

Under this article, statement covering about 30 pages of record, and containing less than one-half page of evidence in form of questions and answers, held not to show such flagrant violation of statute and rules as to require it to be stricken. *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.

**Art. 2071. Transcript for party appealing without bond; affidavit; falsity; punishment.**—In any civil case where the appellant or plaintiff in error has made the proof required to appeal his case without bond, such appellant or plaintiff in error may make affidavit of such fact, and upon the making and filing of such affidavit, the Court shall order the stenographer to make a transcript as provided in Section 5 [art. 1924, *Vernon's Sayles' Civ. St.* 1914] of this Act, and deliver same as herein provided in other cases, but the stenographer shall receive no pay for same; provided, that should any such affidavit so made by such appellant or plaintiff in error be false he shall be prosecuted and punished as is now provided by law for making false affidavits. [Acts 1911, p. 264, § 8; Act April 3, 1917, ch. 189, § 1; Act May 19, 1917, 1st C. S., ch. 27, § 1.]

**Explanatory.**—See art. 1925 and note thereunder. The provision relating to false affidavit, though seemingly more appropriate for the Penal Code, has not been severed from its context for the reason that it seems to have no operative effect; there being no law defining the punishment for "making false affidavits" in judicial proceedings.

Cited, *Joachim v. Hamilton* (Civ. App.) 186 S. W. 251.

**Enforcement of article.**—This article held mandatory, and enforceable by mandamus against district or circuit court refusing to order the stenographer to prepare such transcript, for under this article and art. 1924, preparation free of charge of transcript of testimony upon request of pauper appellant is the duty of such stenographer, nor does fact that appellant may prepare a statement of facts himself, independent of the stenographer's notes and transcript, preclude a pauper appellant from procuring an order to such stenographer to prepare a transcript free of charge. *Rice v. Roberts* (Civ. App.) 177 S. W. 149.

Where affidavit in forma pauperis, under this article was never presented or acted upon by court, and where no reason appeared why a statement of facts could not have been made out within the time allowed by law, a purported statement of facts would not be considered. *Lewis v. State* (Cr. App.) 177 S. W. 972.

The court which tried a murder case committed no error when it refused to entertain defendant's affidavit, praying that the official stenographer be required to prepare a statement of facts for him without charge, as for a pauper appellant, which was filed before sentence and pending motion for new trial, and while it is the duty of the court to make an order requiring the stenographer to make out a statement, yet a conviction of murder on second trial would not be reversed for the court's failure to do so where defendant took no steps to protect his rights beyond praying an order to that effect. *Herrera v. State* (Cr. App.) 180 S. W. 1097.

Court of Civil Appeals has power, under art. 1592, to order official stenographer of county court to prepare transcript for pauper appellant, as required by this article, and it is the duty, compellable by mandamus, of a judge of a county court, who found that plaintiff had filed sufficient affidavit of inability to pay the costs of appeal, to order a special stenographer appointed under Acts 32d Leg. c. 119, to act in a single case, who did so for three days, receiving his pay of \$15, to prepare a transcript for the plaintiff free of charge. *Otto v. Wren* (Civ. App.) 184 S. W. 350.

### Art. 2072. Laws repealed; not to prevent preparation of statements of fact by parties.

Cited, *Joachim v. Hamilton* (Civ. App.) 186 S. W. 251.

**Repeal.**—Arts. 2068 and 2069, relative to making up of statement of facts, held not superseded or repealed by Acts 31st Leg. (1st Called Sess.) c. 39, notwithstanding the proviso incorporated in this article. *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 816.

**Preparation of statement in general.**—That the delay in the preparation of the statement of facts was occasioned by sickness of the stenographer's wife was not a sufficient excuse for not filing a statement in time, as appellant should have mandamus the stenographer, or his attorneys should have prepared a statement as permitted by this article. *Roberts v. State*, 168 S. W. 98, 74 Tex. Cr. R. 294.

Under this article and arts. 1924 and 2070, where appellant had the official stenographer prepare a narrative form of a statement of facts from the shorthand notes, the reporter acted as appellant's agent, and the statement so prepared was a statement of facts, independent of the transcript of the reporter's notes, permitted by this article. *Canode v. Sewell* (Civ. App.) 170 S. W. 271.

This article and arts. 1924 and 2070 must be construed together, and, where the parties on appeal have agreed to a statement of facts by virtue of this article, they lose the right to object that articles 1924 and 2070 have not been complied with. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 170 S. W. 859.

Under arts. 1924 and 2070, a statement of facts prepared from the stenographer's notes, no transcript of which had been filed, should be stricken, where the parties have not agreed to a statement as authorized by this article. *Id.*

Under art. 1924, providing for an official transcript of testimony, art. 2070, requiring a statement of facts, and this article, held, that appellant could not require appellee to agree to a statement of facts prepared by him independently of the official transcript, which statement would not be considered as a statement of facts. *Buffalo Bayou Co. v. Lorentz* (Civ. App.) 170 S. W. 1052.

Under this article and arts. 1924 and 2070, an appellant may, without procuring the reporter's transcript of the proceedings, prepare a statement of facts, though the appellee did not consent thereto. *Ft. Worth Pub. Co. v. Armstrong* (Civ. App.) 175 S. W. 1113.

Under the statute, appellant, without consent of appellee, may without the reporter's transcript prepare a statement of facts on appeal, and have it approved by the judge. *J. B. Farthing Lumber Co. v. Illig* (Civ. App.) 179 S. W. 1092.

### Art. 2073. Time for preparing and filing statements of fact and bills of exceptions; judge may extend, provided, etc.; when parties fail to agree on statement, etc.; proviso.

Cited, *Fire Ass'n of Philadelphia v. Strayhorn* (Civ. App.) 165 S. W. 901; *Shaw v. Garrison* (Civ. App.) 174 S. W. 942.

3½. **Certification by attorney.**—Under this article, statement of facts held not to be stricken because appellant's attorney, when presenting it to trial court for approval, after failure of parties to agree, did not certify to it. *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

4. **Filing with clerk.**—A statement of facts prepared by the trial judge, upon a disagreement between counsel in reference thereto, need not be prepared in duplicate but need only be filed with the clerk of the court, where the case was tried, as part of the record of the cause. *Austin Fire Ins. Co. v. Brown* (Civ. App.) 160 S. W. 973.

A statement of facts, bearing no file marks and not showing when it was filed in the trial court, cannot be considered on appeal, but where the clerk of the trial court certified that he erroneously omitted the file marks from the transcript, the statement of facts must be considered on appeal. *Nolen v. State*, 72 Cr. R. 450, 162 S. W. 869.

The statement of facts should be sent up to the Court of Civil Appeals separately, and should not be incorporated in the transcript. *Staley v. Colony Union Gin Co.* (Civ. App.) 163 S. W. 381.

This article applies to the manner of filing the statement of facts and the time therefor when the cause is taken to the appellate court by petition in error. *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

Agreement by appellee's counsel that the statement of facts might be filed out of time could not relieve appellant of the duty and necessity of filing such statement in the trial court. *International & G. N. Ry. Co. v. Reek* (Civ. App.) 179 S. W. 699.

5. **Time for filing—In general.**—Where no bill of exceptions was filed on the overruling of a challenge to jurors, showing the testimony heard on the motion, until nearly 20 days after court adjourned, it was too late. *Hail v. State*, 70 Cr. R. 590, 158 S. W. 272.

Bills of exception filed more than 20 days after the adjournment of court cannot be considered. *Stephens v. State*, 71 Cr. R. 308, 158 S. W. 531, 532.

Statement of facts filed by accused more than 20 days after the adjournment of the trial term cannot be considered. *Stephens v. State*, 71 Cr. R. 308, 158 S. W. 531, 532; *Partridge v. State*, 71 Cr. R. 302, 158 S. W. 549; *Wilson v. State*, 71 Cr. R. 547, 160 S. W. 454; *Calhoun v. State*, 72 Cr. R. 24, 160 S. W. 706; *Hart v. State*, 72 Cr. R. 160, 161 S. W. 458; *Staha v. State*, 72 Cr. R. 386, 162 S. W. 521; *Newsome v. State*, 72 Cr. R. 453, 162 S. W. 891; *Pena v. State*, 72 Cr. R. 621, 163 S. W. 74.

Where accused was convicted at a term of court which lasted three months, a statement of facts, not filed until 95 days after the overruling of his motion for new trial, held, in view of Rules 1 and 2, adopted by the Supreme Court for the Court of Criminal Appeals (142 S. W. xvii), and this article, not to be considered. *Fowler v. State*, 71 Cr. R. 1, 158 S. W. 1117.

Where accused was convicted at a term of court which lasted three months, bills of exceptions not filed until 95 days after the overruling of his motion for new trial cannot be considered, rules 1 and 2, adopted by the Supreme Court for the Court of Criminal Appeals (142 S. W. xvii), requiring the filing of transcripts within 90 days, and under this article. *Id.*

Where, on the overruling of a motion for new trial on August 26th, the court granted accused 30 days' additional time in which to file his statement of facts, a statement of facts not filed until the last of November cannot be considered. *Harrison v. State*, 71 Cr. R. 40, 158 S. W. 1120.

A statement of facts on a collateral matter such as a qualification of a juror must be filed before the court adjourns or it cannot be considered on appeal. *Vick v. State*, 71 Cr. R. 50, 159 S. W. 50.

Where the trial court adjourned on December 21, 1912, and the statement of facts in a criminal prosecution were not filed until May 8th following, it was too late, and cannot be considered. *Johnson v. State*, 71 Cr. R. 391, 159 S. W. 848.

Where the trial court adjourned on December 21, 1912, and the bill of exceptions in a criminal prosecution were not filed until May 8th following, it was too late, and cannot be considered. *Id.*

Where court adjourned on January 4th, after judgment of conviction, a statement of facts not filed until April 14th was filed too late, and cannot be considered on appeal. *Thomas v. State*, 71 Cr. R. 183, 159 S. W. 1183.

Where the term of the county court at which accused was convicted adjourned May 3d, a statement of facts not approved and filed until July 2d cannot be considered. *Stubbs v. State*, 71 Cr. R. 390, 160 S. W. 87.

Where the term of the county court at which accused was convicted adjourned May 3d, a bill of exceptions not approved and filed until July 2d cannot be considered. *Id.*

Unless the county court in misdemeanor cases allows 20 days or more after adjournment for filing bills of exceptions, neither bills of exceptions nor statements of facts not filed during the term can be considered. *St. Clair v. State*, 72 Cr. R. 37, 160 S. W. 353.

A statement of facts must be filed within 90 days after adjournment, and a statement of facts not filed until September 17th comes too late on an appeal from a conviction at a term which adjourned May 30th. *Smith v. State*, 72 Cr. R. 12, 160 S. W. 681.

Bill of exceptions filed by accused more than 20 days after the adjournment of the trial term cannot be considered. *Calhoun v. State*, 72 Cr. R. 24, 160 S. W. 706.

The county court in a misdemeanor case is not authorized to allow longer than 20 days after the adjournment for filing bills of exceptions. *Butler v. State*, 72 Cr. R. 81, 160 S. W. 1191.

Where transcripts were required to be filed within 90 days after sentence, under Acts 32d Leg. c. 119, § 7, and appellant was sentenced February 24th, and the statement of facts was not presented until August 30th, it was too late. *Bracher v. State*, 72 Cr. R. 198, 161 S. W. 124.

Where the term at which defendant was convicted of a misdemeanor adjourned May 28th, a statement of facts not filed until July 30th, could not be considered either in passing on alleged errors or as the basis for supporting the judgment. *Hall v. State*, 72 Cr. R. 161, 161 S. W. 457.

Where the term at which defendant was convicted of a misdemeanor adjourned May 28th, a bill of exceptions, not filed until July 30th, could not be considered either in passing on alleged errors or as the basis for supporting the judgment. *Id.*

Where a term of the county court adjourned on May 31st, bills of exception not filed within 20 days after adjournment of court could not be considered. *Hart v. State*, 72 Cr. R. 160, 161 S. W. 458.

Where accused was convicted at a term of the county court which adjourned August 16th, and his statement of facts was not filed until September 15th, it was not filed within the required 20 days after adjournment. *Hampton v. State*, 72 Cr. R. 189, 161 S. W. 966.

That a bill of exceptions containing the evidence heard on motion for new trial may be considered on appeal, it must have been filed during the term. *Brice v. State*, 72 Cr. R. 219, 162 S. W. 874.

Where appellant's bills of exception were not filed within 20 days after adjournment of court, they were too late. *Newsome v. State*, 72 Cr. R. 453, 162 S. W. 891.

Where counsel neither notified the trial judge, who was on his vacation nor took the bills of exception to him for approval within 90 days and they were not approved within that time, held that they could not be considered; for the mere filing of bills of exception within 90 days from adjournment of court would not entitle them to consideration. *Jones v. State*, 74 Cr. R. 350, 163 S. W. 75.

The filing of a statement of facts within 90 days from adjournment of court would not entitle it to consideration, where it was not approved until after the expiration of 90 days. *Id.*

A statement of facts relating to evidence heard on motion for a new trial will not be considered if not filed in term time. *Forester v. State*, 73 Cr. R. 61, 163 S. W. 87.

Where a statement of facts heard on a motion for new trial was not filed during the term, it could not be considered. *Hoskins v. State*, 72 Cr. R. 107, 163 S. W. 426.

Where a statement of facts was not filed until more than 20 days after adjournment of court, and the bills of exceptions were filed 2 days thereafter, the bills could not be considered, and matters set up in a motion for new trial could not be reviewed. *Joiner v. State*, 72 Cr. R. 620, 163 S. W. 436.

On appeal from the county court a statement of facts filed after adjournment of the term could not be considered, where the record contained no order authorizing such filing. *Archer v. State*, 73 Cr. R. 15, 163 S. W. 441.

Where the term of court may continue more than 8 weeks, bills of exception must be filed within 30 days after adjournment, unless the court shall, by order entered of record, extend the time for filing. *Sewall v. Colby (Civ. App.)* 163 S. W. 694.



Statements of facts showing the evidence heard on motions for new trial, in order to be considered by this court, must be filed within term time. *Graham v. State*, 73 Cr. R. 28, 163 S. W. 726.

It is the duty of defendant to see that his bills of exception are filed within the time fixed by law, and even after delivery to the trial judge in time it is his duty to have them acted upon and filed. *Gowan v. State*, 73 Cr. R. 222, 164 S. W. 6.

On appeal from the county court, a statement of facts filed within 20 days after adjournment could not be considered, where no order was entered allowing the filing after adjournment. *Powell v. State*, 73 Cr. R. 146, 164 S. W. 852.

A statement of facts, filed in the trial court September 10, 1913, and in the Court of Civil Appeals on September 17, 1913, was too late, and will not be considered, where judgment was rendered May 24, 1913, and the order overruling the motion for new trial was made on May 30, 1913. *Robson v. Moore* (Civ. App.) 166 S. W. 908.

Under this article, where the only order in the record granted defendant 30 days after adjournment, a bystanders' bill filed 38 days thereafter will not be considered. *Hicks v. State*, 75 Cr. R. 461, 171 S. W. 755.

Under this article, statement of facts filed July 17th, case having been tried at term of county court adjourned March 21st, was filed in time. *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

The court, in exercising its inherent power to prevent fraud, might allow a motion to correct statement of facts, though not filed within 30 days. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 180 S. W. 928.

A statement of fact filed within 12 months after final judgment was rendered, is in time in case of writ of error. *Kirby Lumber Co. v. Smith* (Civ. App.) 185 S. W. 1068.

Better practice is to take bill of exceptions, have it approved and filed during trial at time an adverse ruling is made. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

Under rule 55 (142 S. W. xxi) for government of district and county courts, providing that rulings on application for continuance may be reviewed only through bills of exception, held, that assignment of error to denial of continuance cannot be sustained, where bill of exceptions was filed after term without order extending time. *M. Piowaty & Sons v. Wyche* (Civ. App.) 193 S. W. 1146.

6. — Filing within time for filing transcript.—This article applies to writs of error as well as to appeals, and hence a statement of facts filed at any time within 12 months after final judgment is in time in case of a writ of error. *Louisiana-Rio Grande Canal Co. v. Quinn* (Civ. App.) 160 S. W. 151.

Under this article, an accused person has 90 days in which to file his statement of facts. *Romero v. State*, 72 Cr. R. 105, 160 S. W. 1193.

Under this article, a statement of facts filed before the transcript is required to be filed is filed in time, though not filed within the time specified by the trial court. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 171 S. W. 520.

Under this article, irrespective of Courts of Civil Appeals rule 8 (142 S. W. xi), statement of facts, filed before expiration of time for filing transcript in Court of Civil Appeals, held duly filed. *Tyler v. Sowders* (Civ. App.) 172 S. W. 205.

Under this article, bills of exception must be filed within the time extended by the court, and cannot be considered though they are filed within 90 days after the adjournment of the district court. *Loeb v. Texas & N. O. R. Co.* (Civ. App.) 186 S. W. 378.

8. Extension of time.—Where, on the overruling of a motion for new trial on August 26th, the court granted accused 30 days' additional time in which to file his bills of exception and statement of facts, statement of facts and bills of exception not filed until the last of November cannot be considered. *Harrison v. State*, 71 Cr. R. 40, 158 S. W. 1120.

This article, providing that any statement of facts filed before the time for filing the transcript in the appellate court shall be considered as having been filed within the time allowed by law, has no reference to bills of exception, and will not justify an extension of the time of filing. *Louisiana-Rio Grande Canal Co. v. Quinn* (Civ. App.) 160 S. W. 151.

Where the trial court ordered bills of exception to be filed, and marked them approved as of a date long prior to the actual filing and approval, that will not give them added sufficiency, and they will be considered as filed on the date they actually were. *Id.*

The county court in a misdemeanor case is not authorized to allow longer than 30 days after the adjournment for filing the statement of facts. *Butler v. State*, 72 Cr. R. 81, 160 S. W. 1191.

Where, in a misdemeanor case, the only authority to file a statement of facts after term time was a verbal order of the judge, a statement filed within the time as so extended could not be considered. *Smith v. State*, 72 Cr. R. 206, 162 S. W. 835.

Neither the trial judge nor any other person has authority to antedate bills of exception or statements of fact. *Gowan v. State*, 73 Cr. R. 222, 164 S. W. 6.

9. — Time of granting extension.—An order extending time to file bills of exceptions may be made after the time for filing previously given has expired, whether the court be one whose terms are more or less than 8 weeks. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

This article does not impose on trial judge absolute duty to extend time for filing, or approve statement of facts, if found correct, or, if not, to prepare one himself, after 30 days after adjournment, but gives him discretion, which cannot be controlled by any other court. *Dobie v. Scott* (Civ. App.) 188 S. W. 286.

Discretion being in the trial judge as to allowing statement of facts filed after 30 days after adjournment, it is immaterial whether parties acted with all possible diligence, if the statement was offered too late. *Id.*

Where a transcript was filed August 25th without a statement of facts, and on October 2d the clerk refused to file an offered statement without an order of the court, but no request therefor was made until the case was submitted the following February, permission to file the statement will be denied. *Hill v. Kincaid* (Civ. App.) 193 S. W. 185.

12. Excuses for failure to file in time.—Where one convicted of a crime did not file his bill of exceptions within the time required by statute, through no fault of his own

or of his attorneys, and thereafter the judge receives and certifies the bill to be correct, the Court of Criminal Appeals may consider it, and where a convicted person uses due diligence to obtain a statement of facts in time, but fails through no fault of his own, the judgment should be reversed. *Johnson v. State*, 71 Cr. R. 391, 159 S. W. 848.

That the county court in a misdemeanor case allowed 30 days for filing statement of facts, and convinced defendant's counsel that the law authorized him to do so, is not, on motion to strike, an excuse for not filing in 20 days. *Butler v. State*, 72 Cr. R. 81, 160 S. W. 1191.

Where the court stenographer prepared a transcript of the proceedings for accused, who was a pauper, before the expiration of the 90 days within which he was required by Acts 32d Leg. c. 119, to file the statement of facts, the failure of the stenographer to prepare it within the 30 days allowed by the court will not deprive accused of a statement so as to entitle the unapproved transcript to consideration on appeal. *Romero v. State*, 72 Cr. R. 105, 160 S. W. 1193.

Where accused employed his own attorney to defend him, the negligence of such attorney in failing to present the statement of facts to the judge for approval in time will be imputed to accused. *Bracher v. State*, 72 Cr. R. 198, 161 S. W. 124.

That the trial judge, after receiving the bill of exceptions within the time allowed for approving same, stated that he could not give his approval until he had received the statement of facts did not excuse the failure of accused to secure bills of exception in time, where he made no application for extension of the time. *Chavario v. State*, 72 Cr. R. 240, 161 S. W. 972.

Statement of facts or bills of exception not filed within the time prescribed by statute will not be considered, notwithstanding any agreement of attorneys or order of district judge; but, if the delay be through fault of the prosecuting officers, there will be a reversal. *Brice v. State*, 72 Cr. R. 219, 162 S. W. 874.

Where a failure to get the statement of facts into the record within the time required arises from no fault of accused and it is subsequently approved by the judge as correct, it will be considered. *Jones v. State*, 74 Cr. R. 350, 163 S. W. 75.

Where the bill of exceptions was not signed by the trial judge until the 27th day after adjournment after accused had made several attempts to have it passed upon by the county attorney, held that accused did not show due diligence in having it filed, so that it cannot be considered. *Laws v. State*, 73 Cr. R. 286, 164 S. W. 1015.

Statement of facts filed late in the trial court will be considered when the late filing is properly excused in the motion for rehearing by showing difficulty of counsel in getting the statement prepared. *International & G. N. Ry. Co. v. Reek (Civ. App.)* 179 S. W. 699.

**13. Effect of failure to file in time—In general.**—A motion for a new trial, though insufficient because not filed within the time prescribed by this article, may nevertheless be considered to determine whether it is sustainable as a bill of review to set aside a judgment. *Nocona Nat. Bank v. Goin (Civ. App.)* 159 S. W. 189.

The time for filing bills of exception held to relate to formalities in bringing a case to the appellate court within Court of Civil Appeals rule 8 (142 S. W. xi), so that failure to file in time is waived where a motion to strike is not filed and docketed within 30 days after the filing of the transcript. *Conn v. Houston Oil Co. of Texas (Civ. App.)* 171 S. W. 520.

Courts of Civil Appeals will notice a failure to file a statement of facts in time, although the question be not raised by the appellee. *International & G. N. Ry. Co. v. Reek (Civ. App.)* 179 S. W. 699.

**14. — Not considered.**—A bill of exceptions, not filed until more than 90 days had elapsed from the adjournment for the term, cannot be considered. *Richardson v. State*, 71 Cr. R. 111, 158 S. W. 517.

Where one convicted of a crime did not file his statement of facts within the time required by statute, through no fault of his own or of his attorneys, and thereafter the judge receives and certifies the statement to be correct, the Court of Criminal Appeals may consider it. *Johnson v. State*, 71 Cr. R. 391, 159 S. W. 848.

Unless the county court in misdemeanor cases allows 20 days or more after adjournment for filing bills of exceptions, neither bills of exceptions nor statements of facts not filed during the term can be considered. *St. Clair v. State*, 72 Cr. R. 37, 160 S. W. 353.

Bills of exception filed 183 days after the adjournment, with no excuse for the delay, cannot be considered. *Bradford v. State*, 72 Cr. R. 5, 160 S. W. 681.

Statement of facts filed 150 days after adjournment, with no excuse for delay, cannot be considered. *Id.*

Where accused complained of the misconduct of the jury, a statement of facts as to the evidence, on the motion for new trial, which motion was overruled, cannot be considered where not filed until after the adjournment of court. *Johnson v. State*, 71 Cr. R. 620, 160 S. W. 695.

Where accused on motion for new trial offered evidence of the improper conduct of the jury, his statement of facts preserving the evidence cannot be considered unless filed in term time. *Matthews v. State*, 71 Cr. R. 374, 160 S. W. 1185.

A statement of facts, not filed within the statutory time, cannot be considered. *Lisenbee v. State*, 72 Cr. R. 494, 162 S. W. 1150.

A statement of facts showing the evidence introduced on a motion for a new trial for newly discovered evidence could not be considered where it was not filed until long after the adjournment of the term. *Jones v. State*, 74 Cr. R. 350, 163 S. W. 75.

Bills of exception or statements of fact not presented for approval or filed within the time allowed by law cannot be considered. *Gowan v. State*, 73 Cr. R. 222, 164 S. W. 6.

Where the statement of facts is not filed within the 90 days after adjournment allowed by statute, and there is no showing why it was not done, it cannot be considered. *Armstrong v. State*, 72 Cr. R. 658, 164 S. W. 381.

Where a bill of exceptions is not filed within the 90 days after adjournment allowed by statute, and there is no showing why it was not done, it cannot be considered. *Id.*

Bill of exceptions to denial of new trial filed, nearly two months after adjournment of court, held not to be considered. *International & G. N. Ry. Co. v. Jones (Civ. App.)* 175 S. W. 488.

A purported statement of facts, filed in the Court of Civil Appeals, which statement had never been filed below within 90 days of perfecting the appeal, as required, could not be considered. *International & G. N. Ry. Co. v. Reek* (Civ. App.) 179 S. W. 699.

Filing of statement of facts in Court of Civil Appeals held not to preclude such court from refusing to consider such statement because it was not filed below. *Id.*

A bill of exceptions not filed within the time given by statute, or any extension thereof, cannot be considered. *Pearce v. Supreme Lodge, Knights and Ladies of Honor* (Civ. App.) 190 S. W. 1156.

15. — **Striking out.**—A statement of facts not filed in the county court until more than 20 days after adjournment will be stricken on motion. *Collins v. State*, 72 Cr. R. 44, 161 S. W. 115.

A purported statement of facts, not filed in the trial court until six months after adjournment, will be stricken. *Arrisman v. State*, 72 Cr. R. 45, 161 S. W. 118.

Bills of exceptions not filed in the trial court until the sixtieth day after adjournment for the term, and after appellant had, within 30 days allowed for filing a statement of facts and bills of exception, attempted to extend the time for another 30 days, were filed too late, and will be stricken on motion. *Boyd v. State*, 72 Cr. R. 159, 161 S. W. 459.

A statement of facts and bill of exceptions, not filed until 60 days after the adjournment of court in a misdemeanor prosecution will be stricken on motion, in view of the Stenographer's Act of 1911 (Acts 32d Leg. c. 119). *Phillips v. State*, 72 Cr. R. 160, 161 S. W. 459.

A statement of facts and bill of exceptions not filed within 90 days after the adjournment of the term at which accused was convicted will be stricken. *Dosh v. State*, 72 Cr. R. 239, 161 S. W. 979.

Statement of facts and bills of exceptions filed more than 20 days after the adjournment of the term at which the trial was had will be stricken on motion. *Ferguson v. State*, 72 Cr. R. 494, 163 S. W. 65.

A statement of facts not certified, approved, and filed within the time allowed by law will be stricken from the record. *Gowan v. State*, 73 Cr. R. 222, 164 S. W. 6.

Under this article, the statement of facts, not filed within the time for filing the transcript of a criminal case, tried at a term which continued more than 8 weeks, must be stricken. *Williams v. State* (Cr. App.) 177 S. W. 971.

#### Art. 2074. [1382] [1379a] Statement of facts not filed in time, when considered by court.

**Judge's failure to sign statement.**—Under art. 2068, a statement of facts not signed through the inadvertence of the judge must be stricken, though appellant may, under this article, file a signed statement pending motion to strike, on showing excuse for not discovering the judge's failure. *Rea v. Fields* (Civ. App.) 172 S. W. 191.

#### Art. 2075. Time for judge to file conclusions, etc.

Cited, *Head v. Altman* (Civ. App.) 159 S. W. 135; *Bowles v. Belt* (Civ. App.) 159 S. W. 885.

**Applicability of statute.**—Where a criminal prosecution is tried by the court, it is not authorized to file conclusions of fact and law, as in a civil action. *Morris v. State*, 73 Cr. R. 67, 163 S. W. 709.

This article and art. 1989 apply only to trials by the court. *Schofield v. Texas Bank & Trust Co.* (Civ. App.) 175 S. W. 506.

**Time for filing.**—Where the judge filed his conclusions of fact and law within ten days after the adjournment of the term as permitted by this article, it was not material that they were not reduced to writing and filed during the term. *August v. Gamer Co.* (Civ. App.) 166 S. W. 1197.

Under the statutes allowing the court 10 days after adjournment in which to file findings of fact and conclusions of law, an order of court allowing itself 30 days after adjournment in which to file such findings and conclusions conferred no power to file them after the prescribed 10 days. *Alsworth v. Reppert* (Civ. App.) 167 S. W. 1098.

Under this article, additional findings cannot be filed after the 10-day period. *De Bruin v. Santo Domingo Land & Irrigation Co.* (Civ. App.) 194 S. W. 654.

**Filing after time allowed.**—Findings of fact and conclusions of law not filed within the time required by law cannot be considered on appeal. *Standard Paint & Wall Paper Co. v. Rowan* (Civ. App.) 158 S. W. 251; *Dennis v. Kendrick* (Civ. App.) 163 S. W. 693.

The findings of fact and conclusions of law filed by the trial court more than 10 days after the adjournment of the term are a nullity. *Bliss v. San Antonio School Board* (Civ. App.) 173 S. W. 1176; *International & G. N. Ry. Co. v. Mudd* (Civ. App.) 179 S. W. 686.

Where findings of fact were not filed within 10 days after the adjournment of the trial term, as required by this article, findings made thereafter are not a part of the appellate record. *Houston Oil Co. of Texas v. Ragley-McWilliams Lumber Co.* (Civ. App.) 162 S. W. 1183.

Conclusions of law and fact not filed for over two months after the trial come too late and cannot be considered for any purpose. *Sewall v. Colby* (Civ. App.) 163 S. W. 694.

Conclusions of fact and law filed by the trial court 28 days after adjournment of court cannot be considered by the appellate court; they not being a part of the record. *First Nat. Bank of Wichita Falls v. Zundelowitz* (Civ. App.) 168 S. W. 40.

Findings of fact and conclusions of law, filed at a date later than allowed by law, are a nullity and not part of the record on appeal. *Averill v. Wierhauser* (Civ. App.) 175 S. W. 794.

**Reversal for failure to file in time.**—A judgment will be reversed for failure of the trial judge, when duly requested, to file findings of fact and conclusions of law within the time limited by this article. *Bruce v. Stark* (Civ. App.) 175 S. W. 795; *Averill v. Wierhauser* (Civ. App.) 175 S. W. 794.

Under this article and art. 1989, findings of fact and conclusions of law cannot be filed within ten days after subsequent term at which judgment nunc tunc was entered,

so that request therefor made at trial term was seasonable, and failure to file them was reversible error. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 193 S. W. 1087.

**Review.**—Where findings of fact and conclusions of law are filed and there are no exceptions or request for additional findings, the only question reviewable on appeal is whether the pleadings justify the judgment. *Pugh v. Werner* (Civ. App.) 166 S. W. 698.

Under rule 101 for Courts of Civil Appeals, as amended June 25, 1913, held that object of rule is to permit assignments of error to action of court after final judgment, and findings filed by court after adjournment, under this article, can be assailed on appeal on ground that evidence will not support them without exception thereto being first filed, though there was no motion for new trial. *Goodman v. W. S. Peck & Co.* (Civ. App.) 192 S. W. 785.

**Waiver or estoppel to raise objection.**—If appellant, after requesting written findings of fact, agreed that they need not be filed within the statutory period, he thereby waived his right to have such findings made a part of the record, but evidence held not to show that appellant so agreed. *Houston Oil Co. of Texas v. Ragley-McWilliams Lumber Co.* (Civ. App.) 162 S. W. 1183.

Where plaintiff requested written findings of fact and conclusions of law, and the same being prepared by defendant and signed by the judge were presented to plaintiff's counsel within the time allowed, plaintiff's counsel, having neglected to file them with the clerk, cannot complain that they were not filed in time. *Teal v. Lakey* (Civ. App.) 181 S. W. 759.

**Art. 2076. Where term of office expires before adjournment, etc.**

**Filing conclusions after expiration of term of office.**—Under this article, the statement must be approved and signed by the presiding judge, though his term of office has expired. *Richardson v. State*, 71 Cr. R. 111, 158 S. W. 517.

The trial judge is the judge who must sign the bills of exception required by this article; a bystander's bill being necessary if the bill cannot be signed and approved by the trial judge. *Kaufman v. State* (2 cases), 72 Cr. R. 455, 163 S. W. 74.

Under this article, that the bill of exceptions may be considered, it must be signed and approved by the trial judge; he being accessible. *Morgan v. State* (Cr. App.) 180 S. W. 610.

CHAPTER TWENTY

APPEAL AND WRIT OF ERROR

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| <p>Art.<br/>2078. Appeals, etc., to the courts of civil appeals, allowed in what cases.<br/>2079. Appeal from interlocutory order appointing receiver or trustee, etc.<br/>2079a. Appeal from interlocutory order overruling motion to vacate order appointing receiver or trustee, etc.<br/>2080. Appeal from interlocutory orders granting or dissolving temporary injunctions.<br/>2084. Appeal perfected, how.<br/>2085. By parties of whom no appeal bond is required.<br/>2086. Writ of error sued out, when.<br/>2087. By petition.<br/>2088. Requisites of petition.<br/>2089. Error bond.<br/>2090. Citation in error.<br/>2091. Form and requisites of citation.<br/>2092. Service and return of.<br/>2095. Service on the attorney of record.<br/>2096. Service in other modes.<br/>2097. Cost bond on appeal or writ of error.<br/>2098. Appeal, etc., by pauper.<br/>2099. Appeal, etc., perfected, when.<br/>2099a. Revival against successor of officer against whom judgment in mandamus or injunction has been rendered and appeal perfected; motion to make successor a party.</p> | <p>Art.<br/>2099b. Clerk shall cause motion to be served on parties.<br/>2099c. Court shall proceed to determination of case and render judgment and enforce same; costs.<br/>2100. Appeal, etc., on cost bond or affidavit does not suspend execution.<br/>2101. Supersedeas bond.<br/>2102. Supersedeas bond where judgment is for land or other property.<br/>2103. Judgment stayed and execution suspended.<br/>2104. Amendment of appeal bond.<br/>2105. State, county, etc., not to give bond.<br/>2106. Of executors, etc.<br/>2107. Executor, etc., may take appeal or writ of error.<br/>2108. Transcript to be made out and delivered.<br/>2109. To contain all proceedings, except, etc.<br/>2110. Citation and return omitted, when.<br/>2111. Omission of unimportant proceedings, when.<br/>2112. Agreed statement of pleadings and proof.<br/>2113. Transcript must contain, what.<br/>2114. Clerk's certificate and indorsement.<br/>2115. Briefs filed in court below, and notice given.</p> |
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**Article 2078. [1383] [1380] Appeals, etc., to the courts of civil appeals, allowed in what cases.**

Cited, *Browne v. International & G. N. Ry. Co.* (Civ. App.) 158 S. W. 1155; *Bryant v. Moore* (Civ. App.) 169 S. W. 395; *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (in dissenting opinion).

1. Appeals and writs of error—Nature and origin.—No right of appeal exists in a particular case, unless conferred by statute. *Muela v. Moye* (Civ. App.) 185 S. W. 331.

2. — Statutory provisions and remedies.—Statutes relating to appellate jurisdiction do not affect a cause wherein a writ of error had been applied for before such statutes became operative. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

3. — **Proper mode of review.**—Where, in an action against the clerk, the court refuses to grant a motion to appoint a clerk pro tem., plaintiff's remedy is by mandamus, and not by appeal. *Kruegel v. Williams* (Civ. App.) 158 S. W. 1052.

Error in rendering judgment against a minor without a guardian, appearing on the face of the record, may be taken advantage of by appeal or writ of error. *Kelly v. Kelly* (Civ. App.) 178 S. W. 686. And hence a bill of review will not lie. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

4. — **Successive proceedings for review.**—That the unsuccessful party below perfected an appeal by filing a supersedeas bond will not preclude him from subsequently suing out a writ of error, so long as the adverse party did not secure an affirmation of the appeal on certificate. *Louisiana-Rio Grande Canal Co. v. Quinn* (Civ. App.) 160 S. W. 151.

A cause in error being but another mode of appeal, the petition in error, by which, pending appeal, the same cause is brought up, will, there having been a reversal and remand on the appeal, be dismissed. *Trammell v. Rosen* (Civ. App.) 165 S. W. 518.

A party to a judgment, foreclosing a vendor's lien on real estate, might abandon an attempted appeal and bring the judgment to the Court of Civil Appeals by writ of error; no motion to affirm on a certificate having been made in the meantime. *Smith v. McDaniel* (Civ. App.) 170 S. W. 1070.

7. **Grounds of appellate jurisdiction.**—In general.—Under this article, authorizing appeals from final judgments, an appeal must be dismissed, where the transcript contains no judgment entered on the verdict, because of want of jurisdiction of the appeal. *Southwestern Traction Co. v. Melton* (Civ. App.) 166 S. W. 363.

8. — **Existence of actual controversy.**—On motion by the state to dismiss an appeal taken by defendants from a temporary injunction in an action to abate a public nuisance, the suit will be dismissed, where defendants had sold the property conducted as a disorderly house, although costs were involved. *Ansley v. State* (Civ. App.) 175 S. W. 470.

Where, pending appeal from denial of an application for mandamus to compel a district clerk to issue an execution, respondent ceases to be clerk, the cause will be dismissed. *Peck v. Murphy & Bolanz* (Civ. App.) 175 S. W. 1078.

Where the controversy between the parties has been settled pending appeal, the appeal will be dismissed. *A. A. Fielder Lumber Co. v. Gamble* (Civ. App.) 179 S. W. 522.

Where injunction judgment appealed from has expired by its own limitation, leaving nothing but question of costs to be adjudicated, the Court of Civil Appeals will not entertain jurisdiction. *Sanders v. Bledsoe* (Civ. App.) 180 S. W. 926.

The appeal of a railroad for which, at the instance of its bondholder, a receiver has been appointed, from the order of appointment, will not be dismissed as moot because subsequently another receiver is appointed by a United States court, and the road does not appeal from, and apparently acquiesces in, the second appointment. *Houston & B. V. Ry. Co. v. Hughes* (Civ. App.) 182 S. W. 23.

9. — **Jurisdiction of lower court.**—Where justice and county courts were without jurisdiction of cause, Court of Civil Appeals is without jurisdiction, and can make no order other than to reverse judgment of county court and dismiss case. *Houston & T. C. R. Co. v. Patterson* (Civ. App.) 193 S. W. 691; *Knight v. Armstrong* (Civ. App.) 162 S. W. 448; *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657; *Goodman v. Schwind* (Civ. App.) 186 S. W. 282.

Where the district court had no jurisdiction over an appeal from justice court, the Court of Civil Appeals has no jurisdiction over an appeal from district court, and it should reverse the judgment, dismiss the case, and direct a transfer to the county court. *Turnbow v. J. E. Bryant Co.* (Sup.) 181 S. W. 686; *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 183 S. W. 431.

Where, on appeal from a judgment of the county court, it did not appear from the record that the county court had jurisdiction, the judgment will be reversed, and the cause remanded. *Wilson v. Ford* (Civ. App.) 159 S. W. 73.

Upon appeal from a judgment of the county court, which was without jurisdiction, the appeal will not be dismissed, but the cause will be reversed and remanded to enable that tribunal to dismiss the action. *Ft. Worth & R. G. Ry. Co. v. Mathews* (Civ. App.) 169 S. W. 1052.

An order denying a motion to set aside the judgment at a former term, the trial court being without jurisdiction to entertain it, was not appealable. *Banks v. Blake* (Civ. App.) 171 S. W. 514.

Where the amount demanded by plaintiff in justice's court exceeds its jurisdiction, the county court is without jurisdiction, and an appeal from the county court must be dismissed. *Vicars v. Tharp* (Civ. App.) 174 S. W. 949.

Jurisdiction of county court on appeal from justice's court must affirmatively appear. *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657.

Where the amount in controversy in the county court was \$159, the record must show that the cause was appealed from a justice court, and, if it fails to make such showing, the appeal must be dismissed unless the record is perfected. *Rhodes v. Coleman-Fulton Pasture Co.* (Civ. App.) 185 S. W. 355.

Finding of trial judge on appeal from justice that suit was filed and tried in justice court, and an appeal duly perfected to the county court, held not to supply omission of justice court's transcript, and not a sufficient showing that county court acquired appellate jurisdiction. *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965.

The Court of Civil Appeals has no jurisdiction in an appeal from the county court where the amount involved is \$60, such amount being below jurisdiction of county court. *American Disinfecting Co. v. Freestone County* (Civ. App.) 193 S. W. 440.

10. — **Consent of parties.**—Jurisdiction of county court may be made an issue for the first time on appeal in the Court of Civil Appeals. *Houston & T. C. Ry. Co. v. Lewis* (Civ. App.) 185 S. W. 593; *Fuller Hanna & Co. v. Rogers* (Civ. App.) 184 S. W. 322.

12. **Decisions reviewable**—In general.—An order denying a motion for the appointment of a clerk pro tem. is not appealable. *Kruegel v. Williams* (Civ. App.) 158 S. W. 1052.

Under art. 1833, an order sustaining a plea of privilege to be sued in another county is appealable before trial. *Hickman v. Swain*, 106 Tex. 431, 167 S. W. 209.

Under art. 1833, judgment of district court sustaining plea of privilege to the venue held reviewable in Court of Appeals. *Woelfel v. McKean, Eilers & Co.* (Civ. App.) 175 S. W. 476.

A peremptory instruction for plaintiff serves as basis for assignments of error raising issues involved. *Leonard v. Kendall* (Civ. App.) 190 S. W. 786.

13. — **Action of judge in vacation or at chambers.**—Except where so made by statute, an order made in vacation by a district judge is not appealable. *Barker v. Wilson* (Civ. App.) 189 S. W. 748; *National Surety Co. v. David Castle Const. Co.* (Civ. App.) 170 S. W. 800.

So far as right of appeal from final judgment perpetuating injunction was concerned, held, that it was immaterial that it was rendered outside the county, especially in view of art. 1714. *Trayhan v. State* (Civ. App.) 180 S. W. 646; *Anderson v. State* (Civ. App.) 180 S. W. 648.

No appeal lies to the Court of Civil Appeals from an order of the judge of the county court not made at a regular term of court in a proceeding in the nature of a habeas corpus to obtain custody of a minor child. *Rosamond v. Murff* (Civ. App.) 185 S. W. 1067.

16. **Finality of judgment**—In general.—Under this article, an appeal can only be taken from a final judgment of the trial court. *Herron v. Tolbert* (Civ. App.) 180 S. W. 650; *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 162 S. W. 922; *Cisco Oil Mill v. Shepherd* (Civ. App.) 176 S. W. 822; *Nunez v. McElroy* (Civ. App.) 184 S. W. 531; *Houston Transp. Co. v. Texas Co.* (Civ. App.) 187 S. W. 430.

Where an appeal does not lie from an interlocutory order, a party may complain thereof on appeal from the final judgment. *Holmes v. Coalson* (Civ. App.) 178 S. W. 628.

With certain statutory exceptions, no appeal can be prosecuted until a final judgment, disposing of all the issues, has been rendered. *Wooton v. Jones* (Civ. App.) 189 S. W. 350.

17. — **Nature of action or proceeding.**—Interlocutory orders in receivership proceedings are not reviewable until the case is finally disposed of. *National Surety Co. v. David Castle Const. Co.* (Civ. App.) 170 S. W. 800.

An appeal from an order denying a temporary injunction is interlocutory. *Spence v. Fenchler* (Sup.) 180 S. W. 597.

18. — **Nature and scope of decision.**—A decree restraining a levee district from completing a levee adjacent to the water works of complainant city held not a final judgment, from which an appeal would lie. *Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S. W. 164, 48 L. R. A. (N. S.) 994.

Where verdict was rendered for several railroads who were defendants, together with a receiver, a judgment, which recited the verdict but failed to provide that plaintiff take nothing against such railroad defendants, was not final so as to give the court of civil appeals jurisdiction of an appeal therefrom. *Freeman v. Miller* (Civ. App.) 160 S. W. 126.

A judgment sustaining exceptions to a plea in reconvention held not to dispose of the plea, leaving a judgment for plaintiff in the main action interlocutory and not appealable. *Lanius v. People's Home Telephone Co.* (Civ. App.) 160 S. W. 304.

Where the petition in trespass to try title prayed for an adjudication of title and possession in plaintiff, and for damages for converting timber thereon, and the answer merely set up ownership to the timber through conveyance, a judgment which merely awarded plaintiff damages was not final. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 162 S. W. 922.

Judgment in habeas corpus proceeding to obtain custody of child held not final or appealable because question of permanent custody was left open to allow father to show his competency, worthiness, and ability to care for the child. *Herron v. Tolbert* (Civ. App.) 180 S. W. 650.

In suit for foreclosure of judgment lien against land, praying that it be sold and proceeds be applied to pay a vendor's lien balance to plaintiff, judgment for plaintiff against a defendant for the debt, ordering land to be sold and directing application of proceeds, was final and appealable. *Reyes v. Kingman Texas Implement Co.* (Civ. App.) 188 S. W. 450.

In an action against the owner by sureties on contractors' bonds, who also sought recovery against the architect, a judgment which did not dispose of that contention, nor of the contractors' claim against the architect, is not final, and no appeal therefrom will lie. *Rouser v. Hogue* (Civ. App.) 189 S. W. 349.

Judgment, in suit to enjoin sale on foreclosure, which did not attempt to dispose of plaintiffs' plea seeking to recover penalties against mortgagee for usury, held not final. *Wooton v. Jones* (Civ. App.) 189 S. W. 350.

An order of court sustaining a joint plea in abatement for misjoinder of causes of action as to one defendant, and overruling it as to other defendant, not being a final judgment disposing of the controversy, is not appealable. *Phillips v. Faircloth* (Civ. App.) 189 S. W. 747.

In suit to cancel deed on ground of fraudulent representations inducing it, where plaintiff tendered a deed of land received in exchange, judgment for plaintiff, though not disposing of the tender, held a final appealable judgment. *Pitt v. Gilbert* (Civ. App.) 190 S. W. 1157.

19. — **Finality as to all parties.**—Where a judgment did not dispose of the action as to all of the defendants and with reference to the entire subject-matter of the litigation, it was not final or appealable. *McCarty v. Gray* (Civ. App.) 158 S. W. 1154.

In an action to recover damages, and also to cancel one contract, and reinstate another, a judgment awarding plaintiff damages, and dismissing the action as to one of the parties defendant, held not final. *Hamilton v. Joachim* (Civ. App.) 160 S. W. 645.

A judgment against all the defendants except one, but in no way disposing of him, whose dismissal would have resulted in a dismissal of the defendant partnership, of which

he was a member, is not final, and so not appealable. *Wichita Mill & Elevator Co. v. Burrus* (Civ. App.) 164 S. W. 16.

A judgment which did not dispose of a party to the suit is not a final judgment. *St. Louis, S. F. & T. Ry. Co. v. Tuttle* (Civ. App.) 171 S. W. 797.

A record showing a judgment rendered against two of the parties defendant, but not showing what disposition was made as to a third defendant, failed to show a final judgment, for want of which the appeal will be dismissed. *Kolp v. Weil Bros.* (Civ. App.) 173 S. W. 1006.

The judgment in consolidated causes is not final unless it disposes of the litigation as to all parties to the suit. *Wright v. Chandler* (Civ. App.) 173 S. W. 1173.

Where in suit of interpleader one defendant alleged causes of action for conversion and an accounting against the other, a judgment not disposing thereof held not final, and hence not appealable. *Braden v. Rhyne* (Civ. App.) 178 S. W. 691.

In an action on a note, a judgment not disposing of indorser's prayer for judgment over against his codefendant held not a final appealable judgment. *Houston Transp. Co. v. Peden Iron & Steel Co.* (Civ. App.) 179 S. W. 443.

Where a judgment did not dispose of certain interveners, nor of the subject-matter sued for by them, and there was no order of dismissal as to them, the judgment would not support an appeal. *Moore v. Toyah Valley Irr. Co.* (Civ. App.) 179 S. W. 550.

In an action having several parties plaintiff and defendant, a judgment not disposing of issues between some parties is not final, and not appealable. *J. I. Case Threshing Mach. Co. v. Lipper* (Civ. App.) 179 S. W. 701.

Where on appeal to the county court from justice court a new plaintiff appeared, and judgment was rendered in his favor without disposing of the original plaintiff, such judgment is not final, and the appeal will be dismissed. *Duke v. Trabue* (Civ. App.) 180 S. W. 910.

Where an action against two defendants and a cross-action against a railway were tried together, there can be no appeal from a judgment against the railway until final judgment was rendered as to both defendants. *Gulf, C. & S. F. R. Co. v. Atlantic Fruit Distributors* (Civ. App.) 184 S. W. 294.

Disposition of any cross-action pleaded by defendants as to whom he dismissed his suit is essential to finality of the decree or judgment. There is an implied disposition, by discontinuance or dismissal, of the other defendants' cross-action, in the order that plaintiff's suit was dismissed as to them, "and that this cause stand for trial with M. as plaintiff, and N. as defendant," and such cross-action is by necessary implication disposed of and adjudicated by the judgment for plaintiff. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

A judgment for certain plaintiffs for specific amounts, declaring alleged liens void, and by agreement of parties appointing a receiver to take possession of and keep defendants' property, subject to order of court, until sold under execution or by receiver, held, a final and appealable judgment, determining all rights of parties. *Beene v. National Liquor Co.* (Civ. App.) 189 S. W. 86.

20. — **Determination of controversy.**—Where a receiver for a railroad originally filed a suit, though the railroad company afterwards filed an amended petition, alleging that it had acquired the claim sued on by assignment from the receiver, and there was no order permitting the holder to be substituted as plaintiff, a judgment which did not dispose of the receiver's interest in the claim was not final, so as to be appealable; nor was it final and appealable, where it did not dispose of either of two defendants. *Browne v. International & G. N. Ry. Co.* (Civ. App.) 158 S. W. 1155.

Where a judgment appealed from was final in form, it was reviewable, notwithstanding it was based on a verdict which was defective in that it failed to dispose of certain cross-pleas filed by the defendants. *Ft. Worth Belt Ry. Co. v. Perryman* (Civ. App.) 158 S. W. 1181.

The test of whether a judgment is final so as to be appealable is whether it disposes of the whole matter in controversy as to all of the parties. *Havard v. Carter-Kelley Lumber Co.* (Civ. App.) 162 S. W. 922.

A judgment held final, so that an appeal might be duly perfected therefrom, even though it did not specifically dispose of defendants' counterclaim. *Swan v. Price* (Civ. App.) 162 S. W. 994.

Where defendant filed a plea in reconviction for more than plaintiff's claim, a judgment for the plaintiff for the full amount of his claim, which did not mention the defendant's cross-action, was not a final judgment from which an appeal would lie. *Brown v. Wofford* (Civ. App.) 167 S. W. 764.

Where a judgment of the county court on appeal from a judgment of a justice did not dispose of a plea in reconviction, the judgment was not final, and the Court of Civil Appeals acquired no jurisdiction on appeal. *Anderson, Evans & Evans v. Smith* (Civ. App.) 167 S. W. 765.

A judgment which fails to dispose of all the issues raised by the pleadings is not a final judgment. *Bryant v. Moore* (Civ. App.) 169 S. W. 395.

In an action for several years' rent and for money due for the sale of personalty, a judgment based on a directed verdict for a small amount, not in controversy, which did not dispose of the other issues, cannot be held a final judgment on the theory that the verdict, being for only part of the amount in suit, was an implied finding against plaintiff's other claims. *Id.*

Where, in an action by assignee against debtor and assignor, as guarantor, the issue was whether the debtor was liable to the assignee, a judgment not determining that issue was not final. *Carver Bros. v. Merrett* (Civ. App.) 174 S. W. 929.

Judgment in suit by corporation to recover title and possession of goods in which interveners claimed, which neither directly or by implication adjudicated plaintiff's claim, held not a final judgment and not appealable. *Finnigan-Brown Co. v. Escobar* (Civ. App.) 179 S. W. 1127.

In suit to recover title and possession of goods, interests being claimed by defendants and interveners as well as plaintiff, judgment failing to adjudicate on plaintiff's claim was not by implication an appealable final determination because the verdict determined such claim. *Id.*

Relative to the judgment disposing of all the subject-matter, giving the appellate court jurisdiction, amendment of the petition reducing the land claimed of itself eliminates all other lands. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

A judgment, which did not specifically dispose of a set-off and counterclaim pleaded by defendant, held a final determination of those issues as against defendant and appealable. *Trinity County Lumber Co. v. Conner* (Civ. App.) 187 S. W. 1022.

21. — **Collateral matters and proceedings.**—Whether dismissal of the cross-action of defendants, as to whom plaintiff dismissed his suit, was rightful, is immaterial, relatively to there having been a disposition of the issue, making the judgment final, and so giving the appellate court jurisdiction. *Nunez v. McElroy* (Civ. App.) 184 S. W. 531.

In suit for supplies furnished, with a distress warrant against defendant, a garnishment proceeding against a third party was a distinct suit from the original suit, and the quashing of the garnishment proceeding was a final judgment. *Walton & Stockton v. Corpus Christi Nat. Bank* (Civ. App.) 185 S. W. 369.

23. **Amount in controversy.**—See art. 1589 and notes.

A Court of Civil Appeals has no jurisdiction, under art. 1589, subd. 3, of an appeal from a judgment of the county court, rendered on appeal from a justice's court, where the amount in controversy and the judgment of the county court are for less than \$100. *Western Union Telegraph Co. v. Fricke & Boyd* (Civ. App.) 167 S. W. 6.

Neither the judgment appealed from nor the amount in controversy exceeding \$100 exclusive of interest and costs, the Court of Civil Appeals has no jurisdiction. *Cox v. W. A. Chanslor & Son* (Civ. App.) 170 S. W. 120.

Where plaintiff in justice's court, demanding judgment for \$104, recovered judgment for \$76, and on appeal filed in the county court an amendment reducing the demand to \$76, the Court of Civil Appeals had no jurisdiction of an appeal from a judgment for that amount. *Globe Loan Co. v. Betancourt* (Civ. App.) 171 S. W. 308.

A petition held sufficient to warrant a recovery of \$116 and confer jurisdiction on the Court of Civil Appeals, especially where defendant urged a counterclaim for \$154. *Mahaney v. Lee* (Civ. App.) 171 S. W. 1093.

Where the basis of garnishment was a judgment for over \$100, Court of Civil Appeals held to have jurisdiction of appeal involving controversy over sum in garnishee's hands amounting to less than \$100. *Childress v. Harmon* (Civ. App.) 176 S. W. 154.

26. — **Interest.**—Under art. 4977, touching allowance of interest on written contracts ascertaining the sum payable when no rate is agreed, the Court of Civil Appeals had no jurisdiction of an appeal from the judgment of a county court in an action for a disability indemnity of \$100, on which plaintiff prayed interest. *Great Eastern Casualty Co. v. Anderson* (Civ. App.) 183 S. W. 802.

The Court of Civil Appeals has jurisdiction on appeal from a judgment of the county court in an action begun before a justice of the peace to recover \$95 and general relief under which interest exceeding \$5 could be awarded. *International & G. N. Ry. Co. v. Perkins* (Civ. App.) 184 S. W. 725.

In an action against a carrier for injury to a mule, held, that allegations in the petition of \$99.50 damage, coupled with allegations showing he was entitled to interest, made the amount of the controversy over \$100, giving the Court of Civil Appeals jurisdiction on appeal. *Ft. Worth & R. G. Ry. Co. v. Albin* (Civ. App.) 185 S. W. 647.

The Court of Civil Appeals has no jurisdiction of an appeal where the amount in controversy does not exceed \$100 exclusive of interest. *Dowell v. Rettig* (Civ. App.) 186 S. W. 281.

27. — **Attorney's fees.**—Where plaintiff sued for \$100 and for reasonable attorney's fees not to exceed \$20 under art. 2178, the attorney's fees constituted a part of the amount in controversy and the case was within the jurisdiction of the Court of Civil Appeals under arts. 1589, 2078. *Wichita Valley Ry. Co. v. Leatherwood* (Civ. App.) 170 S. W. 262.

28. — **Reduction or remission.**—The Court of Civil Appeals has jurisdiction of an appeal from a county court judgment on appeal from the justice of the peace in an action for a sum and interest which would amount to more than \$100, though plaintiff waived a portion of interest. *International & G. N. R. Co. v. Perkins* (Civ. App.) 184 S. W. 725.

29. **Persons entitled to right of review—in general.**—In an action by the widow and minor child for the death of the husband and father, an engineer, the defendant could not allege error, in that plaintiffs had the authority to sue without joining the father and mother of deceased, who were adjudged to have no right to recover, and that it was unnecessary to join them, since any error in so doing did not concern the defendant. *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 158 S. W. 1171.

Where plaintiff's indorser was made a party defendant to the suit and failed to appeal, the makers of the note could not complain of the judgment finding that the indorser had transferred his interest to plaintiff. *Webb v. Reynolds* (Civ. App.) 160 S. W. 152.

In a proceeding to foreclose a chattel mortgage, the mortgagee cannot complain on appeal that the intervener who sought to enforce a landlord's lien on the same property did not serve citation upon the defendant. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

Where an intervener neither appealed nor assigned errors, the effect of the decision of the appellate court on his rights cannot be considered, though he filed a brief asking that judgment for plaintiff be affirmed. *Brown v. Bay City Bank & Trust Co.* (Civ. App.) 161 S. W. 23.

In trespass to try title, where plaintiff counted on adverse possession, and defendant set up the property was deeded to her as trustee, and she held for the beneficiary, plaintiff cannot complain that the court allowed the beneficiary to intervene, setting up the same facts as those alleged by defendant; the rights of the beneficiary under the trust not affecting his claim. *Ratcliff v. Ratcliff* (Civ. App.) 161 S. W. 30.

In an action against two connecting carriers for injuries to cattle, where judgment was rendered against the second carrier, it may complain of error in an instruction



that the evidence did not warrant a finding that the cattle had been roughly handled by the first carrier. *Houston & T. C. R. Co. v. Hawkins & Nance* (Civ. App.) 167 S. W. 190.

Where the allegations of defendant's cross-action did not justify a default judgment against a third party, it could not complain of a judgment in favor of the third party on the ground that he had not answered. *Reserve Loan Life Ins. Co. v. Benson* (Civ. App.) 167 S. W. 266.

In an action for damages to a shipment of goods, held, that the railroad company could not complain that the court allowed the seller of the goods to intervene and claim part of the recovery, though he was not a proper party. *International & G. N. Ry. Co. v. Rathblath* (Civ. App.) 167 S. W. 751.

Vendor held not entitled to complain of judgment in purchaser's favor for the land, on the ground that the purchaser had sold a part to a third person. *Stewart v. Williams* (Civ. App.) 167 S. W. 761.

Where purchasers of minerals in and under described land obtained the benefit of a partial payment of the price made by a copurchaser, he was the only person who could complain of a judgment for the balance against the purchasers, including himself, and where he did not appeal, the judgment would not be disturbed. *Whited v. Johnson* (Civ. App.) 167 S. W. 812.

In an action against a bank for negligence in making a deposit, where plaintiff did not set up any claim against a second bank impleaded by the defendant, plaintiff, who was defeated below, cannot complain that the court also found in favor of the impleaded bank. *First Nat. Bank of Shreveport v. City Nat. Bank* (Civ. App.) 168 S. W. 415, certified questions answered by Supreme Court 106 Tex. 297, 166 S. W. 689.

Defendants, whose separate appeals had been dismissed for delay in filing briefs, held not entitled to review on a subsequent appeal prosecuted by its codefendant. *Kansas City, M. & O. Ry. Co. v. Cave* (Civ. App.) 174 S. W. 872.

A judgment in sequestration will not be reversed as against the principal for error against the surety on his replevin bond who did not appeal. *Hawkins v. First Nat. Bank of Canyon, Tex.* (Civ. App.) 175 S. W. 163.

In an action against a corporation and its stockholders, where the stockholders alone appeal, they cannot assign error to a part of the judgment affecting only the corporation. *Staacke v. Routledge* (Civ. App.) 175 S. W. 444.

In a suit against the widow and heirs of a contractor and a county to foreclose chattel mortgages on machinery sold to the contractor, but claimed by the county, held, that county, which alone appealed, could not object to the judgment against it on ground that the contractor's widow and heirs were improperly made parties. *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

Where a party defendant assigned no error and did not appeal either against plaintiff or its codefendant, the appellate court could not review judgment against it. *Le Master v. Hailey* (Civ. App.) 176 S. W. 818.

A banker having deducted from the depositor's account the amount of a voucher issued by a school district taken for collection, cannot complain because the district was thereafter garnished. *Lawrence v. Box & Leediker* (Civ. App.) 177 S. W. 983.

Plaintiff, found not to have been a creditor of defendant when he levied on mules claimed to be covered by his mortgage from defendant, could not complain on appeal that the mules had been left by another, who claimed them, in defendant's possession for more than two years so as to be subject to the mortgage under *Vernon's Sayles' Ann. Civ. St. 1914, art. 3969*. *Hudgins v. Hammers* (Civ. App.) 178 S. W. 986.

In action against corporation on its notes, and against its president as surety thereon, where the surety sought no relief against the corporation, he could not question the validity of the default judgment against it because the record showed no service on it. *Bonner Oil Co. v. Gaines* (Civ. App.) 179 S. W. 686.

In action on a note by indorsee and to foreclose a mortgage on chattels in possession of a third person made a defendant, the third person held not entitled to complain of judgment for plaintiff against him though the payee intervened. *Fawcett v. Mayfield* (Civ. App.) 183 S. W. 111.

In an action on a note for the purchase price of a silo brought by a bank to which it had been negotiated, the bank having been defeated, cannot on appeal complain that judgment was in favor of the buyer against the impleaded seller; the seller not complaining. *First Nat. Bank of Garner, Iowa, v. Smith* (Civ. App.) 183 S. W. 862.

A judgment against several will not be disturbed as regards those defendants who did not appeal. *Sweeten v. Taylor* (Civ. App.) 184 S. W. 693.

Errors in the judgment, prejudicial to defendants who did not appeal, will not be reviewed. *Pictorial Review Co. v. Pate Bros.* (Civ. App.) 185 S. W. 309.

Where one of parties plaintiff against whom judgment was rendered, though jury did not return verdict against him, as directed, did not complain, defendant cannot complain. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

In action by seller against purchaser and carrier, where judgment was rendered against purchaser on theory that title passed upon delivery to carrier, held, that purchaser who had filed no cross-action against carrier could not complain on appeal that judgment was not rendered in favor of seller against the carrier. *Robert McLane Co. v. Swernemann & Schdake* (Civ. App.) 189 S. W. 282.

Mortgagees who sued payees and indorsers of notes on which the mortgaged mules were pledged as collateral could not appeal from the judgment against certain indorsers and payees, establishing the lien of another payee as superior to theirs. *T. W. Marse & Co. v. White* (Civ. App.) 189 S. W. 1027.

In action for breach of contract against original contractor and parties who assumed his liability, held, that such parties could not complain of jury's failure to find against original contractor, who pleaded over against them, but against whom they asked no relief. *Roberts v. Abney* (Civ. App.) 189 S. W. 1101.

Where two parties join in claiming personal property upon its sequestration and both recover judgment, that one of them cannot maintain such claim is not error of which plaintiff may complain. *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522.

Sureties on a replevin bond cannot maintain an appeal from a judgment against

their principal without joining him where the judgment is not against them. *Carr v. McDuffie* (Civ. App.) 191 S. W. 623.

In suit for partition and accounting, where court decreed all land to plaintiffs to satisfy in part damage done them by defendants' wrongful acts in cutting timber, defendants could not complain of action of court in allowing plaintiffs to make division of the land among themselves. *Stuart v. Teagarden* (Civ. App.) 193 S. W. 416.

In suit on vendor's lien notes, claim of defendant who made cross-claim against defendant appellant, but who recovered no judgment and has not appealed, need not be considered. *Rhoads v. Harris* (Civ. App.) 194 S. W. 621.

The right of appeal of claimant of a garnished fund, proceeds of a draft drawn in claimant's favor by defendant, who would ultimately bear loss if fund is declared to be property of defendant, held not affected by fact that it merely sought a release of fund so that it might be handled in usual manner instead of praying that it be paid direct. *West Texas Nat. Bank v. Wichita Mill & Elevator Co.* (Civ. App.) 194 S. W. 835.

Where claimant of garnished fund prayed for general and special relief, thus entitling it to a payment of fund if that were proper, it was entitled to appeal from a judgment that fund belonged to defendant in case. *Id.*

31. — **Interest in subject-matter.**—Parties adjudged to have no right or interest in trust fund held not entitled to complain of allowance of attorney's fees from the fund. *West Texas Bank & Trust Co. v. Matlock* (Civ. App.) 172 S. W. 162.

Plaintiff, found not to have been a creditor of defendant when he levied on mules claimed to be covered by his mortgage from defendant, could not complain on appeal that the mules had been left by another, who claimed them, in defendant's possession for more than two years so as to be subject to the mortgage under art. 3969. *Hudgins v. Hammers* (Civ. App.) 178 S. W. 936.

The vendor of realty, who had no interest in the insurance money payable the purchaser for burning of the house, could not complain of the amount of recovery allowed the purchaser against the insurance company in the vendor's garnishment proceeding against it. *Stratton v. Westchester Fire Ins. Co. of New York* (Civ. App.) 182 S. W. 4.

A decree against a defendant who did not appeal will not be disturbed on the appeal of the other defendants not interested in that particular. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

In a suit for partition, defendant, who had sold portion of land, held without interest entitling him to complain of the judgment. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

32. — **Parties or persons injured or aggrieved.**—In trespass to try title, where each of the plaintiffs was entitled to 160 acres out of the larger survey, the fact that the land awarded to them jointly was less than 320 acres, and was located with due regard to the defendants' right to an equitable partition, in no way injured defendants, and hence they could not complain of a judgment on that ground. *Davis v. Collins* (Civ. App.) 169 S. W. 1128.

An appeal, by a nominal party, who is not affected by the judgment, will not be considered. *Style v. Lantrip* (Civ. App.) 171 S. W. 786.

In suit against a bankrupt on the unsatisfied portion of the debt, and also against his guarantor, any error in overruling the bankrupt's demurrer to the suit against him was harmless to the guarantor. *Neblett v. Cooper Grocery Co.* (Civ. App.) 180 S. W. 1162.

In suit for partition, where one defendant admitted that he had conveyed his interest in the land, and there is no evidence that other defendants are his purchasers or have any claim upon land except a deed for an interest for which court gave them judgment, held, that they show no injury from the judgment. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

In action for rent, if defendant corporation did not claim damages, judgment against a codefendant's cross-action did not injure it. *Bond-Reed Hardware Co. v. Walsh* (Civ. App.) 193 S. W. 1148.

34. **Waiver of right of review—In general.**—In an action by a materialman against contractor and sureties on his bond, where the contractor admitted liability, and exceptions of sureties were sustained, plaintiff's election to take judgment against contractor held not to prevent him from seeking relief by appeal. *Buell Planing Mill Corp. v. Bullard* (Civ. App.) 189 S. W. 776.

An agreement, in an action begun by attachment in justice court, that the attachment should be quashed and the court should enter such judgment as might be just held not to preclude defendant from asserting on appeal his claim for damages for wrongful attachment. *Johnson v. Tindall* (Civ. App.) 161 S. W. 401.

35. — **Recognition of or acquiescence in decision.**—One who became a defendant to an action on a policy upon allegations by the company that the amount sued for had been paid to defendant under garnishment proceedings, and that he had agreed to reimburse it if it were again compelled to pay the insurance, cannot complain of the judgment against the company, where he consented that a judgment should be rendered against him in its favor, without either pleading or proof to make him liable. *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

Where the court intimated that it would not allow a verdict to stand for defendant, and a consultation with attorneys resulted in the suggestion that a peremptory instruction should be given, and defendant's counsel consulted with defendant and announced that they had no objection, defendant consented to a peremptory instruction, and could not complain thereof. *Pope v. Commonwealth Bonding & Casualty Co.* (Civ. App.) 166 S. W. 1195.

In a broker's action for commissions on an exchange of land, based on the value of defendant's land, defendant cannot complain of error in submitting the case on the theory that the claim was based on the value of the lands received in exchange where he acquiesced therein. *Hicks v. Hunter* (Civ. App.) 183 S. W. 792.

In view of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1906, held that, though one of

the original parties to a judgment of partition who had conveyed her interest was not party to a proceeding to revive it, defendants having consented to revive, cannot complain on appeal that she was not a party. *Teel v. Brown* (Civ. App.) 185 S. W. 319.

Where it was agreed in trial court that plaintiffs owned junior survey except as it conflicted with senior surveys, defendants cannot assert on appeal that the junior survey was void. *Maddox v. Dayton Lumber Co.* (Civ. App.) 188 S. W. 953.

37. — **Acceptance of benefits.**—Where plaintiffs sued to cancel deed to 200 acres reserving vendor's lien, on the ground that they had title to 160 acres by adverse possession, held, that defendant, having recovered judgment for his share of the purchase money for 100 acres sold by plaintiffs, could not complain of the judgment in plaintiffs' favor for their share. *Stewart v. Williams* (Civ. App.) 167 S. W. 761.

38. — **Pursuing other remedy.**—Where appellant excepted and filed notice of appeal after the filing of findings of fact and conclusions of law, and after expiration of the term filed an objection to the same, but the matter was not brought to the attention of the trial court, appellant cannot complain of them on appeal. *Broussard v. Le Blanc* (Civ. App.) 182 S. W. 78.

39. **Persons entitled to allege error.**—See *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

Where defendants requested the court to submit an almost identical proposition, they cannot complain of submission on a special issue of a similar proposition. *Smith v. Webb* (Civ. App.) 181 S. W. 814; *Paris & G. N. R. Co. v. Flanders* (Civ. App.) 165 S. W. 98; *Watson v. Rice* (Civ. App.) 166 S. W. 106; *Miller v. Campbell* (Civ. App.) 171 S. W. 251; *Wichita Cotton Oil Co. v. Hanna* (Sup.) 173 S. W. 644, affirming judgment (Civ. App.) 139 S. W. 1000; *Galveston, H. & S. A. Ry. Co. v. Templeton* (Civ. App.) 175 S. W. 504; *Paris & G. N. R. Co. v. Flanders* (Sup.) 179 S. W. 263; *Donada v. Power* (Civ. App.) 184 S. W. 793; *Western Indemnity Co. v. MacKechnie* (Civ. App.) 185 S. W. 615; *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427; *Chicago, R. I. & P. Ry. Co. v. De Bord* (Sup.) 192 S. W. 767.

Assignments of error complaining of portions of general charge will be overruled where a charge given at request of plaintiff in error was subject to the same criticism. *Gestean v. Bishop* (Civ. App.) 181 S. W. 696; *Webb v. Harding* (Civ. App.) 159 S. W. 1029; *International & G. N. Ry. Co. v. Walker* (Civ. App.) 162 S. W. 921, denying re-hearing 161 S. W. 961; *Wilson v. Burch* (Civ. App.) 162 S. W. 1018; *Guerra v. San Antonio Sewer Pipe Co.* (Civ. App.) 163 S. W. 669; *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180; *San Antonio & A. P. Ry. Co. v. Littleton* (Civ. App.) 180 S. W. 1194; *Galveston, H. & S. A. Ry. Co. v. Watts* (Civ. App.) 182 S. W. 412; *Gulf States Telephone Co. v. Evetts* (Civ. App.) 188 S. W. 289; *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

The receipt of improper evidence is waived where appellant's own witness testified as to such matters. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773; *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460; *Funk v. House* (Civ. App.) 168 S. W. 481; *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

Where defendants by their answer sought partition of the land in suit, they cannot on appeal attack their own pleadings, as insufficient to warrant partition. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

Where defendant railroad set up contributory negligence, and the court charged on that issue, defendant's request of a special charge on that question will not, upon the theory of invited error, preclude it from attacking the sufficiency of the evidence to warrant any verdict for plaintiff. *International & G. N. Ry. Co. v. Walker* (Civ. App.) 161 S. W. 961.

Where the court submits the issue of defendant's negligence as requested by defendant, and it does not appear that they were requested on condition that the peremptory charge be refused or requested after the court read its general charge, any error, in the submission of the issue of negligence, being invited, could not be complained of by defendant. *Missouri, K. & T. Ry. Co. of Texas v. Maples* (Civ. App.) 162 S. W. 426.

The giving of a charge which submitted a ground of negligence not pleaded was not reversible error, where it was given in explanation of a charge given at the request of defendant. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

Defendant held not responsible for the admission of plaintiff's improper testimony as to defendant's statement that he had insurance, though his counsel interrupted before the answer was given and told him not to tell what any one but defendant said. *Carter v. Walker* (Civ. App.) 165 S. W. 483.

Where special instructions given at appellant's request were not correct, the conflict between such instructions and the court's charge which correctly declared the law is no ground for reversal. *Missouri, K. & T. Ry. Co. of Texas v. Withers* (Civ. App.) 167 S. W. 5.

Where appellants requested the submission of an issue, they cannot be heard to assert that there is no evidence to sustain the finding. *Gosch v. Vrana* (Civ. App.) 167 S. W. 757.

Defendant could not complain of the admission of testimony developed in response to questions propounded by its counsel on his cross-examination of plaintiff. *Southwestern Casualty Ins. Co. v. Heisterman* (Civ. App.) 167 S. W. 1095.

The trial court having met a party's objection to a charge that it did not contain certain provisions by supplying them, he may not complain of it because it contained them. *Galveston, H. & S. A. Ry. Co. v. Dickens* (Civ. App.) 170 S. W. 835.

Error, if any, in the admission of evidence of the contents of a telegram, brought out by appellant on cross-examination, held not error of which appellant could complain. *Memphis Cotton Oil Co. v. Goode* (Civ. App.) 171 S. W. 284.

Where plaintiff alleged perfect health, except a slight weakness incident to an operation, she could not complain of an instruction that the car should be heated sufficiently for a person in normal health. *Bulloch v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 171 S. W. 808.

Defendant having proved that the hydrostatic test was the best to ascertain defects in locomotive could not complain that plaintiff, a servant, proved the same fact and relied on defendant's failure to apply the test as a ground for actionable negligence. *National Ry. of Mexico v. Ligarde* (Civ. App.) 172 S. W. 1140.

A party requesting instructions submitting issues may not complain of refusal of a subsequent requested peremptory instruction. *Stephenville, N. & S. T. Ry. Co. v. Wheat* (Civ. App.) 173 S. W. 974.

Error could not be predicated on an instruction assuming a fact in conformity with the evidence, agreement of the parties, pleading, and a requested instruction of the complaining parties. *Hermann v. Bailey* (Civ. App.) 174 S. W. 865.

Where defendant surety company did allege, in conformity with art. 4947, the materiality or contributory nature of untrue statements in the application, it cannot complain on appeal of lack of evidence to support the court's finding that they were not material. *National Surety Co. v. Murphy Walker Co.* (Civ. App.) 174 S. W. 397.

Where defendant requested charges permitting jury to pass on issues of fact which he claimed entitled him to judgment, he could not urge on appeal that there was no evidence to justify their submission. *Just v. Herry* (Civ. App.) 174 S. W. 1012.

A litigant on appeal will not be heard to complain of an error he himself invited, since to do so would be to permit him to assume inconsistent positions. *King v. Gray* (Civ. App.) 175 S. W. 763.

A party given opportunity to substitute papers desired by it, but refusing to substitute, cannot complain of the action of the court. *Trinity County Lumber Co. v. Conner* (Civ. App.) 176 S. W. 911.

Defendant held not entitled to complain that court submitted defense set up by him, even though it was not a legal defense. *Boswell v. Pannell* (Sup.) 180 S. W. 593.

Where plaintiff by writ of sequestration had secured an automobile alleging that it was worth \$1,000, he could not thereafter question the correctness of the court's findings against him that it was worth \$850, though there was evidence to show that it was worth only \$600. *J. I. Case Threshing Mach. Co. v. Lipper* (Civ. App.) 181 S. W. 236.

A defendant urging on the trial that a question was in issue may not on appeal complain because the trial court submitted that issue. *Kansas City, M. & O. Ry. Co. v. Cole* (Civ. App.) 183 S. W. 137.

Where plaintiff on cross-examination of impeaching witnesses elicited testimony as to particular incidents, he cannot complain that the witnesses on redirect examination were permitted to give the details. *Yeatts v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 184 S. W. 636.

In an action for libel, defendant cannot complain of error in permitting plaintiff to testify to a fact, where defendant introduced in evidence a newspaper published by it stating substantially the same facts. *Houston Chronicle Pub. Co. v. Quinn* (Civ. App.) 184 S. W. 669.

Defendant, who had proved the contents of a letter of its witness before it was offered by plaintiff to show witness' bias toward plaintiff, could not complain of its admission on the ground of its irrelevancy. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

Admission of defendant purchaser of land pending partition that he had notice thereof, made in action to revive judgment in partition, held binding on appeal. *Teel v. Brown* (Civ. App.) 185 S. W. 319.

On appeal a party cannot question a ruling of the trial court made at his suggestion, such as incorporating special requested issues in the general charge instead of submitting them as special charges. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

Where defendant's requested issues were submitted to jury in language of defendant, if there was error, defendant held in no position to assail them. *Southwestern Telegraph & Telephone Co. v. Sheppard* (Civ. App.) 189 S. W. 799.

Defendant, which accepted jurors without protest after they heard claimed improper remark of plaintiff's counsel in argument on exception to petition, held unable to complain of it. *Marshall Mill & Elevator Co. v. Scharnberg* (Civ. App.) 190 S. W. 229.

The error in a charge, submitting the issue of implied and apparent authority to consent for parents to an operation on their child, held not invited by a requested charge, defining implied and apparent authority, in the absence of a showing that the order for exception and request prescribed by arts. 1971, 1973, as amended was not followed. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

Special requests to charge on doctrine of assumption of risk held not to invite court to charge the subject of assumed risk under state law instead of federal law, so as to waive the right to object to court's charge and to have case tried under federal doctrine. *Chicago, R. I. & G. Ry. Co. v. De Bord* (Sup.) 192 S. W. 767.

Where in a divorce proceeding defendant admits that plaintiff is a bona fide inhabitant, failure to submit issue of inhabitancy cannot be urged on appeal. *Hill v. Hill* (Civ. App.) 193 S. W. 726.

40. — **Estoppel to allege error.**—Where the issue of unavoidable accident in a servant's action for injuries was for the jury and plaintiff offered a special charge defining such an accident, but did not offer it after the refusal of or subject to the refusal of a peremptory charge not to consider the issue, he was estopped from claiming that the issue should not have been submitted. *Carter v. South Texas Lumber Yard* (Civ. App.) 160 S. W. 626.

A party inviting error is estopped to complain thereof. *Glover v. Houston Belt & Terminal Ry. Co.* (Civ. App.) 163 S. W. 1063.

51. **Supersedeas.**—Under arts. 2078, 2084, 2097, 2101, giving a right to appeal from every final judgment in Civil Cases, and providing for bonds, a prohibitory injunction may be suspended during appeal by supersedeas bond, and it is the duty of the trial court to fix the amount of such bond, and it may be enforced by mandamus. *Ætna Club v. Jackson* (Civ. App.) 187 S. W. 971.

**Art. 2079. [1383] [1380] Appeal from interlocutory order appointing receiver, or trustee, etc.**

Cited, *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (in dissenting opinion).

**Order appointing receiver.**—Arts. 2079, 2080, held not to authorize an appeal from an order refusing an application to appoint a receiver, and for alimony in a suit to set aside a divorce decree, and for a decree granting complainant a divorce and alimony. *Swearingen v. Swearingen* (Civ. App.) 165 S. W. 16.

In absence of statute, no appeal lies to Court of Civil Appeals from interlocutory order of county court appointing a receiver, this article authorizing an appeal from an interlocutory order of the district court, not applying. *Muela v. Moye* (Civ. App.) 185 S. W. 331.

— **Setting aside appointment.**—No appeal can be taken from an order denying motion to vacate the appointment of a receiver; but the appeal must be from the order making the appointment. *Williams v. Watt* (Civ. App.) 171 S. W. 266. But see art. 2079a, post.

Where a receiver was appointed and subsequently on an amended petition the order of appointment was vacated, but was followed by a later order of reappointment, an appeal from the order lies, under this article. *Hart-Parr Co. v. Alvin-Japanese Nursery Co.* (Civ. App.) 179 S. W. 697.

**Order denying appointment of receiver.**—No appeal lies from an interlocutory order denying the appointment of a receiver, though this article authorizes an appeal from an order appointing a receiver. *Tipton v. Railway Postal Clerks' Inv. Ass'n* (Civ. App.) 173 S. W. 562; *Leary v. International Coal & Wood Co.* (Civ. App.) 185 S. W. 665.

**Appeal from part of order.**—Where an order dissolves a temporary injunction and denies the application for the appointment of a receiver, the part of such order relating to the receiver is not appealable under this article. *Gulf Nat. Bank v. Bass* (Civ. App.) 177 S. W. 1019.

Under arts. 2079, 2080, plaintiff held to have the right to appeal from a judgment dissolving a temporary injunction, although the judgment also showed the court's refusal to appoint a receiver. *Driskill v. Boyd* (Civ. App.) 181 S. W. 715.

**Notice of appeal.**—No notice is necessary on appeal from an interlocutory order appointing a receiver. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

**Filing transcript.**—Under this article and article 1608, providing for the filing of a transcript within 90 days in appeal cases, held, that the defendant had 90 days from the time the appeal was perfected from an order appointing a receiver to file a transcript of the record, in view of the history of legislation as shown by articles 2084, 2089, 2105, 2108, 4644, 6401 and chapter 20 of title 37. *Simpson v. Alexander* (Civ. App.) 183 S. W. 852.

**Stay of proceedings.**—Under this article, an appeal on an ordinary appeal bond, covering probable costs of appeal, taken from an interlocutory order appointing a receiver, did not stay the proceedings in the trial court, so that the receivership might be continued there. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

**Moot question.**—See *Houston & B. V. Ry. Co. v. Hughes* (Civ. App.) 182 S. W. 23; note under art. 2078, note 3.

**Art. 2079a. Appeal from interlocutory order overruling motion to vacate order appointing receiver or trustee, etc.**—An appeal shall lie from an interlocutory order of the district court overruling a motion to vacate an order appointing a receiver or trustee in any case, provided such appeal be taken within twenty days from the entry of such order appealed from. An appeal in such cases shall take precedence in the appellate court; but the proceedings in other respects in the court shall not be stayed during the pendency of the appeal, unless otherwise ordered by the appellate court. [Act March 30, 1917, ch. 168, § 1.]

**Explanatory.**—The act amends ch. 20, tit. 37, Rev. Civ. St. 1911, by adding thereto a new article to be known as art. 2079a, to read as above. Took effect 90 days after March 21, 1917, date of adjournment. See notes under art. 2079.

**Art. 2080. Appeals from interlocutory orders granting or dissolving temporary injunctions.**

See *Swearingen v. Swearingen* (Civ. App.) 165 S. W. 16; *Driskill v. Boyd* (Civ. App.) 181 S. W. 715; notes under art. 2079.

Cited, *Tipton v. Railway Postal Clerks' Inv. Ass'n* (Civ. App.) 173 S. W. 562; *Gulf Nat. Bank v. Bass* (Civ. App.) 177 S. W. 1019; *Leary v. International Coal & Wood Co.* (Civ. App.) 185 S. W. 665; *McFarland v. Hammond*, 106 Tex. 579, 173 S. W. 645 (in dissenting opinion).

**Art. 2084. [1387] [1387] Appeal perfected, how.**

Cited, *Wells Fargo & Co. Express v. Mitchell* (Civ. App.) 165 S. W. 139; *Gulf, C. & S. F. Ry. Co. v. Atlantic Fruit Distributors* (Civ. App.) 184 S. W. 294.

**Time to appeal in general.**—Under arts. 1608, 1610, 2084, held that, where no excuse was shown for failing to file the record in the trial court or in the Court of Civil Appeals in time, the motion to affirm the judgment upon certificate would be granted. *Mott v. Scurlock* (Civ. App.) 185 S. W. 1016.

**Interlocutory orders.**—No notice is necessary on appeal from an interlocutory order appointing a receiver. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

The appellate court held to have jurisdiction to review an original order granting an injunction, although the notice of appeal recited that it was taken from the order dissolving the injunction; no notice of appeal as required by this article in ordinary cases being necessary under arts. 4643, 4644. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

Under arts. 2078, 2084, 2097, 2101, giving a right to appeal from every final judgment in Civil Cases, and providing for bonds, a prohibitory injunction may be suspended during appeal by supersedeas bond. *Ætna Club v. Jackson* (Civ. App.) 187 S. W. 971.

Under arts. 2078, 2084, 2097, 2101, it is the duty of the trial court to fix the amount of supersedeas bond on appeal from a prohibitory injunction and it may be enforced by mandamus. *Id.*

**Notice of appeal—Necessity.**—Appeals must be prosecuted by giving the necessary notice of appeal in open court as required by this article. *Kolp v. Shrader* (Civ. App.) 168 S. W. 464.

Under arts. 3631 and 3632, and despite this article, notice of an appeal from a judgment admitting a will to probate is unnecessary, the giving of the bond being sufficient. *Beversdorff v. Dienger* (Sup.) 174 S. W. 576, reversing judgment (Civ. App.) 141 S. W. 533.

Notice of appeal in the court below and a motion for a new trial therein are not required, where the case is brought up by petition and writ of error. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

— **Sufficiency.**—A notice of appeal, given in the term in connection with the order overruling a motion for new trial, after notice of appeal had been given when judgment was rendered, was valid; the trial court having control of the judgment during the term. *Robson v. Moore* (Civ. App.) 166 S. W. 908.

A paper which in no way identifies the case, whether by its style, file number, or the description of any judgment or order, and which is not signed, though filed with the clerk of court, does not constitute notice of appeal. *Russell v. Koennecke* (Civ. App.) 190 S. W. 253.

— **Entering of record.**—Where the transcript shows that no notice of appeal was given in open court, the Court of Civil Appeals has no authority to consider the case. *Russell v. Koennecke* (Civ. App.) 190 S. W. 253.

— **Dismissal for failure to file or file in time.**—Under this article appellant, whose notice of appeal was not given before the last day of the term, and who filed no appeal bond, did not perfect his appeal so as to give the Court of Civil Appeals jurisdiction, and it will be dismissed. *Elkins v. Houlihan* (Civ. App.) 179 S. W. 894.

**Time for filing bond or affidavit.**—Under this article, where motion for new trial after judgment was overruled April 4th and the term ended April 5th, but no appeal bond was filed until June 12th, the appeal will be dismissed. *Bolton v. United States Fidelity & Guaranty Co.* (Civ. App.) 166 S. W. 1194.

Appeals must be prosecuted by filing the necessary bond within 20 days after the expiration of the term, or within 20 days after giving notice of appeal as required by this article. *Kolp v. Shrader* (Civ. App.) 168 S. W. 464.

Under an order of the commissioners' court, authorized by Const. art. 5, § 29, as to the terms of the county court, a term for civil and probate business held, regarding time for filing appeal bond, to end when the next term for criminal business began. *Wells Fargo & Co's Express v. Mitchell* (Civ. App.) 176 S. W. 818, reversing judgment on rehearing 165 S. W. 139.

Under this article, appellate court held to have no jurisdiction where appeal bond was not filed within 20 days after adjournment of term which by law could continue only five weeks. *Hartsough-Stewart Const. Co. v. Harty & Vogelsang* (Civ. App.) 183 S. W. 1.

— **Nonresident of county.**—Under this article an appeal bond must be filed within 20 days after the adjournment of the trial court, where appellant is a nonresident of the county, and the record does not show that the judgment term could have continued in session for more than eight weeks. *James v. Golson* (Civ. App.) 165 S. W. 896.

Where an appeal bond was not shown to have been filed until more than 30 days after the order overruling the motion for a new trial, it was not filed in time, and the appeal will be dismissed. *Spaulding Mfg. Co. v. Kuykendall* (Civ. App.) 182 S. W. 371.

Thirty days allowed nonresident appellant to file appeal bond under this article held to apply only to terms which may continue longer than eight weeks and to run from date of judgment. *Hartsough-Stewart Const. Co. v. Harty & Vogelsang* (Civ. App.) 183 S. W. 1.

Husband, by going to another county, held not to make himself and wife nonresidents, and they could not, by affidavits, change their residence, as fixed by the record, to gain additional time to file appeal bond. *Sale v. Gersdorff* (Civ. App.) 189 S. W. 574.

— **Effect of failure to file in time.**—Where the appeal bond was not filed within 20 days after adjournment, as required by this article, the appellate court acquired no jurisdiction. *Underwood v. Midland Furniture & Hardware Co.* (Civ. App.) 166 S. W. 86; *Dilworth v. Ed. Steves & Sons* (Sup.) 174 S. W. 279, dismissing writ of error *Dilworth & Green v. Ed. Steves & Sons* (Civ. App.) 169 S. W. 630.

Where the requirement of this article that an appeal bond be filed within 20 days after the term at which the judgment was rendered is not complied with, the appeal will be dismissed. *Trim v. Planters' Cotton Oil Co.* (Civ. App.) 163 S. W. 103; *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

A writ of error will be dismissed, where plaintiff in error neither filed an appeal bond nor made proof of her inability to pay the costs on appeal, as authorized by art. 2098. *Jesse French Piano & Organ Co. v. Elliott* (Civ. App.) 166 S. W. 29.

Where the term of the court rendering the judgment appealed from continued more

than eight weeks, as authorized by Vernon's Sayles' Ann. Civ. St. 1914, art. 30, subd. 68, and the appeal bond was not filed within 20 days after notice of appeal, as required by this article, the appeal will be dismissed. *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (Civ. App.) 178 S. W. 731.

**Time for filing transcript.**—See *Simpson v. Alexander* (Civ. App.) 183 S. W. 852, citing this article.

**Effect of transfer to appellate court.**—Where the appellate court has acquired jurisdiction by filing of an appeal bond by two appellants, pursuant to arts. 2084, 2099, one appellant cannot defeat such jurisdiction by thereafter erasing his name from the bond. *Scott v. Fields* (Civ. App.) 170 S. W. 139.

**Art. 2085. [1388] [1388] By parties of whom no appeal bond is required.**

**Appeal perfected by notice.**—Under this article written statement filed with clerk, not brought to attention of court, does not amount to notice of appeal in open court. *Russell v. Koennicke* (Civ. App.) 190 S. W. 253.

**Art. 2086. [1389] [1389] Writ of error sued out, when.**

**Time for suing out writ of error.**—This article, in requiring petition for writ of error to be filed within 12 months from the time final judgment is rendered, means 12 months from the time the judgment was rendered, and not from the time the motion for a new trial was overruled. *Evans v. San Antonio Traction Co.* (Civ. App.) 166 S. W. 408.

Where no appeal has been taken, a writ of error may be prosecuted under this article at any time within 12 months after final judgment, provided at the time of the filing of the petition a bond or affidavit in lieu thereof is filed as required by article 2089. *Kolp v. Shrader* (Civ. App.) 163 S. W. 464.

Under this article, and notwithstanding the amendment (Acts 33d Leg. c. 136; Vernon's Sayles' Ann. Civ. St. 1914, art. 1612) and Supreme Court rule 24 (142 S. W. xii), a writ of error held too late, though filed within 12 months after denial of new trial. *St. Louis & S. F. Ry. Co. v. Stapp* (Civ. App.) 171 S. W. 1080.

Filing of petition for writ of error and error bond gave Court of Appeals jurisdiction, where the petition and bond were filed in one year from date of judgment, whether together or not. *Rounds v. Coleman* (Civ. App.) 185 S. W. 640.

**Dismissal for failure to sue out writ in time.**—Where a petition for a writ of error was not filed within 12 months from the time final judgment was rendered, as required by this article, the writ will be dismissed, since the requirement is jurisdictional. *Evans v. San Antonio Traction Co.* (Civ. App.) 166 S. W. 408.

Where affidavits show that plaintiffs in error filed a petition and bond, and their attorney took the papers to his office to issue citation to the state but failed to issue it for over a year, the writ of error will be dismissed. *Cruz v. State*, 76 Cr. R. 32, 172 S. W. 235.

**Art. 2087. [1390] [1390] By petition.**

Practice Act, 1846, p. 363 (2 Gammel's Laws, p. 1706), cited, *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922.

**Notice of appeal and motion for new trial.**—Notice of appeal in the court below and a motion for a new trial therein are not required, where the case is brought up by petition and writ of error. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

**Art. 2088. [1391] [1391] Requisites of petition.**

**Requisites of petition—In general.**—Under this article, a statement as to the particular district to which the case shall be taken is surplusage, and, if incorrect, does not affect the validity of the writ. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 159 S. W. 453.

Where Court of Civil Appeals refused to consider assignments of error, motion for rehearing and petition to Supreme Court for writ of error held not defective because they complained only of the "overruling" of the assignments. *Chicago, R. I. & G. Ry. Co. v. Pemberton*, 106 Tex. 463, 161 S. W. 2, reversing judgment (Civ. App.) 155 S. W. 652. Rehearing denied 106 Tex. 463, 168 S. W. 126.

— **Names and residences of parties.**—Where a prayer for a citation incorrectly states the first initial of the defendant in error, but the initials are correct elsewhere in the petition, and the citation was issued in the correct name, the error was a clerical one, which does not require a dismissal of the writ. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 159 S. W. 453.

A petition for a writ of error must state the names of the parties adversely interested in the judgment. *State v. Dayton Lumber Co.* (Civ. App.) 164 S. W. 48.

**Waiver of defects.**—Under this article, a petition for a writ of error may be waived by the parties. *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922.

**Parties to writ of error—Necessary parties.**—A codefendant not adversely interested to plaintiff in error need not be joined in the petition. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

**Dismissal for failure to join necessary parties or for defects in petition.**—When a party adversely interested to plaintiff in error is not joined in the petition, failure to file a motion to dismiss does not necessarily confer jurisdiction, as the court may dismiss of its own motion. *McPhaul v. Byrd* (Civ. App.) 174 S. W. 644.

A mistake in the description of land specified in the judgment in a petition in error held not ground for dismissal of the writ. *Id.*

**Art. 2089. [1392] [1392] Error bond.**

**Time for filing bond.**—Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 2089–2090, governing the error bond and citation in error, the petition for writ of error and the

bond for costs must be filed before issuance of the citation. *Rounds v. Coleman* (Civ. App.) 185 S. W. 640.

**Cost bond on appeal operating as error bond.**—A cost bond on appeal becomes inoperative on the dismissal of the appeal and on payment of the costs, and it cannot be treated as a bond on writ of error, though the sureties present affidavits reciting that they intend the bond to be operative on writ of error. *Kolp v. Shrader* (Civ. App.) 168 S. W. 464.

**Art. 2090. [1393] [1393] Citation in error.**

Cited, *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922.

**Citation in error—Time of issuance.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 2089, 2090, governing the error bond and citation in error, the petition for writ of error and the bond for costs must be filed before issuance of the citation, and where citation and service thereof were defective because citation issued before filing of the error bond, the Court of Appeals is authorized to strike the appeal from its docket. *Rounds v. Coleman* (Civ. App.) 185 S. W. 640.

**Art. 2091. [1394] [1394] Form and requisites of citation.**

Cited, *Farmers' State Bank of Newlin v. Bell* (Civ. App.) 176 S. W. 922.

**Art. 2092. [1395] [1395] Service and return of.**

**Necessity of service.**—A court of Civil Appeals has no jurisdiction to entertain a writ of error, unless citation has been legally served on the defendant in error or service accepted. *Webster v. International & G. N. Ry. Co.* (Civ. App.) 184 S. W. 295.

Until citation issues for defendant in error and service thereof is had, the case is improperly filed in a Court of Civil Appeals. *Rounds v. Coleman* (Civ. App.) 185 S. W. 640.

**Manner of service.**—Under arts. 2092, 2095, held, that the appellate court was without jurisdiction where, without any showing that the officer was unable to serve the defendants in error, citation was served directly on their counsel. *Mims v. Foster* (Civ. App.) 177 S. W. 513.

**Art. 2095. [1398] [1398] Service on the attorney of record.**

**Service on attorney of record.**—Under this article, service of citation in error upon party's attorney, instead of upon the party who resided in the county where the case was tried, was invalid and did not confer jurisdiction upon the Court of Civil Appeals. *First Nat. Bank of Knox City v. Lester* (Civ. App.) 179 S. W. 684.

**When attorney may be served.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 2092, 2095, held, that the appellate court was without jurisdiction where, without any showing that the officer was unable to serve the defendants in error, citation was served directly on their counsel. *Mims v. Foster* (Civ. App.) 177 S. W. 513.

Under arts. 2095 and 2099, service of citation on a writ of error upon attorney of parties and upon guardian of infant heirs of deceased defendant not found in county was sufficient. *Jolly v. Brown* (Civ. App.) 188 S. W. 972.

**Art. 2096. [1399] [1399] Service in other modes.**

**Service on corporation.**—Under the statute, citation in error held properly served on general manager of domestic corporation's business. *Garner v. Jamison* (Civ. App.) 162 S. W. 940.

**Art. 2097. [1400] [1400] Cost bond on appeal or writ of error.**

Cited, *Willis v. Keator* (Civ. App.) 181 S. W. 556; *Doolen v. Hulsey* (Civ. App.) 188 S. W. 1009.

1. **Necessity of bond.**—Where the appellee did not perfect an appeal by executing an appeal bond as to certain defendants, appellee's cross-assignment attacking the judgment in favor of such defendants against him cannot be considered. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

7. **Parties to bond—Obligees.**—Parties adversely interested in the judgment must be made obligees in the bond and on proceedings to obtain a writ of error. *State v. Dayton Lumber Co.* (Civ. App.) 164 S. W. 48.

Though the statute authorizes an appeal from an interlocutory order refusing an injunction, the appellate court cannot consider appeal from such order, where the defendants are not named as payees in the appeal bond. *Barker v. Wilson* (Civ. App.) 189 S. W. 748.

8. — **Obligors.**—Under a petition, for a partnership receiver, showing that the individual defendants are the real parties in interest, an appeal bond in the firm name of defendants, but not in their individual capacity, is insufficient. *Style v. Lantrip* (Civ. App.) 171 S. W. 786.

12. **Amount of bond.**—A writ of error bond should be double the amount of the probable costs, as fixed by the clerk. *Rounds v. Coleman* (Civ. App.) 185 S. W. 640.

Under arts. 2078, 2084, 2097, 2101, it is the duty of the trial court to fix the amount of supersedeas bond on appeal from a prohibitory injunction, and it may be enforced by mandamus. *Ætna Club v. Jackson* (Civ. App.) 187 S. W. 971.

14. **Sufficiency of bond—In general.**—A cost bond on appeal becomes inoperative on the dismissal of the appeal and on payment of the costs, and it cannot be treated as a bond on writ of error, though the sureties present affidavits reciting that they intend the bond to be operative on writ of error. *Kolp v. Shrader* (Civ. App.) 168 S. W. 464.

Clerical defects in an appeal bond as to the number of the judicial district of a county named in which the action is pending do not deprive the appellate court of jurisdiction to hear the appeal. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.



**Art. 2098. [1401] [1401] Appeal, etc., by party unable to give cost bond.**

**Proof before county judge or court in session.**—Where appeal is taken on a pauper's oath and the record fails to show that proof thereunder was made to the county judge while the court was in session, the appeal will be dismissed. *Rhodes v. Coleman-Fulton Pasture Co.* (Civ. App.) 185 S. W. 355.

**Requisites and sufficiency of affidavit.**—An affidavit in lieu of an appeal bond stating the style and number of suit, the date of the judgment, and the court wherein it was rendered is sufficient in form to give jurisdiction. *Ford v. Johnston* (Civ. App.) 164 S. W. 424.

Defendant sued on a note, and to foreclose a mortgage, was not legally required to appeal from the judgment in favor of his codefendant and against himself for conversion of the mortgaged property, and his failure to do so would not make his pauper's oath insufficient on appeal from the judgment for plaintiff against himself. *Id.*

Affidavit of appellant's inability to pay costs on appeal, made by her attorney before a notary public, held insufficient, under this article. *Jesse French Piano & Organ Co. v. Elliott* (Civ. App.) 166 S. W. 29.

Where attempt is made to perfect appeal after the term at which judgment is rendered, the pauper's oath must be made before the judge of the county court wherein the appellant resides, and, if the court trying the case is in session, proof must be made before the court and not the judge. *Rhodes v. Coleman-Fulton Pasture Co.* (Civ. App.) 185 S. W. 355.

Where a case was tried in county court, affidavit that appellants were unable to pay costs of an appeal or give security, made before judge who tried case, during term of court, held sufficient, though the court was not in open session. *Morrison v. Brooks* (Civ. App.) 189 S. W. 1094.

An affidavit held not insufficient because sworn to by only one of two appellants. *Id.*

**Proof of inability.**—An affidavit for an appeal in forma pauperis executed before a notary public, but to which was attached no certificate of the county judge or the judge trying the case showing proof of inability to pay the costs, was not a sufficient compliance with this article. *Missouri Pac. Ry. Co. v. Cheek* (Civ. App.) 159 S. W. 427.

A writ of error will be dismissed, where plaintiff in error neither filed an appeal bond nor made proof of her inability to pay the costs on appeal, as authorized by this article. *Jesse French Piano & Organ Co. v. Elliott* (Civ. App.) 166 S. W. 29.

Under this article, nonresident seeking to appeal as pauper must make proof of inability to give required security before trial court, and certificate of county judge of another state is of no legal value. *Ridling v. Fannin County* (Civ. App.) 190 S. W. 251.

**Contest.**—Where nonresident seeking to appeal as pauper did not prove inability to give security before trial court, as required by this article, defect is fundamental, of which Court of Appeals is required to take notice without action by opposing party. *Ridling v. Fannin County* (Civ. App.) 190 S. W. 251.

**Art. 2099. [1402] [1402] Appeal or writ of error, perfected, when.**

Cited, *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 160 S. W. 337.

**Appeal perfected when.**—See *Simpson v. Alexander* (Civ. App.) 183 S. W. 852.

The filing of a petition for writ of error and bond with the clerk of the lower court causes the case to be pending in the appellate court from that date. *Cruz v. State*, 76 Cr. R. 32, 172 S. W. 235.

**Effect of transfer to appellate court—In general.**—The deposition of a witness whose conviction for murder was suspended by appeal at the time of the taking of the deposition becomes incompetent for use at a trial after such conviction has been affirmed. *Berry v. Godwin* (Civ. App.) 188 S. W. 30.

— **Powers and proceedings of lower court.**—Where defendant in a suit by a tenant in common for contribution was found to have no interest in the land, but his name was omitted from the judgment of dismissal by mistake, the district court had the right, at any time before final judgment in this court, to correct the mistake and render such judgment nunc pro tunc as should have been rendered. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

When an appeal is perfected during a term of the trial court, that court, during its term, can make orders in the case and revoke the judgment from which the appeal was taken. *Boynnton v. Brown* (Civ. App.) 164 S. W. 897.

When an appeal is perfected during a term of the trial court, that court, during its term, can make orders in the case and alter or revise the judgment from which the appeal was taken. *Id.*

After appeal from an interlocutory order on an application for a temporary writ of injunction, the trial judge cannot change his order or exercise any jurisdiction whatever over it. *Id.*

The district court has jurisdiction to correct the record, notwithstanding an appeal has been perfected and the transcript filed in the Court of Civil Appeals. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

An appeal held to deprive the trial court of jurisdiction, so that an unsuccessful defendant could not procure an injunction in the trial court preventing enforcement of the judgment. *St. Louis Southwestern Ry. Co. of Texas v. Sterling* (Civ. App.) 175 S. W. 1128.

An appeal or writ of error clothes the appellate court with exclusive jurisdiction of the case, and the lower court cannot make any orders in reference thereto excepting those necessary to protect the subject of the appeal. *Birchfield v. Bourland* (Civ. App.) 187 S. W. 422.

**Abandonment of appeal.**—Where the appellate court has acquired jurisdiction by filing of an appeal bond by two appellants, pursuant to arts. 2084, 2099, one appellant cannot

defeat such jurisdiction by thereafter erasing his name from the bond. *Scott v. Fields* (Civ. App.) 170 S. W. 139.

**Service of citation on attorney.**—See *Jolly v. Brown* (Civ. App.) 188 S. W. 972, note under art. 2095.

**Art. 2099a. Revival against successor of officer against whom judgment in mandamus or injunction has been rendered and appeal perfected; motion to make successor a party.**—That hereafter when any suit in mandamus or injunction is brought against any person holding any public office, in this State, in his official capacity, and after final trial and judgment in the trial court, and notice of appeal to the Court of Appeals or Supreme Court has been given in such cause, and if such person for any reason should vacate such public office, such suit shall not abate but his successor to such office may be made a party thereto by a motion setting out such facts and showing in such motion that he has demanded such successor to such office to do or to refrain from doing such official act as such suit is based upon and such successor has failed or refused to comply with such demand and duly verified, by any person or his attorney, who is a party to such suit, and file the same in the court in which such suit is pending, giving the name and location of such successor. [Act March 30, 1917, ch. 158, § 1.]

**Explanatory.**—Sec. 4 repeals all laws in conflict. Sec. 5 is the emergency clause, and reads as follows: "Sec. 5. That the fact there is no law now in this State after a cause of mandamus or injunction against any person holding any public office, in his official capacity, to compel him to do some official act or to prohibit him from doing some official act, and after such cause has been finally tried and on appeal to the Court of Appeals or Supreme Court, and should such person vacate his office during such appeal, by expiration, resignation, death or otherwise, to make his successor a party to such suit, but the courts of this State have in such cases held that such suit abates; and the further fact that most public officers of this State have two year terms, unless re-elected, and on account of the such short term of office, and on account of the crowded conditions of the Court of Appeals and Supreme Court of this State being so far behind, and that justice demands that some law should be enacted whereby such suits against public officers should not abate, but being an official act, his successor should be made a party to such suit and the same may be prosecuted and determined right and justly to all parties, and that right and justice may be done, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and this Act take effect and be in full force from and after its passage, and it is so enacted." The title of the act reads as follows: "An Act providing that in all suits of mandamus and injunctions against any person holding any public office in this State, and in his official capacity, after final trial and judgment in the trial court and after notice has been given of appeal to the Court of Appeals or the Supreme Court, should such person vacate his office such suit shall not abate; providing that his successor to such public office may be made a party by motion, and regulating same; providing for charging court costs and creating an emergency." A reading of this act as a whole seems to create some doubt as to the extent of its operation. It is not certain whether the proceedings for revival are to take place in the trial court or in the appellate court. The title of the act, which is the test of its operation, confines the remedy to a case in which judgment has been rendered and notice of appeal given. The act cannot apply, therefore, to original proceedings commenced in the appellate courts. If the revival proceedings are to take place in the appellate court after the cause has reached there by appeal, the act would seem to properly belong to this chapter. On the other hand, if such proceedings are to be taken in the trial court, it would be more appropriate to place the act in chapter 7 of title 37, relating to abatement of causes in the district and county courts. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2099b. Clerk shall cause motion to be served on parties.**—That in all such cases when such motion is filed the clerk of the court shall immediately proceed to have same duly served on all parties to such suit as in motion of other cases, unless same is waived. [Act March 30, 1917, ch. 158, § 2.]

**Art. 2099c. Court shall proceed to determination of case and render judgment and enforce same; costs.**—That in all such cases, after service is duly perfected or waived by the parties, the court in which such suit is pending shall proceed to hear and determine same, and render such judgment, order or decree as may be right and proper, and same as if such successor was the original official party thereto, and such judgment, order or decree, shall be enforced by the court and such successor shall be bound thereby; provided that such successor in such cases shall not be liable for any costs in such cause that has accrued prior to the time he was made a party thereto. [Act March 30, 1917, ch. 158, § 3.]

**Art. 2100. [1403] [1403] Appeal, etc., on cost bond or affidavit does not suspend execution.**

**Payment of proceeds of sale to party.**—Where after judgment decreeing certain moneys in the hands of the clerk to one of the parties the other appeals and files his cost bond, but files no supersedeas bond, it is the duty of the clerk to pay over the money to the successful party as directed, and in a suit to foreclose a chattel mortgage, an appeal without supersedeas held not to excuse the clerk from paying the proceeds of the property to one of the defendants as directed by a judgment of dismissal, though the lien of the mortgage attached to the proceeds in the hands of the clerk. *Willis v. Keator* (Civ. App.) 181 S. W. 556.

**Art. 2101. [1404] [1404] Supersedeas bond.**

Cited, *Willis v. Keator* (Civ. App.) 181 S. W. 556; *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

**Right to supersedeas.**—Under arts. 2078, 2084, 2097, 2101, giving a right to appeal from every final judgment in Civil Cases, and providing for bonds, a prohibitory injunction may be suspended during appeal by supersedeas bond. *Aetna Club v. Jackson* (Civ. App.) 187 S. W. 971.

**Amount of bond.**—Under Rev. St. 1911, arts. 2078, 2084, 2097, 2101, it is the duty of the trial court to fix the amount of supersedeas bond on appeal from a prohibitory injunction, and it may be enforced by mandamus. *Aetna Club v. Jackson* (Civ. App.) 187 S. W. 971.

**Execution of bond.**—Signers of the supersedeas bond on condition that other signatures should be obtained before it was filed, having delivered the bond to the appellant without notifying the clerk of the condition, held estopped to deny the validity of the bond because it was filed without performing the condition. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 160 S. W. 337.

That a married woman who was a party could not legally sign the supersedeas bond did not affect its validity if the sureties were sufficient. *Duller v. McNeill* (Civ. App.) 161 S. W. 45.

**Quashing supersedeas bond.**—Under art. 1593, the Court of Appeals, on an application by sureties on a supersedeas bond to quash the same, has power to hear proof dehors the record as to the validity of the bond. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 160 S. W. 337.

**Accrual of liability on bond.**—Upon decree foreclosing lien on land, with a money judgment against certain defendants, but not against appellants, supersedeas bond under this article, partaking to some extent of the nature of a cost bond under article 2097, and of the supersedeas bond under article 2102, held insufficient, where money judgment exceeded the penalty denominated. *Doolen v. Hulsey* (Civ. App.) 188 S. W. 1009.

**Extent of liability.**—Evidence, in action on bond staying execution of judgment of foreclosure of mortgage on traction engine held to sustain finding that its actual value and sale price at time of sale was greater than at time sale was stayed. The measure of damages, if any, recoverable on such bond is the difference between the amount the property would have sold for when bond was given and amount it did sell for, and where no interest was sought to be recovered, eo nomine, plaintiff was not entitled to interest from execution of bond. *Port Huron Engine & Thresher Co. v. McGregor* (Civ. App.) 174 S. W. 848.

Where supersedeas bond for appeal from judgment foreclosing chattel mortgage was conditioned to perform judgment of Court of Civil Appeals, and judgment was affirmed, sureties are liable only for costs. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

Under this article, appellants, where the bond is in statutory form, are not necessarily required to pay the judgment in event of defeat, as the bond is merely one of indemnity, and not one of penalty for the amount of the money judgment. *Doolen v. Hulsey* (Civ. App.) 188 S. W. 1009.

**Art. 2102. [1405] [1405] Supersedeas bond, where judgment is for land or other property.**

See *Doolen v. Hulsey* (Civ. App.) 188 S. W. 1009; note under art. 2101.

Cited, *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

**Art. 2103. [1406] [1406] Judgment stayed and execution superseded.**

**Scope and effect as stay.**—An appeal under a supersedeas bond from an interlocutory order appointing a receiver stays all further proceedings in the trial court and suspends the functions of the receiver. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

Though no order was entered below on dissolving a temporary restraining order suspending the judgment of the court during appeal, the injunction was not in force pending appeal, where a supersedeas bond in the ordinary form was filed. *Rogers v. Ivy* (Civ. App.) 191 S. W. 728.

**Art. 2104. Amendment of appeal bond.**

**Amendment or substitution of bond.**—In general.—Where the clerk's failure to copy the appeal bond and transcript was not discovered until appellee moved to dismiss for that reason, which motion was not filed within 30 days from the time the record was filed, as required by Court of Civil Appeals Rule 9 (142 S. W. xi), so as to make it impossible for appellant to move to amend within the time required by Rule 8 (142 S. W. xi), held that the Court of Civil Appeals would permit the bond and transcript to be filed as a part of the record. *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290.

This article does not permit the filing of a bond in the appellate court for the first

time, and there must be at least an attempt to comply with the statute, and when that is done a defective bond may be remedied by leave of court. *Kolp v. Shrader* (Civ. App.) 168 S. W. 464.

Under this article, held that, on filing of defective appeal bond giving Court of Civil Appeals jurisdiction, appellee should have filed timely motion pointing out defect, whereupon appellant might have amended. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

Where a bond for appeal from a judgment of justice court did not appear to have been filed or approved, it is not a defective bond within this article, which may be corrected by amendment or for which a new bond may be substituted. *Texas & P. Ry. Co. v. Midland Mercantile Co.* (Civ. App.) 181 S. W. 270.

— Does not apply to pauper affidavits.—This article does not authorize the filing of a new affidavit in lieu of an appeal bond, where the one filed with the petition in error is defective. *French Piano & Organ Co. v. Elliott* (Civ. App.) 166 S. W. 29.

**Art. 2105. [1407] [1407] State, county, etc., not to give bond.**

See *Simpson v. Alexander* (Civ. App.) 183 S. W. 852.

**Head of department.**—That appellants, who were personally enjoined, filed a personal bond, though, as agents of the commissioner of insurance, they could appeal under this article, without bond, is no ground for dismissal. *Collier v. Smith* (Civ. App.) 169 S. W. 1108.

**Art. 2106. [1408] [1408] Of executors, etc.**

**Appeal in individual capacity.**—Under arts. 2106, 3633, held that, on an appeal by one in her individual capacity, the transcript was filed in time when filed within 90 days after she filed her appeal bond, though more than 90 days after notice of appeal, wherein she erroneously stated that she appealed as administratrix as well as in her individual capacity. *Reeves v. Fuqua* (Civ. App.) 183 S. W. 34.

**Art. 2107. [1409] [1409] Executor, etc., may take appeal or writ of error.**

**Appeal by administrator.**—Under this article, where insane person was represented at trial by guardian who was satisfied with judgment against her, and did not appeal, administrator of such insane person, latter having died, within a year after the judgment was authorized to sue out writ of error. *Lauraine v. Masterson* (Civ. App.) 193 S. W. 708.

**Art. 2108. [1410] [1410] Transcript to be made out and delivered.**

See *Simpson v. Alexander* (Civ. App.) 183 S. W. 852.

**Art. 2109. [1411] [1411] Transcript to contain all proceedings, except, etc.**

**3. Matters to be shown by transcript—In general.**—Where the transcript fails to disclose any order overruling exceptions, the appellate court will only consider the question of fundamental error. *Pierce Fordyce Oil Ass'n v. Woods* (Civ. App.) 180 S. W. 1181.

Appellee's motion, to strike a paper filed in the Court of Civil Appeals, purporting to be the conclusions of fact and of law of the trial court, but not made a part of the transcript, will be granted. *Hester v. Baskin* (Civ. App.) 184 S. W. 726.

Under arts. 2109, 2110, transcript on appeal from default judgment against sureties on replevin bond held not to show the facts necessary to authorize the judgment, and hence to make no case on appeal. *Palomas Land & Cattle Co. v. Good* (Civ. App.) 184 S. W. 805.

**7. Scope and contents of transcript.**—A motion to dismiss a suit, which is set out in full in the bill of exceptions, need not be copied in the transcript. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 158 S. W. 564.

Where error was assigned to the overruling of a motion to dismiss the suit on the ground of changed cause of action in the amended petitions, the original and amended petitions should be set out in the transcript, but need not be in the bill of exceptions. *Id.*

**10. Clerk's certificate and indorsement.**—Under arts. 2109 and 2114, a certificate that the transcript is a correct copy as "per order filed" is defective. *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452.

A certificate that a transcript is a "true and correct" copy is not defective for failing to state that it is a "full" copy under arts. 2109, 2114, and district and county court rule 94 (142 S. W. xxiv), providing for the requisites of a transcript and certificate. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 159 S. W. 453.

Under this article a certificate which states that the transcript contains all the proceedings, except the injunction bond, is defective. *Id.*

**11. Effect of omissions.**—Where the transcript did not show that any default judgment was ever rendered, the Court of Appeals cannot review an assignment complaining of an order vacating the default. *Johnson v. Conger* (Civ. App.) 166 S. W. 405.

Though the transcript is silent, the citation issued by the justice is not necessarily regarded as the pleading on which the cause is submitted to the inferior court. *Chicago, R. I. & G. Ry. Co. v. Gladish* (Civ. App.) 175 S. W. 863.

Where a motion to dismiss an appeal from the district court in a proceeding brought in the probate court does not complain that the file marks of the district clerk are not noted on the transcript, and that a certificate of the clerk of probate court that certain proceedings were had in that court is lacking, such omissions will be deemed waived. *Reeves v. Fuqua* (Civ. App.) 183 S. W. 34.

Finding of court that suit was tried in justice court and appeal duly perfected to county court held not to supply omission of transcript of proceedings on appeal to Court of Civil Appeals. *Patrick v. Pierce* (Sup.) 183 S. W. 441.

The requirement of arts. 2109, 2110, as to the transcript on appeal, cannot be supplied by the recitation in the judgment. *Palomas Land & Cattle Co. v. Good* (Civ. App.) 184 S. W. 805.

13. **Correction of transcript.**—Under Court of Civil Appeals rules 1 and 8 (142 S. W. x, xi), concerning the amendment of a transcript, the court may permit an appellant to withdraw a transcript, which is defective for not containing the injunction bond, for correction. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 159 S. W. 453.

Court of Civil Appeals Rules 8 and 11 (142 S. W. xi) requiring motions to amend the transcript, necessitated by irregularity in bringing the case into the appellate court to be filed within 30 days after the case is filed in the Court of Civil Appeals, should not be arbitrarily construed so as to defeat the ends of justice. *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290.

Where the clerk's failure to copy the appeal bond and transcript was not discovered until appellee moved to dismiss for that reason, which motion was not filed within 30 days from the time the record was filed, as required by Court of Civil Appeals rule 9 (142 S. W. xi), so as to make it impossible for appellant to move to amend within the time required by Rule 8 (142 S. W. xi), held that the Court of Civil Appeals would permit the bond and transcript to be filed as a part of the record. *Id.*

Appellate courts may not make corrections in the record, and any application for correction must be made to the trial court and a proper transcript brought to the appellate court. *Eaton v. Klein* (Civ. App.) 174 S. W. 331.

Under rules 8 and 11 of the Courts of Civil Appeals (142 S. W. xi), held, that motion to correct record would be denied because too late and as showing no necessity for correction. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

Under Court of Civil Appeals rule 22 (142 S. W. xii), each party to an appeal must see that the transcript is properly prepared, and after submission the court will not permit a correction of the record. *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657.

Even where there is a record to correct, an application to amend it is too late after judgment in the Court of Civil Appeals. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

Under Court of Civil Appeals rule 1 (142 S. W. x), and rule 22 as amended (142 S. W. xii), appellant should be notified of omission of transcript of proceedings on appeal from justice court and given opportunity to correct record. *Patrick v. Pierce* (Sup.) 183 S. W. 441.

Under Court of Civil Appeals rule 1 (142 S. W. x), and rule 22 as amended (142 S. W. xii), appellant should be notified of omission from transcript of proceedings on appeal from justice court and given opportunity to correct record. *Id.*

Opportunity should be given for correcting the record before reversing the judgment of the county court for failure to show it obtained jurisdiction on appeal from a justice. *Hamilton v. Hannus* (Civ. App.) 185 S. W. 938.

Under rule 1, and rule 22, as amended (142 S. W. x, xii), appellant should be given an opportunity to perfect the record before ruling that county court had no jurisdiction of appeal from justice court. *Texas Glass & Paint Co. v. Darnell Lumber Corp.* (Civ. App.) 185 S. W. 965.

Motion to amend the record presented the day preceding submission of the case with no excuse offered for the delay will be overruled under rule 22 for Courts of Civil Appeals (142 S. W. xii), providing that parties should see before submission that the record is properly prepared, etc. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

16. **Conclusiveness and effect of transcript.**—On error to review judgment by default against a surety, where judgment recites surety filed no answer, but transcript contains an answer marked as having been filed before rendition of judgment, recital in judgment was conclusive. *Shaw v. Southland Life Ins. Co.* (Civ. App.) 185 S. W. 915.

20. **Presumption as to matters not shown.**—See notes under art. 3687, rule 12, notes 77-105.

### Art. 2110. [1412] [1412] Citation and return omitted, when.

Cited, *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452; *Palomas Land & Cattle Co. v. Good* (Civ. App.) 184 S. W. 805.

**Omission of citation and return.**—A default judgment against a defendant will be reversed where the record fails to show service of citation other than by the recital thereof in the judgment. *Bonner Oil Co. v. Gaines* (Civ. App.) 179 S. W. 686.

Where the record contains no citation showing due service or an appearance by defendant, judgment by default will be reversed on appeal, though the judgment contains a recital that defendant was duly served. *Gilles v. Miners' Bank of Carterville, Mo.* (Civ. App.) 184 S. W. 284.

### Art. 2111. [1413] [1413] Omission of unimportant proceedings, when.

Cited, *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452.

**Presumption of agreement.**—Under this article, held that an appeal from the district court should not be dismissed because the record failed to contain a certified transcript from the county probate court, the presumption being that the omission was by agreement. *Reeves v. Fuqua* (Civ. App.) 183 S. W. 34.

### Art. 2112. [1414] [1414] Agreed statement of pleadings and proof.

Cited, *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452; *Stone v. Robinson* (Civ. App.) 180 S. W. 135; *Palomas Land & Cattle Co. v. Good* (Civ. App.) 184 S. W. 805; *Light v. Hart* (Civ. App.) 193 S. W. 740.

### Art. 2113. [1415] [1415] Transcript must contain what.

Cited, *Overton v. Colored Knights of Pythias* (Civ. App.) 163 S. W. 1053.

**Scope and contents of transcript—Copy of final judgment.**—Under art. 2078, transcript on appeal from county court must show a final judgment. *Cisco Oil Mill v. Shepherd* (Civ. App.) 176 S. W. 822; *Southwestern Traction Co. v. Melton* (Civ. App.) 166 S. W. 363.

Where there is no copy of the transcript from the justice's court in the record, or of the appeal bond filed in that court, the record of the court of civil appeals does not show jurisdiction in the county court. *Freeman v. Miller* (Civ. App.) 160 S. W. 126.

If the transcript contains no judgment or record entry showing a ruling on a demurrer to the petition, the ruling cannot be reviewed, though shown by a bill of exceptions reserved thereto. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

Where the transcript contained no copy of the final judgment, as required by this article, an appeal from an interlocutory order striking or dismissing the plea in reconvention, germane to the suit, will be dismissed for want of jurisdiction. *Beardsley v. Smith* (Civ. App.) 173 S. W. 692.

The transcript on appeal from the county court in a case originating before a justice should show rendition of judgment and giving appeal bond in justice court, necessary for jurisdiction of county court. *Hamilton v. Hannus* (Civ. App.) 185 S. W. 938.

— **Appeal bond.**—Under this article, an appeal from an order denying a temporary injunction must be dismissed where the transcript shows no appeal bond and none was filed within 15 days from the order. *Baker v. Griffin* (Civ. App.) 180 S. W. 907.

— **Assignment of errors.**—Under arts. 1607, 1612, 2113, held, that a transcript not containing copy of assignment of errors and not disclosing reversible error on its face required an affirmation. *English v. Allen* (Civ. App.) 173 S. W. 1172.

Under rule 101 District and County Courts (159 S. W. xi), cross-assignments of error need not be copied in the transcript, and an objection that they were not filed in the trial court without other showing is not sufficient to prevent their consideration. *Yates v. Watson* (Civ. App.) 187 S. W. 548.

**Art. 2114. [1416] [1416] Clerk's certificate and indorsement.**

**Clerk's certificate and indorsement.**—Under arts. 2109 and 2114, providing for the contents of a transcript of record, and that the certificate thereof should state whether the transcript was prepared under articles 2110, 2111 and 2112, providing for a partial transcript in certain circumstances, a certificate that the transcript is a correct copy as "per order filed" is defective. *Gutheridge v. Gutheridge* (Civ. App.) 159 S. W. 452.

A certificate that a transcript is a "true and correct" copy is not defective for failing to state that it is a "full" copy under arts. 2109, 2114, and district and county court rule 94 (142 S. W. xxiv), providing for the requisites of a transcript and certificate. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 159 S. W. 453.

Under Rev. Civ. St. 1911, art. 2109, requiring a transcript to contain a full and correct copy of all of the proceedings, a certificate which states that the transcript contains all the proceedings, except the injunction bond, is defective. *Id.*

**Art. 2115. [1417] [1416a] Briefs filed in courts below and notice given.**

**Time for filing.**—Where a case on appeal was set for submission on April 1st, and appellant, in violation of the court rules, did not file its brief until March 23d, nor deliver a copy to appellee until March 24th, appellee was not required to brief the case within the limited time, but could have the appeal dismissed. *Weston v. Patterson* (Civ. App.) 165 S. W. 1194.

**Sufficiency of filing.**—Under this article and rule 39 of the Court of Civil Appeals (142 S. W. xiii), where appellant presented a folded paper not indorsed to the clerk of the county court for the file mark on January 27th, but took it away and did not return it to the clerk's office until March 25th, notice being given appellee on March 26th, the case being set for hearing April 5th, there was not a sufficient compliance with the statute, and a motion to dismiss the appeal will be sustained. *Harwood-Barley Mfg. Co. v. McCulloch* (Civ. App.) 188 S. W. 263.

**Notice of filing.**—In Court of Civil Appeals, appellee is not required to notify appellant that his brief has been filed. *Houston & T. C. R. Co. v. Derden* (Civ. App.) 194 S. W. 489.

**Excuse for failure to file in time.**—Where plaintiff in error did not file briefs in accordance with the statute, though it sent a copy to defendant, its motion, made the day before submission, for leave to file briefs should be denied. *Texas & P. Ry. Co. v. Cave* (Civ. App.) 173 S. W. 988, 1201.

Under this article, defects in appellant's brief were not excusable because of the submission of the case shortly after it was filed. *International & G. N. Ry. Co. v. Jones* (Civ. App.) 175 S. W. 488.

Failure of appellant to file briefs within the time prescribed by this article, thereby depriving appellee of rights granted by articles 1613, 1616, held not excused. *Goodhue v. Leckie* (Civ. App.) 176 S. W. 647.

This article is directory, so that delay for good cause, prejudice not resulting, will not cause dismissal. *Kirby Lumber Co. v. Smith* (Civ. App.) 185 S. W. 1068.

**Waiver of filing or time of filing.**—Although agreements of parties for a time, beyond that allowed by the law or the court, to file their briefs are not binding on the court, yet they are binding upon the parties to the extent at least of preventing either from asking for a dismissal on the ground that the other's brief was not filed within the time allowed. *Alexander v. Garcia* (Civ. App.) 167 S. W. 1102.

Where parties by an agreement on file in court abrogated rules with regard to the filing of briefs, and the appellant did not object to the filing of appellee's brief not presented within time agreed, the clerk would be directed to file the brief as of the date when presented. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

**Effect of failure to file or file in time.**—See *Heiman v. State*, 70 Cr. R. 480, 158 S. W. 276, and see notes under art. 1614.

Delay in filing brief of appellant held sufficient ground, under the rules for the dismissal of the appeal on motion of the appellee. *Galveston, H. & S. A. Ry. Co. v. Short* (Civ. App.) 158 S. W. 175.

In view of a postponement granted to the appellee and of the absence of any allegation of injury or want of time to file a brief after service of appellant's brief, held, that

a motion to dismiss on the ground of delay would be denied. *International & G. N. R. Co. v. Walters* (Civ. App.) 161 S. W. 916, judgment reversed on rehearing, 165 S. W. 525.

Where, though the parties stipulated on June 5th that appellant should have 90 days in which to file briefs and that appellees should then have 90 days to file their briefs, appellants did not file their briefs until December 8th, nine days before the appeal was set for submission, the appeal will be dismissed. *Brown v. Wm. Cameron & Co.* (Civ. App.) 164 S. W. 425.

An appeal will be dismissed where, from press of business, appellant's counsel did not file briefs within the time prescribed by this article and rule 39 for the Courts of Civil Appeals (142 S. W. xiii), thus preventing appellee from filing a brief because of the shortness of the time. *State Fair of Texas v. Cowart* (Civ. App.) 165 S. W. 1197.

Under Court of Civil Appeals rule 39 (142 S. W. xiii), where appellant failed to file briefs in trial court, as required by this article, did not file briefs in appellate court until two days before the day for submission, and withdrew and retained transcript until day for submission, on motion, appeal must be dismissed. *Pagach v. First Nat. Bank of Rosebud* (Civ. App.) 166 S. W. 50.

Where an appellant failed to file her brief in the district court within the time limited by this article, the appeal will be dismissed on motion, if the appellant fails to give a sufficient excuse. *Anderson v. Ineeda Laundry & Dye Works* (Civ. App.) 167 S. W. 33.

Where plaintiff in error did not comply with this article, and district court rule 102 (142 S. W. xxiv), the briefs must be stricken. *Knight v. Simons* (Civ. App.) 168 S. W. 1018.

Unless waived, Court of Civil Appeals should not, under this article and rule 29 for the Courts of Civil Appeals (142 S. W. xii), without good cause be shown, consider an appellant's brief, where not filed in the court below. *Texas & P. Ry. Co. v. Cave* (Civ. App.) 173 S. W. 988, 1201.

Where appellant's failure to file a copy of his brief before taking out the transcript, as required by this article, was not injurious to appellee, the appeal would not be dismissed therefor. *Speer v. Rushing* (Civ. App.) 178 S. W. 1012.

Where appellants failed to file briefs within the time provided in a stipulation, and no error in law was apparent on the record, judgment held to be affirmed. *Richardson v. Peden Iron & Steel Co.* (Civ. App.) 179 S. W. 544.

Under rule 8 (142 S. W. xi) motion to dismiss for failure to file briefs in time not filed within 30 days after filing the transcript is too late. *Hamlet v. Leicht* (Civ. App.) 187 S. W. 1004.

Under this article and rule 39, Rules for the Courts of Civil Appeals (142 S. W. xiii), where appellants offer no excuse for failure to file copy of brief in district court, appeal must be dismissed. *Hensley v. Pena* (Civ. App.) 190 S. W. 247.

Where plaintiffs in error presented no excuse for not filing briefs within time required by statute, not giving defendant in error time to file briefs, cause will be dismissed under Rule 39 Court of Civil Appeals (142 S. W. xiii). *Sheppard v. Evans* (Civ. App.) 194 S. W. 483.

#### RECORD AND PROCEEDINGS NOT IN RECORD

**1. Matters to be shown by record—Jurisdiction of lower court.**—See art. 2078, note 9.

**4. — Presentation and reservation of grounds of review.**—See art. 1639, note 7, and other articles relating to particular matters.

Refusal of an alleged request to charge cannot be reviewed, where the record fails to show that such a request was made. *Pate v. Vardeman* (Civ. App.) 158 S. W. 1183.

Where the record does not show any ruling on a demurrer and exceptions to the petition, nor that any demurrer or exceptions were filed, an assignment complaining of the refusal to sustain a demurrer and special exception cannot be considered. *Clarke v. A. B. Frank Co.* (Civ. App.) 168 S. W. 492.

Where the record did not show that an exception was ever presented and ruled upon in trial court, it would not be considered on appeal. *Gulf, C. & S. F. Ry. Co. v. King* (Civ. App.) 174 S. W. 960.

Assignments of error complaining of the court's overruling of exceptions cannot be considered where the record did not show that the exceptions were called to the attention of the court. *Oliver v. Oliver* (Civ. App.) 181 S. W. 705.

Where record does not show appellant requested directed verdict, it cannot be urged as error that such direction was not given. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

Where it does not appear except by bill of exception that a plea in abatement for non-joinder of necessary parties was called to attention of court or action taken thereon, it cannot be reviewed. *First Nat. Bank v. Herrell* (Civ. App.) 190 S. W. 797.

**5. — Exceptions.**—See notes under articles relating to particular matters.

**9. — Proceedings of intermediate courts.**—See art. 2078, note 9, and art. 2113.

**13. Scope and contents of record—Interlocutory orders.**—Where record in suit to enjoin obstruction of alley by owners contained no order to abate pending determination of a similar suit, the assignments of error for failure to sustain motion would be overruled. *Bowers v. Machir* (Civ. App.) 191 S. W. 758.

**14. — Evidence.**—Where photographs were in evidence and a map was drawn on the floor in front of the jury, the record on appeal should bring up the photographs and make the testimony as to the map intelligible. *Missouri, K. & T. Ry. Co. of Texas v. Thayer* (Civ. App.) 178 S. W. 988.

**21. Defects, objections, amendment, and correction—Effect of defects in general.**—Motions to strike on ground that findings were not prepared as findings and had been expunged by trial court held to be overruled, as such matters should be brought before the court by certiorari. *Price v. J. B. Faircloth & Co.* (Civ. App.) 181 S. W. 707.

Failure to file motion for a new trial within 2 days after verdict being an informality relating to the manner of appeal which was waived by not filing of the motion within 30 days after the filing of the transcript, the motion for a new trial, even if filed too late in the court below, is in the record for consideration for all purposes. *Winnboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

25. — **Amendment in appellate court.**—See art. 2109, note 13.

27. **Conclusiveness and effect, impeaching and contradicting—Conclusiveness of record.**—Appellate court is bound by evidence in record on appeal. *Johnson v. Johnson* (Civ. App.) 191 S. W. 366.

A judgment of a justice foreclosing, in an action on a note a lien on furniture, cannot be attacked on the ground that value of furniture was beyond the justice's jurisdiction, where the record on appeal to the county court showed that its value was less than \$150. *Robertson v. Balkam* (Civ. App.) 192 S. W. 533.

28. — **Conflict in record.**—A recital in a judgment dismissing one defendant that such defendant had filed no answer is conclusive against the file mark on a paper in the record purporting to be the answer of such defendant. *Sanger v. First Nat. Bank of Amarillo* (Civ. App.) 170 S. W. 1087.

Upon direct attack by appeal or writ of error a recital in the judgment that defendant was "duly cited" does not prevail against the return on the citation in the record showing affirmatively he was not duly cited. *Grubbs v. Marple* (Civ. App.) 185 S. W. 597.

29. — **Impeaching or contradicting.**—A record, showing an appearance by a defendant, cannot be changed by an affidavit of plaintiff's counsel, which was first called to the attention of the Court of Appeals on motion for rehearing. *Baugh v. Baugh* (Civ. App.) 175 S. W. 725.

31. **Questions presented for review—Errors on face of record.**—See notes under art. 1607.

32. — **Jurisdiction of lower court.**—See art. 2078, note 9.

33. — **Venue.**—An order made in May, overruling appellant's plea of privilege, will not be reviewed, where the only pleadings shown by the record are the first amended original petition filed in July and those filed afterwards, and the only evidence before the court on appeal is that introduced upon the trial of the case in July. *Wolfe City Milling Co. v. Ward* (Civ. App.) 185 S. W. 663.

36. — **Conduct of trial or hearing.**—Assignments complaining of improper argument of counsel cannot be reviewed, where the argument was not shown by bills of exception or the record proper. *Clampitt v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 185 S. W. 342.

37. — **Admissibility of evidence.**—Where the entire record is not before this court, it is unable to say whether the exclusion of material testimony was injurious. *Clark & Schaeffer v. Gaar-Scott & Co.* (Civ. App.) 163 S. W. 681.

An assignment of error in excluding testimony must be overruled, where the only thing in the record with reference thereto is the testimony of the witness on his voir dire, which the record does not show was offered to the jury, or that the court refused to allow it to go to the jury, or, if so, that appellant excepted to such ruling. *Graves v. San Antonio & A. P. Ry. Co.* (Civ. App.) 164 S. W. 1059.

Where the record on appeal does not show the materiality of excluded evidence, its admissibility cannot be passed on by the appellate court. *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 630.

In absence of any record showing of the facts alleged as a basis of an objection to depositions, the appellate court cannot say that the court erred in its ruling. *Kolp v. S. F. Scattergood & Co.* (Civ. App.) 185 S. W. 329.

40. — **Verdict, findings, or decision.**—Finding that wife did not receive more property than she was entitled to as her community interest held not to be disturbed, where value of land part of which was devised to her for life did not appear. *Payne v. Farley* (Civ. App.) 178 S. W. 793.

46. **Matters not apparent of record—Matters not included or shown in general.**—The appellate court will not go outside of pleadings to inquire into matters not properly before the court, and which cannot affect the questions involved. *Brown v. Uhr* (Civ. App.) 187 S. W. 381.

It not appearing how long the deposition had been on file, right to object at trial to form and manner of taking it is not apparent. *Galveston, H. & S. A. Ry. Co. v. Packard* (Civ. App.) 193 S. W. 397.

47. — **Matters appearing otherwise than by record.**—Under Court of Appeals Rule 53 (102 Tex. xlix, 142 S. W. xxi), the sustaining of an exception to an allegation in the answer cannot be reviewed, where it appears only by bill of exceptions, and not in the record proper. *Ilseng v. Carter* (Civ. App.) 158 S. W. 1163.

Affirmance of an appeal from a judgment of a justice will not be dismissed, though the record did not show that the district court, to which the action was appealed, had jurisdiction, where the defects are supplied by certified copies. *Ortiz v. Walker* (Civ. App.) 167 S. W. 831.

Where suit was instituted against city and others to enjoin payment of certain city warrants, and an amended petition was filed and original petition discarded, court could not be aided by reference to original petition where it did not appear on record. *City of Aransas Pass v. Usher* (Civ. App.) 191 S. W. 157.

48. — **Evidence relating to question involved.**—See notes under art. 1593.

An ex parte document not made a part of the appellate record cannot be considered. *Moore v. Kelley* (Civ. App.) 162 S. W. 1034.

An affidavit of counsel for plaintiff as to the dismissal of another suit cannot be considered on appeal, being no part of the appellate record. *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119.



## CHAPTER TWENTY-ONE

## CERTAIN INTERLOCUTORY PROCEEDINGS, ETC.

Art.	1. MOTIONS	Art.	2149. Jurisdiction to appoint receiver confined to courts of this state in certain cases.
2118.	Motion docket.	2150.	Receiver of corporation, where applied for.
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## 1. MOTIONS

**Article 2118. [1456] [1452] Motion docket.**

**Authority of clerk.**—Court held to have no right to interfere with its clerk's statutory duty to file papers, and, under this article, to docket all motions. *Cooney v. Isaacks* (Civ. App.) 173 S. W. 901.

**Art. 2123. [1461] [1457] Disposed of, when.**

**Argument of motion.**—The action of the court in sustaining a demurrer to a motion without argument and refusal to allow argument as to exceptions to a special answer will not be reviewed, unless abuse of discretion is shown. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

## 3. RECEIVERS

**Art. 2128. [1465] When receivers may be appointed.**

Cited, *First State Bank of Hubbard v. Hubbard Farmers' Oil & Gin Co.* (Civ. App.) 178 S. W. 1015; *Wardlaw v. Savage* (Civ. App.) 191 S. W. 1176; *Bond-Reed Hardware Co. v. Walsh* (Civ. App.) 193 S. W. 1148.

**1. Applicability of statute in general.**—The preference given to judgments and claims for causes of action arising during receivership over the mortgage lien by arts. 2138, 2142, applies only to the lien of the mortgage to foreclose which suit was brought under this article. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

**2. Nature of remedy.**—Where a receiver of a corporation was obtained at the instance of the holder of a junior mortgage, art. 2135, and articles 2138, 2128, subd. 2, did not confer any authority on the court to conduct such receivership to the prejudice of the security of the first mortgagee, who was not a party to the proceedings so as to render him or the mortgaged property subject to receiver's costs and expenses to the lessening of his security. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

A "receiver" is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*. *Koker-not v. Roos* (Civ. App.) 189 S. W. 505.

**3. Remedy incidental to other relief.**—A petition by a partner held insufficient to authorize the appointment of a receiver for the firm, where it did not ask for any ultimate relief. *Style v. Lantrip* (Civ. App.) 171 S. W. 786.

A bill which has for its sole object the appointment of a receiver will not be entertained. *Continental Trust Co. v. Brown* (Civ. App.) 179 S. W. 939.

The appointment of a receiver for an insolvent railroad in a bondholder's suit, alleging waste and mismanagement, in which his petition expressly showed that a suit on the bonds and for foreclosure would be premature, was improper, the receivership not being sought as an ancillary remedy, despite this article, authorizing appointment in cases of insolvency. *Houston & B. V. Ry. Co. v. Hughes* (Civ. App.) 182 S. W. 23.

The appointment of receivers is an ancillary remedy, and a suit therefor cannot be maintained where that is the primary object, and no cause of action or equitable relief is otherwise stated. *Republic Trust Co. v. Taylor* (Civ. App.) 184 S. W. 772.

Prayer for receiver is merely ancillary to cause of action pending between parties in which a judgment by one may be obtained against the other, and a receiver should not be appointed for a corporation if no cause of action is pending on which a judgment could be predicated. *Kokernot v. Roos* (Civ. App.) 189 S. W. 505.

The power of a court to appoint a receiver of property proceeds from its jurisdiction of a cause. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

4. **Pendency and condition of cause.**—Where plaintiff's petition in divorce had been dismissed when the court appointed a receiver, and defendant had withdrawn his answer, in so far as it prayed for a divorce, only leaving that part which prayed for a division of the property, plaintiff's reply to the answer, in which she renewed her prayer for a divorce, was before the court, so that there was a suit pending when the receiver was appointed. *Crawford v. Crawford* (Civ. App.) 163 S. W. 115.

5. **Existence of other remedy.**—Courts of equity will not appoint a receiver of a corporation at the suit of a stockholder on the ground of fraud, mismanagement, etc., on the part of the corporate authorities, but will merely enjoin or forbid the wrong complained of. *Williams v. Watt* (Civ. App.) 171 S. W. 266.

Where a valid garnishment merely reaches a debt due by the garnishee, the writ will not be aided by the appointment of a receiver, or the issuance of injunction restraining the assignment of the debt. *Gulf Nat. Bank v. Bass* (Civ. App.) 177 S. W. 1019.

6. **Persons entitled to receiver.**—Under this article, a stockholder of a corporation is not entitled to the appointment of a receiver on the ground that it is insolvent, or in imminent danger of insolvency, unless he has a right of action independent of his stockholder's interest. *Williams v. Watt* (Civ. App.) 171 S. W. 266.

A minority stockholder of a corporation, not in imminent danger of insolvency, held not entitled to a receiver, especially where the officers of the corporation administered its affairs in good faith. *Continental Trust Co. v. Cowart* (Civ. App.) 173 S. W. 588.

A receiver of a corporation should not be appointed on the application of minority stockholders, except on a clear showing that their rights imperatively demand it, and that they are in danger of irreparable loss. *Id.*

Under arts. 1203, 2128, § 3, suit by minority stockholders for receivership of going corporation, not shown to be insolvent or in imminent danger of insolvency, held not maintainable. *Toomey v. First Mortgage Trust Co.* (Civ. App.) 177 S. W. 539.

Stockholder applying for receiver of corporation must do so under art. 2154, his right to a receiver depending on whether he brings himself within this article and subdivisions defining circumstances under which receiver may be appointed. *Kokernot v. Roos* (Civ. App.) 189 S. W. 505.

7. **Discretion of court and review.**—Appointment of receiver under proper pleadings held within sound discretion of court, and not to be granted unless circumstances fully demand it. *Toomey v. First Mortgage Trust Co.* (Civ. App.) 177 S. W. 539.

8. **Jurisdiction of court.**—That the federal court, which appointed a receiver of the property of a railroad company, reserved jurisdiction over claims presented, on discharge of the receiver does not give it jurisdiction over claims not presented. *Kansas City, M. & O. Ry. Co. of Texas v. Latham* (Civ. App.) 182 S. W. 717.

Where the federal court appoints a receiver for a railroad company, such court acquires jurisdiction of all claims presented by petition or intervention, and the discharge of the receiver does not itself release such jurisdiction. *Id.*

10. **Grounds of appointment.**—An application by junior lienholder for the administration of an insolvent corporation's assets through a receivership should not be entertained, where the assets are insufficient to pay more than the first lien. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

A receiver held properly appointed for an insolvent corporation pending litigation. *First State Bank of Hubbard v. Hubbard Farmers' Oil & Gin Co.* (Civ. App.) 160 S. W. 1132.

To show grounds for receivership of a corporation, equities must appear in behalf of complainant which require that relief independent of a showing of insolvency. *Floore v. Morgan* (Civ. App.) 175 S. W. 737.

That defendants, in a suit for receivership, would collect attorney's fees and trustee's fees provided for in notes and trust deeds of corporate property, alleged to be unreasonable, is not an equitable ground for a receivership. *Id.*

Under this article, the court held authorized to appoint a receiver to wind up the affairs of an insolvent corporation which has forfeited its rights to do business for non-payment of its franchise tax. *Canadian Country Club v. Johnson* (Civ. App.) 176 S. W. 835.

That the managers of a corporation notified its creditors that the corporation would become insolvent if they should foreclose held not to constitute collusion for the purpose of covering up the debts of the corporation by the appointment of a receiver. *Hart-Parr Co. v. Alvin-Japanese Nursery Co.* (Civ. App.) 179 S. W. 697.

The mere fact that a corporation is insolvent is not sufficient ground for the appointment of a receiver therefor, without a showing of some equity in favor of complainants. *Continental Trust Co. v. Brown* (Civ. App.) 179 S. W. 939.

The fact that the creditor of a corporation attempts to assert an unjust debt and to charge usury does not justify the appointment of a receiver. *Id.*

Where the assets of a debtor were about to be placed beyond a creditor's reach, his right to a receiver need not rest alone in equity, but also exists under the express provision of this article. *Bond-Reed Hardware Co. v. Walsh* (Civ. App.) 181 S. W. 248.

Where it appeared that defendant holding fund as agent in trust for plaintiff was insolvent, so that no judgment against him could be collected on execution, the court, at plaintiff's instance, should have appointed a receiver. *Driskill v. Boyd* (Civ. App.) 181 S. W. 715.

It is not necessary, to constitute grounds for the appointment of a receiver of a corporation, to show that petitioner's claim has been merged in a judgment, or that it has.

an express lien on the corporate property. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

In a suit to place the property and business of a corporation in the hands of a receiver indefinitely, held, that a claim for damages for permanent depreciation would have no basis. *Indiana Co-op. Canal Co. v. Darling* (Civ. App.) 185 S. W. 1039.

The fact that the majority of the stockholders improvidently administer affairs of a corporation is not ground for a receivership. *Id.*

A court of equity will not appoint a permanent receiver for a corporation because of dissatisfaction of minority stockholders with the management of majority. *Id.*

Power to appoint receiver, especially of corporation, will not be exercised, except upon very grave necessity, and clear showing that applicant's rights imperatively demand it, and that he has no other adequate remedy, and is in danger of suffering irreparable loss. *Bounds v. Stephenson* (Civ. App.) 187 S. W. 1031.

The exercise of the extraordinary power of a chancellor in appointing receivers is a delicate and responsible duty, to be discharged with utmost caution, and only under such special and peculiar circumstances as demand summary relief, and to prevent manifest wrong and injury. *Kokernot v. Roos* (Civ. App.) 189 S. W. 505.

**11. Application for appointment, requisites of.**—A receiver should have been appointed, though the creditors did not specifically ask judgment on their claim. *First State Bank of Hubbard v. Hubbard Farmers' Oil & Gin Co.* (Civ. App.) 160 S. W. 1132.

A receiver may be appointed on the court's own motion. *Crawford v. Crawford* (Civ. App.) 163 S. W. 115.

Relief in stockholders' suit, alleging fraud, etc., or ultra vires acts of directors or corporation, held limited to the specific wrongs charged, and receiver will not be appointed. *Toomey v. First Mortgage Trust Co.* (Civ. App.) 177 S. W. 539.

Petition in action in which receiver of corporation was sought held insufficient; it stating no cause of action and seeking no relief except the appointment of a receiver. *Forest Oil Co. v. Wilson* (Civ. App.) 178 S. W. 626.

A petition for the appointment of a receiver to conserve timber held insufficient to show the necessity of such appointment. *Masterson v. Cavin* (Civ. App.) 178 S. W. 662.

A petition for the appointment of a receiver to take charge of a sawmill and personal property held sufficient to show necessity for appointment. *Id.*

Petition for appointment of receiver held to state a cause of action under this article, authorizing such appointment where defendant corporation is in imminent danger of insolvency. *Hart-Parr Co. v. Alvin-Japanese Nursery Co.* (Civ. App.) 179 S. W. 697.

In proceedings for the appointment of a receiver for a corporation, on the verge of insolvency, petition held not to show that certain creditors were attempting to hinder the collection of debts of others. *Id.*

A bill for the appointment of a receiver praying for time in which to pay indebtedness held not to state ground for appointment. *Continental Trust Co. v. Brown* (Civ. App.) 179 S. W. 939.

Under art. 2128, § 3, allegations in petition for a receiver, verified by plaintiff's attorney to the effect that they were true as alleged, held sufficient to justify appointment of a preliminary or temporary receiver. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

**12. Notice of application.**—While notice of an application for the appointment of a receiver is not required by statute, notice should be given, save in case of emergency. *Williams v. Watt* (Civ. App.) 171 S. W. 266.

Though a petition did not warrant the appointment of a receiver without notice, such appointment will not be vacated on appeal for that reason, where an answer was filed. *Id.*

In a suit by the state for the forfeiture of the charter of a railroad corporation on the ground of insolvency, held, that there was no such emergency as warranted the appointment of a receiver under this article, without notice. *Texas-Mexican Ry. Co. v. State* (Civ. App.) 174 S. W. 298.

It is not enough to authorize appointment of receiver without notice to allege that party applying therefor is entitled to possession of real or personal property involved and that it is being wasted, but petition must further show that applicant will probably suffer irreparable loss if receiver is not appointed without delay necessary in giving notice to opposite party. *Simpson v. Alexander* (Civ. App.) 188 S. W. 285.

**14. Proof, nature and sufficiency of.**—Affidavit accompanying petition, but claimed to be not attached to and made a part thereof, held properly considered in passing upon application for appointment of receiver. *Forest Oil Co. v. Wilson* (Civ. App.) 178 S. W. 626.

Allegations of petition to which no answer was filed must be taken as true on hearing a motion to appoint a receiver. *Simpson v. Alexander* (Civ. App.) 188 S. W. 285.

**17. Order of appointment—Description and inclusion of property.**—A judgment, recovered against a railroad company while its properties are in the hands of a receiver, should be presented to the court in which a receivership is pending as evidence of the claim and for approval and payment. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 183 S. W. 829.

**18. — Duration of receivership in general.**—So long as a court of equity has jurisdiction of a cause giving it the right to take possession of property through a receiver, it has the power to continue the receivership. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

Whether a receivership should be continued is to be governed by the necessities of the case as related to the rights of the parties. *Id.*

Right of possession, to property of a debtor, of receiver appointed in her lifetime, does not pass on her death to administrator, by virtue of art. 3235, as to administrator's right of possession, in absence of showing of loss of jurisdiction of court appointing receiver. *Id.*

**20. — Validity and partial invalidity.**—An order appointing a receiver is not invalidated by an error in the exercise of the court's power to make such appointment. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

21. **Operation and effect of appointment in general.**—Appointment of receiver pending action to compel railroad corporation to construct its road through a county seat, as required by Const. art. 10, § 9, held not ground for abatement, dismissal or suspension of such action. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified, 106 Tex. 249, 163 S. W. 582.

The propriety or legality of a receiver's appointment cannot be questioned, nor can his eligibility be attacked in any subsequent proceeding. *New Britain Mach. Co. v. Watt* (Civ. App.) 180 S. W. 624.

The appointment of a receiver and his administration of the affairs of a railroad company impounds the property of the company, so that while it remains in the custody of the court, the receiver's possession cannot be disturbed by any other court. *Kansas City, M. & O. Ry. Co. of Texas v. Latham* (Civ. App.) 182 S. W. 717.

Owners of property in hands of receiver could incur debts and give lien on property to secure them valid as against any interest the owners had left in the property after the payment of all prior claims allowed in the receivership proceedings. *Lauraine v. Masteron* (Civ. App.) 193 S. W. 708.

**Art. 2129. [1466] Who disqualified to act as receiver.**

**Person interested.**—The sheriff held not a "person interested" within this article, so as to prevent his appointment as a receiver in a divorce action. *Crawford v. Crawford* (Civ. App.) 163 S. W. 115.

**Art. 2133. [1470] Receiver's power.**

1. **Property and rights vesting in receiver.**—Where corporation receiver proved that a stockholder took title in his own name for the benefit of the corporation which paid the consideration, he was entitled to recover the land in an action of trespass to try title. *Texas Rice Land Co. v. Langham* (Civ. App.) 193 S. W. 473.

5. **Authority of receiver in general.**—An order of the court authorizing receivers to extend the railroad along a certain street does not authorize an excavation along that street between the tracks and the abutting property. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 191 S. W. 591.

Unpaid subscriptions for capital stock of a corporation, which has become insolvent, become a trust fund for benefit of the creditors of corporation, and may be sued on and collected by receiver for such purpose, even though such creditors did not know of such unpaid subscriptions at time debts were incurred. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

In an action by a stockholder to cancel notes and deed of trust given for stock which were void for that reason, held, that receiver representing creditors is in no better position to enforce collection of such notes or invoke defense of estoppel than is corporation itself. *Id.*

9. **Contracts, authorization or ratification.**—A receiver may contract without the sanction of the court, binding himself personally to another for debts incurred by himself expressly or by accepting services which he is bound to perform and which otherwise would be a charge against the property. *Allen v. Kittrell* (Civ. App.) 162 S. W. 397.

Receivers can bind the property in their hands only by acts which the court may authorize or approve, and, to charge the property after its redelivery by receivers, the claimant must plead and prove the authority of the receivers. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 191 S. W. 591.

12. **Sales—Validity.**—Where after the court had postponed the confirmation of a receiver's sale of property worth \$105,000 for \$10,000, without further advertisement, it permitted the bidder to raise his bid to \$15,000, and then confirmed the sale to him, the sale was void. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

14. — **Vacation.**—The sale of property by a receiver may be set aside for fraud and collusion, and it would be evidence of fraud for a receiver to purchase or be interested in purchasing at his sale of the property. *New Britain Mach. Co. v. Watt* (Civ. App.) 180 S. W. 624.

Allegations in motion to set aside a receiver's sale held to form a sufficient basis for the introduction of evidence on the issue of the inadequacy of price. *Id.*

21. **Liability of receiver in general.**—Petition, in an action for the value of a mule killed by a train, held to state a cause of action against the receiver of the railroad company, based on the ground that the injury occurred after he became receiver. *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 171 S. W. 245.

Where receiver of railroad contracted to transport shipment within state, freight charges payable at destination, and before delivery of shipment destination was changed and bill of lading issued for transportation of shipment beyond state, the receiver was liable as initial carrier of interstate commerce; it being within his authority to so modify original contract. *Andrews v. Roberts* (Civ. App.) 192 S. W. 569.

Arts. 6601, 6602, giving right of recovery against a railroad for allowing Johnson grass to go to seed on its right of way, does not render liable its receivers for allowing it. *International & G. N. R. Co. v. Dawson* (Civ. App.) 193 S. W. 1145.

23. — **Acts of agent.**—Receiver of two persons' property who had knowledge of and directed performance of services by the wife of one of them, but who did not agree to pay therefor, held not personally liable. *Allen v. Kittrell* (Civ. App.) 162 S. W. 397.

Judgment cannot be had against a receiver for wrongs of his alleged servant without proof of appointment and that the servant was employed by the receiver. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 186 S. W. 383.

25. **Liability of property or funds for payment of claims.**—Receiver for purchaser of railroad stock under executory contract held not entitled to obtain the stock without first paying the purchase price. *Continental Trust Co. v. Brown* (Civ. App.) 179 S. W. 939.

Receiver for corporation held to have no right to compel the vendor, under an executory contract with the corporation for the purchase of land, to deliver possession without payment of the purchase price. *Id.*

29. **Order of distribution, conclusiveness of.**—An order directing the payment and distribution of the funds in possession of a receiver cannot be collaterally attacked. *New Britain Mach. Co. v. Watt* (Civ. App.) 180 S. W. 624.

**Art. 2135. [1472] Application of funds in hand of receiver and claims preferred.**

Cited, *Gaupel v. Lakeside Sugar Refining Co.* (Civ. App.) 158 S. W. 1038; *Hooven-Owens-Rentschler Co. v. T. Schriver & Co.* (Civ. App.) 184 S. W. 359.

**Priority of claims in general.**—Where receiver of the assets of a corporation was appointed at the instance of a junior lienholder, and the assets were insufficient to pay more than the first mortgage, and did not produce an income, it was improper to continue the receivership, but the proceeds of the assets should be applied to the payment of the costs of the action to foreclose the first lien, then to the payment of that debt and interest, and the balance to be expended by the receiver as directed by the court. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

The provision of this article giving a preference to certain claims out of moneys coming into the hands of the receiver which are earnings of the property gives no preference lien over prior liens on the corpus of the property, where there were no earnings. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

— **Expenses of receivership.**—Where a receiver of a corporation was obtained at the instance of the holder of a junior mortgage, art. 2135, and articles 2133, 2128, subd. 2, did not confer any authority on the court to conduct such receivership to the prejudice of the security of the first mortgagee, who was not a party to the proceedings so as to render him or the mortgaged property subject to receiver's costs and expenses to the lessening of his security. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

Where receivership proceedings were instituted against a corporation not shown to be of a public character, under a junior mortgage, the court could not postpone the lien of a prior mortgage to the expenses and costs of the receivership. *Clint v. Houston Ice & Brewing Co.*, 169 S. W. 411, 106 Tex. 508.

The holder of a vendor's lien on the property of a corporation for which a receiver was appointed, over the lienholder's protest at the suit of subsequent creditors not entitled to preference under arts. 2135, 2138, and 2142, cannot be compelled to pay the costs of the receivership. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

— **Expenses of continuance of business by receiver.**—Where the court takes charge of quasi public corporations, operating them through a receiver, it may make the necessary debts of operation a prior lien upon the income or the property itself. *Craver v. Greer* (Sup.) 179 S. W. 862, answering certified questions (Civ. App.) 178 S. W. 699, and conformed to in (Civ. App.) 182 S. W. 368.

Without some element of estoppel, vested liens on property of a private corporation or individual cannot be postponed to the receiver's operating expenses, and that one is a party to the receivership suit is insufficient to produce that result. *Id.*

Plaintiff, in a suit to foreclose a mortgage, in which a receiver was appointed to continue the business on application of intervening creditors, held entitled to priority for his mortgage over the receiver's operating expenses. *Id.*

One furnishing current supplies to a quasi public corporation, an irrigation company, is entitled to priority over other unsecured creditors in funds in receiver's hands earned before receivership. *First Nat. Bank v. Campbell* (Civ. App.) 193 S. W. 197.

Where a receiver is appointed for a public service corporation in order to perform its duties to the public by continuing the operation of the plant, the expenses of operation by the receiver are given preference over a lien on the property held by one who did not institute the action in which the receiver was appointed. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

The expense of auditing the books of a public service corporation during receivership proceedings is not an expense necessary for the operation of the plant which would be entitled to preference over a lien, but is taxable against the plaintiffs as costs. *Id.*

A vendor who has abandoned his right to rescind the sale and recover the land, and has elected to sue for his debt and foreclose his lien, has merely a mortgage, not a legal title, and his lien is subject to the expenses of the operation of a public service plant by a receiver. *Id.*

— **Debts incurred prior to receivership.**—It was error to sustain exception to receivers' answer alleging injury before appointment, since if plaintiff could recover, he could recover against the railway company although receiver was a proper party. *Schaff v. Nash* (Civ. App.) 193 S. W. 469.

— **Receiver's certificates.**—Where receiver of an insolvent corporation was appointed at the instance of a junior lienholder and issued certificates of indebtedness, the lienholders thereof were not entitled to a prior lien as against a first mortgagee of the corporation's property, who was not a party to and had no knowledge of the receivership proceedings until the property had been taken by the receiver. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

On foreclosure of a mortgage on the plant of a private corporation, the court cannot give priority to receivers' certificates and expenses of a receivership, obtained by a junior mortgagee over the objection of the first mortgagee. *First State Bank of Hubbard v. Hubbard Farmers' Oil & Gin Co.* (Civ. App.) 178 S. W. 1015, rehearing denied 183 S. W. 112.

**Liability of parties for whom receivers have been appointed.**—A corporation, owning a railroad operated by a receiver, is not liable for injuries caused by the receiver's negligence. *Ft. Worth & R. G. Ry. Co. v. Ballou* (Civ. App.) 174 S. W. 337.

Where a railroad is in receivership, it is not liable for the acts of employes engaged by the receiver. *Beaumont, S. L. & W. Ry. Co. v. Daniel* (Civ. App.) 186 S. W. 383.

Judgment for loss and damage to shipment cannot be rendered against railroad company, where evidence shows that railroad was being operated by receiver at time

contract of shipment was made as well as at time of trial, but such judgment can be rendered only against receiver. *Andrews v. Roberts* (Civ. App.) 192 S. W. 569.

A railroad is not liable for penalty for allowing Johnson grass to go to seed on its right of way after its property had passed into the possession and control of a receiver. *International & G. N. Ry. Co. v. Dawson* (Civ. App.) 193 S. W. 1145.

#### Art. 2137. [1474] When property in the hands of receiver subject to execution.

**Issuance of execution.**—A judgment recovered against a receiver of an insolvent corporation cannot be enforced by seizure of the corporation's assets under an execution. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

#### Art. 2138. [1475] Judgments a first lien on property, and property charged with lien after receivership.

Cited, *First State Bank of Hubbard v. Hubbard Farmers' Oil & Gin Co.* (Civ. App.) 178 S. W. 1015.

**Priority of liens.**—See *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409; note under art. 2135.

The holder of a vendor's lien on the property of a corporation for which a receiver was appointed, over the lienholder's protest at the suit of subsequent creditors not entitled to preference under arts. 2135, 2138, and 2142, cannot be compelled to pay the costs of the receivership. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

The preference given to judgments and claims for causes of action arising during receivership over the mortgage lien by arts. 2138, 2142, applies only to the lien of the mortgage to foreclose which suit was brought under article 2128. *Id.*

#### Art. 2139. [1476] Persons to whom property delivered liable for debts.

**Grounds of liability.**—A shipper of live stock, suing for damages thereto while the property of the railroad was in the hands of receivers, must allege and prove that the receivers had been duly appointed and discharged, and that its property delivered back was equal in value to the amount of the shipper's claim, or that such claim was made a condition of redelivery, and also by what court the receivers were appointed and discharged. *Kansas City, M. & O. Ry. Co. v. Russell* (Civ. App.) 184 S. W. 299.

#### Art. 2141. [1478] Property redelivered by receiver without sale still liable for debts; suits do not abate, but new party may be made.

**Liability for unpaid debts and claims.**—No act of a receiver could relieve a party from obligations arising from a valid contract, made before the receivership. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Discharge of receiver of railroad company pending action against him held to bar further liability and to require dismissal of the action against him. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133; *Id.*, 456.

Under an application for and an order for the return of the property of a railroad company which had been in the hands of a receiver, held, that the company assumed claims against the receiver arising out of negligence in the operation of the road. *Kansas City, M. & O. Ry. Co. of Texas v. Latham* (Civ. App.) 182 S. W. 717.

Where receivers were not personally liable, and had been discharged, they are not necessary parties to an action against a railroad company for damages for negligent injury to a shipment during the receivership. *Id.*

In an action against a railroad company for a nuisance, the inquiry of the jury should have been limited to the acts complained of occurring before the date the railroad went into receivership. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 183 S. W. 829.

A railway company, in absence of statute, is not liable for acts of court receiver by reason alone of his relation to property of road. *International & G. N. Ry. Co. v. Perkins* (Civ. App.) 185 S. W. 657.

Railroad is liable for damages occurring while it was operated by receiver who diverted current earnings by placing them in permanent improvements or turned them over to road without a sale. *Id.*

In suit against railroad for loss of goods in hands of receiver, facts must be shown creating liability on road, which is not primarily liable for acts of receiver. *Id.*

Railroad, which purchased its former property from the purchaser at a sale by federal receiver pursuant to order of court without assuming liability for claim against the receiver for loss of goods, held not liable. *Id.*

In action against railroad, for receiver's negligence in losing goods in transit, brought after receiver has sold property and current assets by order of court, it must be pleaded and proven that the road in some manner has assumed the liability. *Id.*

A petition against a railroad company after it had resumed possession of its property held not to show that the acts of the receivers for which damage was claimed were authorized or approved by the court appointing them. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 191 S. W. 591.

— **Federal court receivership.**—Under this article a shipper whose claim arose while the property of a railroad company was in the possession of a receiver appointed by a federal court, may, after termination of the receivership and return of property to the railroad company, sue the railroad company. The railroad company was liable for claims based on negligence in operating the road, though the federal court reserved jurisdiction as to matters not determined. *Kansas City, M. & O. Ry. Co. of Texas v. Latham* (Civ. App.) 182 S. W. 717.

Where damage to a shipment of live stock occurred while the carrier was in the hands of receivers, appointed by a federal court, such carrier will be treated as in the hands of the federal courts when the injury occurred, and the shipper cannot recover

therefor against the carrier. *Kansas City, M. & O. Ry. Co. v. Russell* (Civ. App.) 184 S. W. 299.

Under this article, a railroad redelivered by receivers appointed by the federal courts held liable in the state courts in an action begun against the receivers for damages caused by the receivers' acts regardless of the terms of the decree or redelivery. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 191 S. W. 591.

**Art. 2142. [1479] Judgments and unsued claims have preference lien over mortgage.**

Priority of claims.—See *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773; note under art. 2138.

**Art. 2143. [1480] Receiver and person to whom property is delivered both liable and may be sued for unpaid claim.**

Liability of receiver.—Petition, in an action against receivers of a railroad company after their discharge, for torts committed by them, held demurrable, notwithstanding this article. *Hovey v. Weaver* (Civ. App.) 175 S. W. 1089.

**Art. 2144. [1481] Receiver to give bond on appeal.**

Cited, *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

**Art. 2146. [1483] Receiver may sue or be sued without leave; effect of judgment against.**

Application in general.—In view of this article a master had not power to order all claims to be presented to the receiver within 30 days or be barred. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Action by receiver.—Under art. 4654, a receiver is not entitled to an injunction restraining the sale of property in custodia legis without depositing the proper bond. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

Action against receiver.—Where a receiver has been appointed for a railroad company, so that it is legally impossible for it to comply with mandamus from a district court, requiring it to construct a line through a county seat and maintain a depot therein, enforcement should be suspended until conditions so change as to put it in the power of the corporation to obey. *Kansas City, M. & O. Ry. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582, modifying judgment (Civ. App.) 155 S. W. 561.

Leave of court to sue receivers.—In absence of statutory law, receiver could be sued only with permission of court appointing him. *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611; *Andrews v. King* (Civ. App.) 170 S. W. 862; *International & G. N. Ry. Co. v. Dawson* (Civ. App.) 193 S. W. 1145.

Where a receiver of the assets of an insolvent corporation was appointed at the instance of a junior lienholder, other creditors were entitled to sue the receiver and recover judgment on their claims, without leave of the court appointing the receiver, by this article. *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409.

An order of a federal court giving the receiver of a railroad authority to defend certain suits held not to authorize a suit in a state court against the receiver to recover damages to a shipment of cattle occurring before the appointment of the receiver. *Andrews v. King* (Civ. App.) 170 S. W. 862.

An action in a state court for injuries to a shipment of horses may not be brought without leave against a receiver of a railroad appointed in a federal court, where the claim arose two or three months before the receiver was appointed, as such claim is not within Act March 3, 1911, § 66. *Id.*

Action against a receiver not suable under Act Cong. March 3, 1911, § 66, for loss of goods, and accruing before his appointment, held not maintainable without permission of the court appointing him. *Andrews v. Jeter & Co.* (Civ. App.) 171 S. W. 838.

Federal railroad receiver held not liable for past torts unless sued with permission of court; but Act Cong. March 3, 1911, § 66, expressly allows suits for his own wrongful acts without leave of court. *St. Louis, B. & M. Ry. Co. v. Dawson* (Civ. App.) 174 S. W. 850.

Absent permission of the federal court, which appointed him, a receiver of a railroad cannot, under the federal statute, be sued in a state court for an injury caused by the road before his appointment. *San Antonio, U. & G. R. Co. v. Vivian* (Civ. App.) 180 S. W. 952.

Judgment against the receiver for a tort of the railroad, committed before his appointment, is unauthorized, absent permission of the federal court appointing him to sue him. *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 180 S. W. 1146.

Under Act Cong. Aug. 13, 1888, claimants against receivers of a railroad company appointed by the federal court may bring suit in the state court without consent of the appointing court, and it cannot, sitting as a court of equity, deprive claimants of that right. *Kansas City, M. & O. Ry. Co. of Texas v. Latham* (Civ. App.) 182 S. W. 717.

By arts. 2146, 2147, it was intention of Legislature, in granting permission to receivers to sue or be sued without permission of appointing court, to permit suits only in venue prescribed, article 2146 granting general permission to bring suits without leave, and article 2147 fixing venue. *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

Venue.—See notes under art. 2147, and see *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

**Art. 2147. [1484] Suits against receiver, where brought.**

Venue.—By arts. 2146, 2147, it was intention of Legislature, in granting permission to receivers to sue or be sued without permission of appointing court, to permit suits only in venue prescribed, article 2146 granting general permission to bring suits without leave, and article 2147 fixing venue. *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

Where officers of Arizona corporation resided in Ft. Worth, Tarrant county, Tex., and from office there proceeded all company's business, county was seat of principal office of company in Texas within meaning of general venue statute (art. 1830), and also special statutes applicable to receiverships for corporations and suits against receivers (articles 2146, 2147, 2150). *Id.*

Suits against receivers, venue for which is prescribed by this article, come within terms of article 1830, subd. 30, providing that whenever in any law authorizing any particular character of action the venue is expressly stated, suit shall be commenced in county to which such jurisdiction may be so expressly given. *Id.*

Under art. 1830, subds. 14, 24, 28, and 30, and this article, held, that a suit against the receiver of a foreign corporation to cancel deed of trust and a note given for stock was properly brought in county where land was situated. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

**Art. 2149. [1487] Jurisdiction to appoint receiver confined to courts of this state in certain cases.**

**Foreign receiver.**—A foreign receiver has no extraterritorial jurisdiction, so that, where no ancillary proceedings for the appointment of a receiver are commenced in this state, title to property here does not vest in him. *Nesom v. City Nat. Bank* (Civ. App.) 174 S. W. 715.

**Art. 2150. [1488] Receiver of corporation, where applied for.**

See *Commonwealth Bonding & Casualty Ins. Co. v. Bowles* (Civ. App.) 192 S. W. 611.

**Art. 2151. [1489] Where there are betterments, general creditors have rights to be protected.**

**Necessity of showing of betterments.**—In an action for damages caused by receivers of a railroad, where property has been redelivered to the owners, plaintiff must show that receivers expended the revenue in betterments. *Hovey v. Weaver* (Civ. App.) 175 S. W. 1089.

**Art. 2152. [1490] Judgments and other claims have preference over mortgage.**

**Applications in general.**—Under this article, held, that the claims of creditors secured by mortgage stood on the same footing as an unsecured claim. *Gaupel v. Lake-side Sugar Refining Co.* (Civ. App.) 158 S. W. 1038.

This article subordinates the mortgage only of the person who instituted the action to the expenses of running the business by the receiver. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

**Art. 2154. [1492] Application for receiver, by whom made.**

**Persons entitled to apply for appointment.**—The prohibition in this article of application by a corporation for a receiver applies to its directors acting in its behalf. *Floore v. Morgan* (Civ. App.) 175 S. W. 737.

Under this article, it is not essential that stockholder seeking receivership should have judgment or an express lien against property of corporation, though he must have a claim, and hence suit not brought on any claim, but for a receivership to delay a defendant's collection of first lien debt against it could not be maintained. *Kokernot v. Roos* (Civ. App.) 189 S. W. 505.

Stockholder applying for receiver of corporation must do so under this article; his right to a receiver depending on whether he brings himself within article 2128, and subdivisions defining circumstances under which receiver may be appointed. *Id.*

**Art. 2155. [1493] Rules of equity shall govern in receivership proceedings.**

Cited, *Houston Ice & Brewing Co. v. Clint* (Civ. App.) 159 S. W. 409; *Forest Oil Co. v. Wilson* (Civ. App.) 178 S. W. 626.

**Costs on discharge.**—The appointment of a receiver for a public service corporation held improvidently made, though the corporation had been losing money, so that a court did not abuse its discretion in taxing the receivership costs against the plaintiffs. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

#### 4. MASTERS IN CHANCERY

**Art. 2156. [1485] Master in chancery, qualifications, duties and appointments.**

**In general.**—The court properly submitted all the matters it saw fit to a master, where there was reserved to the parties the right to except to his findings of fact or law, and to have the questions of fact decided by jury. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

In view of this article and art. 70, it is within the power of the court to appoint a master in chancery by consent of parties. *San Benito Cameron County Drainage Dist. v. Farmers' State Guaranty Bank* (Civ. App.) 192 S. W. 1145.

**Proceedings before master.**—Evidence held not to sustain a finding that the master set down all claims of whatever character against defendant for hearing before him on a date named. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

**Report of master.**—Where a case referred to a master involved the construction of contracts and no parol evidence was offered, a proper practice would be for the court to



declare the legal effect of the contracts. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

Where plaintiff's exceptions to a master's report made it ineffectual for any purpose, a motion to quash it because of certain deficiencies was unnecessary, unless pertinent on the question of costs. *Id.*

Upon exceptions to a master's report, all matters of fact excepted to should be tried de novo by a jury, and the court should construe the contract and determine all questions of law passed upon by the master. *Id.*

Where the parties to a suit agree that a master in chancery shall be appointed and that exceptions to his report must be filed within 60 days, they are bound by such agreement, and cannot file exceptions after a greater time has expired. *San Benito Cameron County Drainage Dist. v. Farmers' State Guaranty Bank* (Civ. App.) 192 S. W. 1145.

## 5. SUBSTITUTION OF LOST RECORDS AND PAPERS

**Art. 2157. [1498] [1475] Lost records and papers supplied, on motion.**

**Necessity of substitution.**—Where it appears that the injunction bond has been lost from the files of the court below, it should be substituted in the record by proper proceedings in that court so as to be brought up to the Court of Civil Appeals. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 159 S. W. 453.

Where respondent's counsel, who lost the clerk's transcript of the record after it was filed in the Court of Civil Appeals, failed to have certified a substitute transcript offered by them, held, that the motion to substitute would be overruled, and the statement of the case and statements supporting the assignments of error in appellant's brief will be treated as correct. *Patterson v. Sylvan Beach Co.* (Civ. App.) 171 S. W. 515.

**Records and papers which may be supplied.**—Under arts. 2157–2163, a motion to substitute lost papers and for certiorari to perfect record will not lie where the papers were missing in court below. *Browne Grain Co. v. Farmers' & Merchants' Nat. Bank of Abilene* (Civ. App.) 173 S. W. 942.

**Art. 2161. [1502] [1479] Adverse party may supply.**

Cited, *Hattaway v. Planters' Cotton Oil Co.* (Civ. App.) 194 S. W. 1119.

**Art. 2163. [1504] [1481] Substituted copies constitute record.**

**Operation and effect in general.**—In view of arts. 1812, 2157, et seq., relating to pleadings and lost pleadings, held that, where corrected transcript contained copy of lost pleading sufficient to support judgment, it would be assumed that the pleading was before court at its rendition of judgment. *Wiggins v. First Nat. Bank of Denton* (Civ. App.) 175 S. W. 735.

**Irregularity in proceedings.**—Where the justice lost the original appeal bond filed with him, and a new bond identical with the original, was executed, filed with and approved by him, though not substituted as required by statute, it should have been recognized by the county court in the absence of objection by the appellee, or, if it was defective, appellant should have been allowed to file a new and sufficient bond. *Galveston, H. & S. A. Ry. Co. v. Burris* (Civ. App.) 186 S. W. 381.

## 6. DEPOSIT OF MONEY, ETC., IN COURT

**Art. 2164. [1462] [1458] Custody of money and other articles deposited.**

**Sufficiency and effect of tender.**—The cash payment called for by a contract for the sale of land need not be actually paid into court when payment is tendered by the pleadings, in a suit for specific performance. *Beaton v. Fussell* (Civ. App.) 166 S. W. 458.

**Disposition of deposit.**—Where, in a suit to foreclose a mechanic's lien, the purchaser at a mortgage sale intervened and made a deposit to secure the delivery of the property by the receiver, it could not complain of the payment of plaintiff's claim from such deposit. *Sweetwater Cotton Oil Co. v. Birge-Forbes & Co.* (Civ. App.) 160 S. W. 1125.

### STIPULATIONS

**Construction and operation in general.**—A stipulation held insufficient to show that a will was inadmissible because an appeal had been taken from the judgment admitting it to probate. *Houston Oil Co. of Texas v. Drumwright* (Civ. App.) 162 S. W. 1011.

In trespass to try title to land, a portion of which defendant claimed by limitation, held that, by the different agreements of the parties, it was admitted that, when plaintiff's predecessor in title took possession before limitations had run in defendant's favor, he was the owner of the record title. *Combes v. Stringer*, 167 S. W. 217, 106 Tex. 427, reversing judgment (Civ. App.) 142 S. W. 668.

In action to recover value of land, admission in agreed statement held to support judgment, though there was an admission therein that at one time certain attorneys had an interest in the land. *White v. Love* (Civ. App.) 174 S. W. 913.

In trespass to try title, stipulation held not an admission that plaintiff had title by a regular chain from the sovereignty of the soil. *Rotge v. Simmler* (Civ. App.) 176 S. W. 614.

Where it was agreed between the parties that appellant's bond should be considered as proved, recovery cannot be defeated because the statement of facts showed plaintiff merely "offered" the bond in evidence. *Commonwealth Bonding & Casualty Ins. Co. v. Harper* (Civ. App.) 180 S. W. 1156.

Where parties agreed that each might read from records title papers and plaintiffs should furnish list with book references 10 days before trial, and file original powers of

attorney, admission of title papers was not error, though powers of attorney were not produced until trial. *Keppler v. Texas Lumber Mfg. Co.* (Civ. App.) 184 S. W. 353.

Where the parties in an action of trespass to try title agreed that the plaintiff owned a certain named league, unless it was divested by the claimed limitation title of the defendants, who by their pleas expressly claimed only a part of another league, the plaintiff was entitled to judgment. *Angelina County Lumber Co. v. Hines* (Civ. App.) 184 S. W. 596.

A statement by defendants' counsel in open court held equivalent to an agreement that a prior judgment of partition should be revived. *Teel v. Brown* (Civ. App.) 185 S. W. 319.

An action cannot be defeated as based on an invalid stipulation, where it was brought on a fraudulent contract for the sale of stock and the stipulation was made only as a means of establishing the right to judgment. *Commonwealth Bonding & Casualty Ins. Co. v. Beavers* (Civ. App.) 186 S. W. 859; *Commonwealth Bonding & Casualty Ins. Co. v. Brannin* (Civ. App.) 186 S. W. 862.

A stipulation by which defendant agreed to permit judgment against it in one suit if such judgment were rendered in a similar suit, and plaintiff agreed to await judgment in the other suit before prosecuting his action, thus postponing immediate collection of moneys due, is not unilateral. *Id.*

That one party refuses to be bound by a stipulation signed by his attorney and filed in an action pending does not invalidate the stipulation as to other parties after determination that there is no cause of action against such party. *Id.*

Where several independent suits by various plaintiffs against one defendant were pending, and all parties agreed in one stipulation to await judgment in one of the suits, and take judgment in accordance therewith, it was not error to refuse a continuance to allow all to be made parties to one suit. *Id.*

In action on contract of guaranty, statement of facts, reciting that pleadings were read, and that it was agreed that amount alleged in plaintiff's petition was due by debtor, was sufficient to place before court invoices sued on; and amount shown, with their dates, together with contract of guaranty, was sufficient to warrant trial court's finding for the amount. *Goodman v. W. S. Peck & Co.* (Civ. App.) 192 S. W. 785.

It being stipulated in county court on appeal from recorder's court that briefs should not be filed there, failure to file them is not ground for dismissing appeal to the Court of Criminal Appeals. *Adams v. State* (Cr. App.) 193 S. W. 1067.

**Conclusiveness and effect.**—Although agreements of parties for a time, beyond that allowed by the law or the court, to file their briefs are not binding on the court, yet they are binding upon the parties to the extent at least of preventing either from asking for a dismissal on the ground that the other's brief was not filed within the time allowed. *Alexander v. Garcia* (Civ. App.) 167 S. W. 1102.

Agreements to waive the provisions of Acts 33d Leg. c. 59, governing objections and exceptions to the charge, should not be respected by the courts. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

A party's agreement to admit a field note would preclude him from moving to strike it from the evidence after its recitals were found to be unfavorable to him. *Crews v. Powers* (Civ. App.) 184 S. W. 363.

Stipulation, recited in order of sale, by assignee of foreclosure judgment secured by the mortgagee of a nursery company, held to preclude the assignee from enjoining the sale or removal of the nursery stock by the company's receiver after sale to the assignee. *Colonial Land & Loan Co. v. Joplin* (Civ. App.) 184 S. W. 537.

Plaintiff held relieved of making proof of facts necessary to revive a prior judgment of partition, defendant stipulating that the judgment should be revived. *Teel v. Brown* (Civ. App.) 185 S. W. 319.

— **Matters concluded.**—Where defendants stipulated that plaintiffs held whatever title A. had at his death, and he died in 1870, evidence to show acquisition of adverse title thereafter is inadmissible. *Adams v. Wm. Cameron & Co.* (Civ. App.) 161 S. W. 417.

It being stipulated that defendants are the owners of certain surveys and plaintiff the owner of a certain survey, and that he is entitled to recover it if and to the extent, it is not in conflict with their surveys, there being no conflict, no other question is open. *Houston Oil Co. of Texas v. Wing* (Civ. App.) 194 S. W. 221.

In trespass to try title, where plaintiff claimed under three and five years' limitation and defendant agreed that in so far as their claims conflicted the plaintiff had paid the taxes and disclaimed as to land not in controversy, defendant could not on appeal contend that all the taxes were not paid on all of the land sued for part of which was not in controversy. *Houston Oil Co. of Texas v. Wm. M. Rice Institute* (Civ. App.) 194 S. W. 413.

## CHAPTER TWENTY-TWO

### SUIT BY NEXT FRIEND

Art. 2167.	When minor may sue by next friend.	Art. 2168.	Next friend may compromise.
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#### Article 2167. [3498u] When minor may sue by next friend.

Actions by next friend of minor.—See *James v. James* (Civ. App.) 164 S. W. 47; note under art. 2168.

Actions by next friend of insane person—Actions maintainable.—Where wife suing for divorce and division of property became insane, no guardian being appointed to represent her, it was proper for her to be represented in her suit by next friend. *Skeen v. Skeen* (Civ. App.) 190 S. W. 1118.

**Art. 2168. [3498v] Next friend may compromise, etc.**

**Effect of admissions by defendants.**—In view of the powers given to a next friend by arts. 2167 and 2168, permitting him to make compromises, etc., the rights of infant plaintiffs, represented by the same next friend in partition proceedings, could not be determined therein as between themselves, and admissions by defendants could not affect plaintiffs' rights as between themselves. *James v. James* (Civ. App.) 164 S. W. 47.

**CHAPTER TWENTY-THREE****SUITS AGAINST NON-RESIDENTS****Article 2172. [1504a] Actions maintainable against non-residents.**

See *Oswald v. Giles* (Civ. App.) 178 S. W. 677.

**CHAPTER TWENTY-FOUR****ATTORNEY'S FEES, RECOVERY OF****Article 2178. Attorney's fees recoverable in certain cases; procedure; costs.**

Cited, *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133.

**Note.**—The title of this act is as follows:—"An Act to regulate \* \* \* and providing a reasonable amount of attorney's fees to be recovered, in cases where the amount of such claims shall not exceed two hundred (\$200) dollars."

**Constitutionality.**—See *Ft. Worth & D. C. Ry. Co. v. Loyd* (Civ. App.) 132 S. W. 899; *Gulf, T. & W. Ry. Co. v. Lunn* (Civ. App.) 141 S. W. 538, in which it was held that this act was void because its subject was not expressed in its title, overruled in *Missouri, K. & T. Ry. Co. v. Mahaffey*, 105 Tex. 394, 150 S. W. 881, in which it was held that in view of the limitation of the statute to claims not exceeding \$200, and inasmuch as a fee not exceeding \$20 would be unreasonable where the claim was a very large one, the statute is limited in its operation to claims not exceeding \$200. See, also, *Lemmons v. Duran* (Civ. App.) 138 S. W. 795. And see *Gulf, T. & W. Ry. Co. v. Lunn*, 106 Tex. 511, 171 S. W. 1121.

Due process of law is not denied, contrary to Const. U. S. Amend. 14, by this article, and there is no denial of the equal protection of the laws, since the statute makes no classification of debtors, and the kinds of claims included cover a wide range, and do not appear to have been grouped for the purpose of bearing against any class or classes of citizens or corporations. *Missouri, K. & T. Ry. Co. of Texas v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915E, 942; *Missouri, K. & T. Ry. Co. of Texas v. Cade*, 234 U. S. 412, 34 Sup. Ct. 678, 58 L. Ed. 1377, L. R. A. 1915E, 942.

The mere fact that attorneys' fees are allowed by this article to successful plaintiffs only, and not to successful defendants, does not involve a denial of the equal protection of the laws, contrary to U. S. Const. 14th Amend., if the classification is otherwise reasonable. *Id.*

The application to a claim against a carrier, based upon a loss of freight shipped in interstate commerce, of the provisions of this article, does not amount to a direct burden upon interstate commerce, and is therefore not repugnant to the commerce clause of the Federal Constitution, or otherwise in conflict with Federal authority, in the absence of any Congressional legislation covering the subject. *Missouri, K. & T. Ry. Co. of Texas v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915E, 942.

Congress has not so far exercised its paramount authority by enacting the Carmack amendment of June 29, 1906, to the act of February 4, 1887 (U. S. Comp. St. Ann. 1916, §§ 8604a, 8604aa), regulating the liability of a carrier for the loss or damage to an interstate shipment, as to prevent the application to a claim against a carrier, based upon a loss of an interstate shipment, of the provisions of this article. *Id.*

One against whom judgment was rendered upon a claim which did not arise out of interstate commerce may not urge the invalidity under the commerce clause of the Federal Constitution and the interstate commerce act of February 4, 1887 (U. S. Comp. St. Ann. 1916, §§ 8604a, 8604aa), and its amendments, of this article. *Missouri, Kansas & Texas Railway Company of Texas v. L. C. Cade*, 233 U. S. 642, 34 Sup. Ct. 678, 58 L. Ed. 1135.

The validity of this article may not be assailed by a defendant upon the ground that natural persons only may avail themselves of its benefits. *Id.*

**Persons entitled to allowance.**—The Federal Supreme Court will not, in the absence of a controlling decision by the state courts, limit to natural persons the benefit of this article. *Missouri, K. & T. Ry. Co. of Texas v. Cade*, 233 U. S. 642, 34 Sup. Ct. 678, 58 L. Ed. 1135.

**Grounds for allowance in general.**—Under this article, plaintiff, to be entitled to attorney's fees as costs, must obtain judgment for the full amount of the claim as presented for payment. *Texas Southeastern Ry. Co. v. Brown* (Civ. App.) 186 S. W. 273.

**Amount and computation.**—Under this article, the amount of attorney's fees forming part of the costs must be determined by the jury trying the case and not by the court. *Oswald v. Williams* (Civ. App.) 169 S. W. 185.

Under this article, allowance of \$20 fee for collecting a \$75 item on claims to recover \$215 damages for killing three head of cattle held erroneous. *St. Louis, B. & M. Ry. Co. v. Dawson* (Civ. App.) 174 S. W. 850.

The court and jury do not judicially know what would be a reasonable attorney's fee which this article authorizes plaintiff to recover in action on bona fide claim for stock killed. *Quanah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

Allegations that plaintiff promised his attorney a certain fee are insufficient to authorize recovery under this article, allowing reasonable attorney fees. *Quanah, A. & P. Ry. Co. v. Watkins* (Civ. App.) 193 S. W. 356.

**Proof and allowance.**—Where the evidence on appeal from justice court authorized a verdict for the wages sued for, judgment allowing attorney's fees under this article and punitive damages without evidence to support such allowance would be modified by permitting remittitur of the fees and punitive damages. *Trinity County Lumber Co. v. Conner* (Civ. App.) 176 S. W. 911.

Under this article, allowing recovery of attorney's fees in action on bona fide claim for stock killed, plaintiff must offer evidence of facts authorizing recovery of attorney's fees and as to what would be reasonable attorney's fee under circumstances. *Quanah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

Under this article, court should require that verdict determine facts as to whether attorney's fees were recoverable and what would be reasonable amount. *Id.*

**As part of amount in controversy.**—See *Wichita Valley Ry. Co. v. Leatherwood* (Civ. App.) 170 S. W. 262; *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 171 S. W. 245; *Houston Packing Co. v. McDonald* (Civ. App.) 175 S. W. 806; *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 180 S. W. 1146; *Houston & T. C. R. Co. v. Patterson* (Civ. App.) 193 S. W. 691.

## CHAPTER TWENTY-FIVE

### MISCELLANEOUS PROVISIONS

Art.  
2180. Process, requisites of.

Art.  
2182. Suits consolidated, when.

#### Article 2180. [1447] [1443] Process, requisites of.

Cited, *McCaulley v. Western Nat. Bank* (Civ. App.) 173 S. W. 1000; *Simms v. Mears* (Civ. App.) 190 S. W. 544; *Smith v. Buckholtz State Bank* (Civ. App.) 193 S. W. 730.

**Sufficiency of attestation.**—Under this article, a citation held sufficiently attested when signed by the clerk officially with the seal of the court, though the word "tested" was not used. *St. Louis, B. & M. Ry. Co. v. Hamilton* (Civ. App.) 163 S. W. 666.

#### Art. 2182. [1454] [1450] Suits consolidated, when.

**Trial of cases together.**—In action against receiver of insurer, and against a railroad for damages from fire communicated from cars, there was no error in hearing the two cases together. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

**Actions which may be consolidated.**—Where the several suits involved similar facts, but a judgment in one would not necessarily be conclusive in another, consolidation to avoid a multiplicity of suits will not be required. *Chicago, R. I. & G. Ry. Co. v. Liberal Elevator Co.* (Civ. App.) 182 S. W. 355.

The court did not err in consolidating two suits in trespass to try title, where the parties and issues in both were the same. *Ferguson v. Dodd* (Civ. App.) 183 S. W. 391.

**Operation and effect of consolidation.**—Under this article, where three suits were consolidated, held that jurisdiction of Court of Civil Appeals was determinable according to the sum of the amounts involved in the three suits. *Rust v. Texas & P. Ry. Co.* (Sup.) 180 S. W. 95.

## TITLE 38

## COURTS—JUVENILE

## CHAPTER TWO

## DELINQUENT CHILDREN

**Art.**

2191-2201. Superseded.  
 2201a. Dependent or delinquent girls may  
     be committed by juvenile court,

**Art.**

etc.; mentally deficient or diseased  
 girls; examination.

**Articles 2191-2198.**

**Note.**—Acts 1907, p. 137, §§ 1-8, constituting the above articles of the Revised Civil Statutes, were also carried into the Revised Criminal Statutes as arts. 1197-1204 of the Code of Criminal Procedure. The latter articles were amended by Acts 1913, ch. 112, §§ 1-10, thus working a supercession of the articles of the revised Civil Statutes above referred to. The act as amended appears in Vernon's Code of Criminal Proc. as arts. 1197-1204.

**Applicable only to boys.**—See *Townser v. State* (Cr. App.) 182 S. W. 1104.

**Appealability of judgment.**—See *Mills v. State* (Cr. App.) 177 S. W. 492; *Horn v. State* (Cr. App.) 181 S. W. 727.

**Jurisdiction.**—See *McCallen v. State*, 76 Cr. R. 353, 174 S. W. 611; *Ex parte Bartee*, 76 Cr. R. 285, 174 S. W. 1051.

**Arts. 2199, 2200.**

**Note.**—Acts 1907, p. 137, ch. 65, § 9, from which the above articles were constructed, was amended, prior to the revision of 1911, by Acts 1909, ch. 55, p. 101, and the revisers carried the amendatory act into the revised Code of Criminal Procedure as art. 1205. The latter article was expressly repealed by Acts 1913, ch. 112, § 13. This repeal would seem to work a supercession of arts. 2199, 2200, Revised Civil Stat.

**Art. 2201.**

**Note.**—This article is superseded by Acts 1913, p. 219, ch. 112, § 12, set forth in Vernon's Code Cr. Proc. as art. 1207.

**Art. 2201a. Dependent or delinquent girls, etc.**

See Code Cr. Proc. arts. 1207a, 1207b.

**Constitutionality.**—See *Ex parte Bartee*, 76 Cr. R. 285, 174 S. W. 1051.

## TITLE 39

## CRIMINAL DISTRICT COURTS

Chap.

2. Dallas Criminal District Court.

Chap.

3. Criminal District Court No. 2 of Dallas County.

## CHAPTER TWO

## DALLAS CRIMINAL DISTRICT COURT

**Article 2234.** [1531f] **Terms of court; grand jury.**—Said court shall hold four terms each year for the trial of causes and the disposition of business coming before it; one term beginning the first Monday of January; one term beginning the first Monday of April; one term beginning the first Monday in July; and one term beginning the first Monday of October, respectively. The grand jury shall be empanelled in said court for each term thereof unless otherwise directed by the judge of said court; and the procedure for drawing jurors for said court shall be the same as is now or may hereafter be required by law in district courts and under the same rules and regulations. [Acts 1893, p. 118; Act March 29, 1917, ch. 136, § 1.]

**Explanatory.**—The act amends art. 2234, Rev. Civ. St. of 1911. Took effect 90 days after March 21, 1917, date of adjournment.

## CHAPTER THREE

## CRIMINAL DISTRICT COURT NO. 2 OF DALLAS COUNTY

**Article 2235b.** **Criminal district court of Dallas county and court No. 2 to exercise concurrent jurisdiction; transfer of causes, etc.**

**Note.**—This section of the act is amended by Act March 22, 1915, ch. 86, § 1. See Vernon's Code Criminal Procedure 1916, art. 97*ll*.

Since the compilation of the Civil Statutes in 1914 the legislature has passed a number of acts relating to the Criminal District Courts. Where those acts are not amendatory of Articles of Revised Civil Statutes of 1911, they have been placed in title 2, chapter 3A, of Vernon's Code of Criminal Procedure 1916, and the corresponding title and chapter in this supplement.

**Transfer of causes.**—See *General Bonding & Casualty Co. v. State*, 73 Cr. R. 649, 165 S. W. 615.

## TITLE 40

## COURTS—COMMISSIONERS'

Chap.

1. Organization.
2. Powers and Duties.

Chap.

3. Terms and minutes of the court.

## CHAPTER ONE

## ORGANIZATION

Art.

2236. Election and term of office of county commissioners.
2237. Court composed of whom and the presiding officer thereof.

Art.

2239. Oath and bond of county commissioner.
2240. Vacancy in office of county commissioner, how filled.

**Article 2236. [1532] [1509] Election and term of office of county commissioners.**

**Inconvenience invalidating division of county into precincts.**—Under the act creating Dunn county (Acts 33d Leg. [1st Called Sess.] c. 35), the division of such county into commissioner's, justice's, and voting precincts held so manifestly wrong, in view of the comparative size and comparative number of voters and the inconvenience to residents of two of the three largest towns in reaching the polling place and justice's court, as to require the holding of an election in such precincts to be enjoined. *Dubose v. Woods* (Civ. App.) 162 S. W. 3.

**Vacancy in office of county commissioner.**—Under Const. art. 5, § 18, article 16, § 17, and Rev. St. 1911, arts. 2236, 2240, 3030, 3032, county commissioner's term expired when result of election was required to be declared, and if no commissioner was elected there was a vacancy, and defendant's subsequent qualification was not premature. *Tom v. Klepper* (Civ. App.) 172 S. W. 721.

**Art. 2237. [1533] [1510] Court composed of whom and the presiding officer thereof.**

**Personal liability for damage arising from official acts.**—Officers, to whom is committed the power of acting in a judicial or quasi judicial capacity, are not personally liable for an honest, though mistaken, exercise of their powers. *Comanche County v. Burks* (Civ. App.) 166 S. W. 470.

**Art. 2239. [1535] [1512] Oath and bond of county commissioners.**

**Liability on bond.**—Under Sp. Acts 28th Leg. c. 25 (Special Road Law for San Augustine County) § 1, sureties on official bond of a county commissioner held not responsible for his illegal drawing or receiving money from the county as ex officio road commissioner. *Slaughter v. Knight* (Civ. App.) 184 S. W. 539.

**Action on bond.**—Under this article, petition against county commissioner for amounts collected for services to county in which he could not be interested, failing to show that they were collected other than for real owners, did not state cause of action, and did not show liability of sureties on official bond. *Polk v. Roebuck* (Civ. App.) 184 S. W. 513.

**Art. 2240. [1536] [1513] Vacancy in office of commissioner, how filled.**

**Vacancy in office.**—See *Tom v. Klepper* (Civ. App.) 172 S. W. 721; note under art. 2236.

## CHAPTER TWO

## POWERS AND DUTIES

Art.

2241. Certain powers of the court specified.
2242. Power to levy taxes.
2244. Tax shall not be levied, except, etc.
2254. May issue bonds for such bridge purpose.
2256. Stationery, etc., may contract for.

Art.

- 2268a. Commissioners shall not make contracts in excess of \$2,000 without submission to competition; exception.
- 2268b. Contracts made without compliance with act void; injunction; repeal.

**Article 2241. [1537] [1514] Certain powers of the court specified.**

Cited, *Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312; *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

1. **Limitation of jurisdiction to county business.**—Under Const. art. 5, § 18, the commissioners' courts are courts of limited jurisdiction, having no authority except such as is expressly or impliedly conferred. *Von Rosenberg v. Lovett* (Civ. App.) 173 S. W. 508.

Relative to the question of a fight between defendants and S., who was taking sand from their land, being an affray, a county commissioner could not authorize him to take sand outside the roadbed. *Haverebakken v. State* (Cr. App.) 194 S. W. 1114.

2. **Establishment of county and precinct boundaries.**—Under the act creating Dunn county (Acts 33d Leg. [1st Called Sess.] c. 35), the division of such county into commissioner's, justice's, and voting precincts held so manifestly wrong, in view of the comparative size and comparative number of voters and the inconvenience to residents of two of the three largest towns in reaching the polling place and justice's court, as to require the holding of an election in such precincts to be enjoined. *Dubose v. Woods* (Civ. App.) 162 S. W. 3.

4. **Construction of roads, bridges, and ferries.**—A contract to furnish a county shells for building and repairing roads to be paid for from current revenues does not create a "debt" within Const. art. 8, § 9. *Broussard v. Wilson* (Civ. App.) 183 S. W. 814.

Under the general power given by this article to "build bridges and keep the same in repair," general discretion is vested in members of commissioners' courts to determine when and where bridges shall be constructed in their county. *Moore v. Coffman* (Civ. App.) 189 S. W. 94.

A commissioners' court may not deprive itself of the power to determine the location for bridges to be built. *Id.*

6. **Contracts in general.**—The commissioners' court has charge of the business affairs of the county, and it alone has authority to make contracts binding upon the county. *Germo Mfg. Co. v. Coleman County* (Civ. App.) 184 S. W. 1063.

The commissioners' court alone has authority to make contracts binding upon the county. *American Disinfecting Co. v. Freestone County* (Civ. App.) 193 S. W. 440.

A county is not bound to pay for disinfectants purchased and used by sheriff, where the commissioners' court did not authorize or ratify the purchase or use. *Id.*

County is not liable on equitable principles for new typewriters and postage stamps used by county clerk, in conducting his office, where commissioner's court did not authorize nor consent to supplies being acquired. *Sparks v. Kaufman County* (Civ. App.) 194 S. W. 605.

County clerk has no authority to acquire new typewriters, by purchase or exchange, or expend money for postage stamps, although such supplies are necessary in conducting his office. *Id.*

9. **Delegation of authority to construct court house.**—A justice of the peace has jurisdiction of a suit to recover a deposit of \$200 made to secure performance of a contract to exchange lands wherein no interest was asked for, and interest allowed dated only from the date of judgment. *Strickland v. Duffie* (Civ. App.) 191 S. W. 622.

Justice court held without jurisdiction of action against railroad by shipper of horses for \$197.50 damages and for attorney's fee of \$20, under Rev. St. 1911, art. 2178, for delay in paying or satisfying claim. *Houston & T. C. R. Co. v. Patterson* (Civ. App.) 193 S. W. 691.

30. **Allowance of claims.**—The lack of merit in a sheriff's claim against a county, and want of proper form in the account as it was presented to the commissioners' court, did not impair the jurisdiction and authority of the court to pass on the claim and allow or reject it as it deemed proper. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

31. — **Conclusiveness of order allowing claim.**—Where items of account allowed to sheriff by commissioners' court could not, under any circumstances, have been proper charges against county, want of authority on part of commissioners' court to allow them was jurisdictional, so that its action in so doing had no conclusive effect. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

Under Rev. St. 1911, art. 2241, subd. 8, as amended by Acts 32d Leg. c. 116 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2241), commissioners' court of county had jurisdiction to settle all accounts presented by sheriff for jail guard hire, and its action in rejecting or paying them was conclusive, and not to be reviewed except by district court under its appellate jurisdiction. *Id.*

In action by a county against sheriff and his sureties to recover amounts of county moneys paid sheriff, the orders of the commissioners' court allowing the sheriff's claims and ordering them paid were conclusive, though procured by false and fraudulent representations made by the sheriff to the court. *Id.*

32. — **Collateral attack.**—Under this article, decisions of commissioners' court relating to settlement of accounts against county are conclusive, and not subject to collateral attack, if court has jurisdiction, but not otherwise. *Polk v. Roebuck* (Civ. App.) 184 S. W. 513.

A judgment of the commissioners' court of a county allowing certain accounts of the sheriff could not be collaterally impeached merely because it was based on a mistake of fact and because the court acted without knowledge of the law. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

34. **Designating place of holding sessions of courts.**—See *Edwards v. McGuire* (Civ. App.) 165 S. W. 477; note under art. 2299.

### Art. 2242. [1538] Power to levy taxes.

**Limitation of levy.**—In view of Const. art. 8, § 9, setting the limits of levies for various county purposes, Vernon's Sayles' Ann. Civ. St. 1914, art. 1440, does not authorize the commissioners' court to transfer into the road and bridge fund such amounts as to make possible an expenditure for roads and bridges in excess of the constitutional limit. *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

Const. art. 8, § 9, authorizing counties to levy 30 cents on the \$100 for roads and bridges, and 25 cents on the \$100 for streets and other permanent improvements, does



not authorize the levy of 55 cents on the \$100 for roads not within the corporate limits of a city or town. *Id.*

**Provision for payment of debts.**—A contract for the drilling for a county of an artesian well on the courthouse square, executed when there was not sufficient revenue on hand or to be collected for the year with which to pay the price, creates a debt within Const. art. 11, §§ 5, 7, and, when no provision is made for the payment of the debt, the contract is void. *Toole v. First Nat. Bank of Hemphill* (Civ. App.) 163 S. W. 423.

Where a fund for the payment of a county debt has been provided for by statute, no provision for the payment of such debt under Const. art. 11, § 5, need be made by county officers when contracting it. *Boesen v. Potter County* (Civ. App.) 173 S. W. 462.

A debt incurred by a county for publishing its delinquent tax list held to be such a current expense of the municipality that the provisions of Const. art. 11, § 5, had no application. *Id.*

A county warrant for courthouse lots, payable out of the revenues for the second year thereafter, held a "debt," for payment of which Const. art. 11, § 7, requires provision at time of creation. *Rogers Nat. Bank v. Marion County* (Civ. App.) 181 S. W. 884.

Within Const. art. 11, § 7, requiring provision, at time of creation of a county debt, for a tax for its payment, a warrant for its payment out of the general fund for the second year thereafter is not "provision." *Id.*

**Diversion of funds.**—Under Const. art. 8, § 9, specifying limits of county levies for various purposes, the expenditure in any fund, whether directly or indirectly as by transferring funds raised for one purpose into another fund, creating an excess over the constitutional limitation on such fund, is unconstitutional. *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

Const. art. 8, § 9, authorizing a levy for roads and bridges and a levy for county purposes, does not permit the use of county purpose funds for roads and bridges of the county. *Id.*

**Art. 2244. [1540] [1517] Tax shall not be levied, except, etc.**

**Laws directory.**—Laws naming the time for the levy of taxes are merely directory, and legal taxes can be levied whenever the necessity arises. *Cadena v. State* (Civ. App.) 185 S. W. 367.

**Art. 2254. [1547c] May issue bonds for such bridge purposes.**

*Cited, Coleman-Fulton Pasture Co. v. Aransas County* (Civ. App.) 180 S. W. 312.

**Art. 2256. Stationery, etc., may contract for.**

**Purchase of typewriters.**—Authority to acquire new typewriters by purchase or exchange for county clerk's office is vested, if in any one, in commissioners' court under this article. *Sparks v. Kaufman County* (Civ. App.) 194 S. W. 605.

**Art. 2268a. Commissioners shall not make contracts in excess of \$2000 without submission to competition; exception.**—The Commissioner's Court of this State, shall make no contract calling for or requiring the expenditure or payment of Two Thousand (\$2000) dollars or more out of any fund or funds of any county, or subdivision of any county, without first submitting such proposed contract to competitive bids; notice of the time and place, when and where such contract will be let, shall be published in some newspaper published in said county or subdivision once a week for two weeks prior to the time set for letting said contract; or if there is no newspaper published either in said county or said subdivision, then notice of the letting of said contract shall be given by causing a notice thereof to be posted at the Court House door of such county for fourteen days prior to the time of letting such contract; provided that in case of public calamity, where it becomes necessary to act at once to appropriate money to relieve the necessity of the citizens or to preserve the property of the county, this provision may be waived; provided, that all contracts made by or with said court calling for or requiring the expenditure of any amount of money less than Two Thousand (\$2000) dollars and exceeding five hundred (\$500) dollars, shall be let by competitive bids at a regular term of court, except in case or urgent necessity or present calamity; provided, that the provisions of this Act shall not apply to any work done under direct supervision of the County Commissioners and paid for by the day. [Act March 30, 1917, ch. 141, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2268b. Contracts made without compliance with act void; injunction; repeal.**—A contract made by the Commissioner's Court without complying with the terms of this Act shall be void and shall not be enforceable in any court of this State, and the performance of same and the payment of any money thereunder may be enjoined by any citizen

of such county or subdivision. This Act shall not be construed so as to repeal any part of Title 29, Chapter 2, Revised Statutes of 1911, and shall be cumulative to said title and chapter. [Id. § 2.]

## CHAPTER THREE

### TERMS AND MINUTES OF THE COURT

Art.  
2274. Regular terms of the court.  
2275. Special terms of the court.

Art.  
2276. Minutes of the court.

**Article 2274. [1552] [1525] Regular terms of the court; more than one session each quarter not mandatory; adjournment.**

See *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

**Art. 2275. [1553] [1526] Special terms of the court.**

See *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

**Art. 2276. [1554] [1527] Minutes of the court.**

**In general.**—Under this article a contract for the transportation of road materials need not be in writing, provided it was made by the commissioners' court acting as a municipal body, but it can be proved only by the written proceedings of the court. *Marshall v. Simmons* (Civ. App.) 159 S. W. 89.

**In mandamus proceedings** against a county commissioner, ex officio road commissioner for his precinct, to compel him to open a second class road, a finding that the commissioners' court of the county made no order that the road be opened was justified, where no such order was shown by the minutes. *Rankin v. Noel* (Civ. App.) 185 S. W. 883.

**Sufficiency of minute entry.**—An entry of an order of the commissioners' court, made on April 8th, approving a written contract which recited that it was the reduction to writing of an oral contract made on March 3d, is sufficient to establish the existence of the oral contract by the records of the court. *Marshall v. Simmons* (Civ. App.) 159 S. W. 89.

Under this article, the fact that the tabulated returns of a stock law election were recorded in a book in which the result of all elections were recorded, and not in the minutes of the court, did not invalidate the election, since the minutes of the court need not necessarily be kept in one book. *Bishop v. State*, 167 S. W. 363, 74 Cr. R. 214.

**Failure to enter order.**—Though the clerk of the commissioners' court should fail to record the tabulated returns of a stock law election in the proper book, it would not invalidate the whole election, where every other essential was complied with, and there was no doubt that the election was carried. *Bishop v. State*, 167 S. W. 363, 74 Cr. R. 214.

Where, after an enlarged school district had been surveyed and the field notes filed, they were adopted and the order enlarging the district passed on by the commissioners' court, the proceedings were not void because the order was not formally entered on the court's minutes, as provided by this article. Where such order was inadvertently omitted from the court's minutes, the defect could be cured by a nunc pro tunc order. *Woods v. Eberling* (Civ. App.) 169 S. W. 932.

Contracts made by municipalities are valid and binding only when entered upon the minutes, except that where order of commissioners' court of county has been passed, omission of clerk to record it will not render it void. *Rankin v. Noel* (Civ. App.) 185 S. W. 883.

**Varying effect of by parol.**—In view of this article a contract between the county commissioners' court and a third person embraced in a written proposal and acceptance cannot be varied by parol. *Douglass v. Myrick* (Civ. App.) 159 S. W. 422.

## TITLE 41

## COURTS—JUSTICES'

Chap.

1. Election and qualification of justices.
2. Powers and jurisdiction.
3. Terms of the court.
4. Dockets, books and papers.
5. Venue.
6. Security for costs.
8. Process and service.

Chap.

9. Pleadings.
11. Appearance and trial.
13. The judgment.
14. New trials, etc.
15. Execution.
17. Appeal.
18. General provisions.

## CHAPTER ONE

## ELECTION AND QUALIFICATION OF JUSTICES

**Article 2283. [1560] [1533] Justices, election, bond and term of office.**

**Liability on bond—Unofficial acts.**—Where defendants paid their account to a justice of the peace, to whom a verified statement thereof was transferred for suit, they cannot recover against the justice's sureties, for defendants are discharged, if the payment was to the justice in his official capacity, and, if not, the sureties are not liable. *Bray-Robinson-Curry Woolen Mills v. W. F. Walker & Son* (Civ. App.) 165 S. W. 107.

In view of this article and under article 2322, a justice to whom a verified statement of an account was transferred for suit is not authorized to collect the account, and his collection is not an official act discharging the debtor. *Id.*

## CHAPTER TWO

## POWERS AND JURISDICTION

Art.

2291. Jurisdiction in civil cases.

Art.

2293. To punish contempts.

**Article 2291. [1568] [1539] Jurisdiction in civil cases.**

1. **In general.**—A satisfaction of a lessor's action for the possession of the property brought in the district court, or a satisfaction of his action of forcible detainer brought in the justice court, would be a satisfaction as to both remedies. *Hartzog v. Seeger Coal Co.* (Civ. App.) 163 S. W. 1055.

An action by a city against a railroad company for the penalty imposed by art. 1068, for failure to place its roadbed over a street in a proper condition for travel, is for a money judgment within the jurisdiction of a justice's court. *City of San Marcos v. International & G. N. Ry. Co.* (Civ. App.) 167 S. W. 292.

The jurisdiction of the justice court over the subjects committed to it by the Constitution is as general and exclusive as that of the district courts. *Chicago, R. I. & G. Ry. Co. v. Gladish* (Civ. App.) 175 S. W. 863.

Under Const. art. 5, §§ 16, 19, and Rev. St. 1911, arts. 1767, 2291, 6624, 6625, on appeal to county court in action against receiver of railroad, plaintiff held entitled to bring in purchaser of the railroad's property and franchises. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

2. **Pleading jurisdictional facts.**—Plaintiff's only pleading in a justice court being the citation, stating items of damages aggregating over \$200; it was without jurisdiction. *Texas & N. O. R. Co. v. Coleman* (Civ. App.) 185 S. W. 1053.

3. **Actions involving title to real property.**—An action for \$137 rent due from defendant, as plaintiff's tenant, is within the jurisdiction of the justice court; the rule stopping a tenant from disputing the title of his landlord rendering the question of title immaterial. *Standley v. Currey* (Civ. App.) 161 S. W. 416.

3½. — **Forcible entry and detainer.**—Jurisdiction of a forcible detainer suit is in the justice's court and not in the county court. *Benavides v. Benavides* (Civ. App.) 174 S. W. 293.

5. **Amount or value in controversy.**—Where the petition stated a cause of action for the recovery of \$200 delivered to defendant under an agreement that he should repay on demand, the jurisdiction of the justice court is not ousted by the general averment of \$500 for the defendant's refusal to pay. *Willett v. Herrin* (Civ. App.) 161 S. W. 26.

Suit to cancel a note for \$65 secured by a chattel mortgage on property valued at more than \$200 with plea of a former judgment on the note for \$76 and a reply seeking damages in the amount of such judgment held a suit for damages to the amount of

the judgment, within the original jurisdiction of the justice's court. *Edwards v. Dennington* (Civ. App.) 161 S. W. 929.

That the amount in controversy was only \$1.61 over \$200, the jurisdictional amount of a justice court, cannot be considered in order to give it jurisdiction of the action. *Wilson v. Ware* (Civ. App.) 166 S. W. 705.

Where the suit was for conversion of a soda fountain, value of which was pleaded at \$350, the justice court was without jurisdiction. *Jeans v. Liquid Carbonic Co.* (Civ. App.) 173 S. W. 643, judgment modified on rehearing 180 S. W. 634.

The amount demanded in the pleading fixed the amount in controversy so as to determine the jurisdiction of the court. *Chicago, R. I. & G. Ry. Co. v. Gladish* (Civ. App.) 175 S. W. 863.

Under arts. 2291 and 2391, amount claimed held to give jurisdiction to justice's court and county court on appeal, though judgments were in excess of \$200. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

A justice's court had jurisdiction of suit for conversion of soda fountain alleged to be worth \$350, where plaintiff alleged his damage to be only \$199.50, where by reason of his indebtedness to the defendant, plaintiff's damage, if any, was less than \$200. *Jeans v. Liquid Carbonic Co.* (Civ. App.) 180 S. W. 634, modifying judgment on rehearing 173 S. W. 643.

As a justice court has no jurisdiction of suits for the recovery of more than \$200 under Const. art. 5, § 19, where a suit was for exactly \$200, a judgment of the county court on appeal from justice court for the principal and a penalty and items exceeding that amount was invalid. *North American Ins. Co. v. Jenkins* (Civ. App.) 184 S. W. 307.

If suit primarily is for an amount within the jurisdiction of a justice's court, the court retains jurisdiction, although pending suit damages accrue beyond that amount. *Sulzberger & Sons Co. of America v. Hille* (Civ. App.) 187 S. W. 992.

Where citation, as contained in record, indicates that plaintiff's demand in a justice court action was less than \$200, the jurisdiction of the justice court is established. *Houston & T. C. R. Co. v. Derden* (Civ. App.) 194 S. W. 489.

6. — **Attachment and garnishment.**—Under arts. 7773 and 7778, the constable's appraisal of attached property claimed by a third person at more than \$200 is conclusive against the justice's jurisdiction. *Fuller, Hanna & Co. v. Rogers* (Civ. App.) 184 S. W. 322.

7. — **Enforcement of liens on personal property.**—In suits in a justice's court to foreclose a lien on personal property, the value of the property is the measure of the court's jurisdiction. *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657.

Justice court is without jurisdiction of a proceeding to enforce a laborer's lien on property of a value exceeding \$200, since value of property, and not value of claim, controls. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

8. — **Mortgage foreclosure.**—In absence of allegation in petition of value of property on which plaintiff in justice's court seeks to foreclose a chattel mortgage, jurisdiction of the court does not affirmatively appear. *City Nat. Bank of Watson* (Civ. App.) 178 S. W. 657.

A judgment of a justice, showing on its face that the value of property on which a chattel mortgage was foreclosed exceeded his jurisdiction, was void. *Parker v. Watt* (Civ. App.) 178 S. W. 718.

9. — **Interest, costs, and attorney's fees.**—Where plaintiff agreed with defendant to represent him in a suit for a certain sum, the receipt for a part of which contained a memorandum of the contract, which receipt was accepted by defendant, held, that the contract determined the sum payable within art. 4977, so that interest was recoverable under the contract, and was not a part of the amount in controversy affecting the jurisdiction of a justice's court. *Ewalt v. Holmes* (Civ. App.) 165 S. W. 39.

Where a justice's court had jurisdiction of a cause when filed, jurisdiction was not defeated by the accrual of interest thereon thereafter, but it could not render judgment beyond the amount of its jurisdiction. *Adair v. Stallings* (Civ. App.) 165 S. W. 140.

Where the principal and interest of the note sued on, when added to the 10 per cent. attorney's fee provided for in the note, amounted to \$201.61, a justice's court did not have jurisdiction in the action. *Wilson v. Ware* (Civ. App.) 166 S. W. 705.

Suit for conversion held to be without jurisdiction of the justice court, where damages and interest for conversion aggregated more than \$200. *Jeans v. Liquid Carbonic Co.* (Civ. App.) 173 S. W. 643, judgment modified on rehearing 180 S. W. 634.

In a suit wherein plaintiff filed no written pleadings and the citation showed that the suit was on an account for \$188.68, held, that the justice had jurisdiction though his docket, after statement that the suit was for \$188.68 with interest, contained the entry "attorney's fees — %." *Lucas v. Harrison* (Civ. App.) 182 S. W. 74.

11. — **Reduction of amount to give jurisdiction.**—Where defendant set up a counterclaim alleging several amounts, the total of which exceeded \$200, the counterclaim was beyond the jurisdiction of the justice, even though defendant prayed for a recovery of only \$200. *Willett v. Herrin* (Civ. App.) 161 S. W. 26.

Where the amount in controversy is in excess of the court's jurisdiction, a portion thereof cannot be remitted to bring the matter within the jurisdiction of the court. *Chicago, R. I. & G. Ry. Co. v. Gladish* (Civ. App.) 175 S. W. 863.

When the amount which the plaintiff is entitled to recover appears from his allegations to be a fixed sum, he will not be permitted to enter a fictitious credit for the sole purpose of giving jurisdiction. *Wells Fargo & Co. Express v. Crittenden* (Civ. App.) 189 S. W. 296.

18½. **Equitable jurisdiction—Injunction.**—A justice of the peace has no jurisdiction to issue writs of injunction. *Poe v. Ferguson* (Civ. App.) 168 S. W. 459.

19. **Judgment—Collateral attack.**—Judgment against owners of land in justice court, in favor of one who had supplied materials to contractors working on such land, held conclusive upon failure of the owners to appeal therefrom, and not open to collateral attack, as by having its enforcement enjoined in suit to enforce mechanics' liens by

the contractors against the owners and materialman. *Waples Painter Co. v. Ross* (Sup.) 176 S. W. 47, reversing judgment (Civ. App.) 141 S. W. 1027.

A justice's judgment foreclosing a laborer's lien cannot be collaterally attacked by parties or privies, the record not showing the value of the property on which the lien was sought, upon the ground that it exceeded the amount of the justice's jurisdiction. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

20. — **Presumption of jurisdiction.**—Upon collateral attack on a judgment of a domestic court it will, where the action was within the court's general jurisdiction, be presumed that the necessary jurisdictional facts existed, though they do not appear of record. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.

**Art. 2293. [1570] [1541] To punish for contempts.**

Cited, *Powell v. Stephenson* (Civ. App.) 189 S. W. 570.

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## CHAPTER THREE

### TERMS OF THE COURT

**Article 2299. [1576] [1547] Times and places of holding.**

**Necessity of designation.**—Under Const. art. 5, § 19, and Rev. St. 1911, arts. 2241, 2299, it is the duty of county commissioners on the organization of a justice's court to designate the time and place for holding the same, and failure to do so is fatal to the justice's jurisdiction, though it is not necessary to fix the time and place on the incoming of each new incumbent. *Edwards v. McGuire* (Civ. App.) 165 S. W. 477.

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## CHAPTER FOUR

### DOCKETS, BOOKS AND PAPERS

**Article 2302. [1579] [1550] Justice's docket.**

**Effect of docket entries.**—In a suit wherein plaintiff filed no written pleadings and the citation showed that the suit was on an account for \$188.68, held, that the justice had jurisdiction though his docket, after statement that the suit was for \$188.68 with interest, contained the entry "attorney's fees —%." *Lucas v. Harrison* (Civ. App.) 182 S. W. 74.

**Failure to enter pleadings.**—A failure to note the pleadings of the parties upon the docket cannot be taken advantage of to procure reversal of a judgment of the county court on appeal from the justice court. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 175 S. W. 749.

**Judgment as evidence of nature of action.**—In a suit to enjoin execution under a judgment of the county court, held that, under arts. 758, 759, 2302, 2327, 2396, judgment of justice court wherein suit was begun is not admissible as part of the record or pleading to show nature of the action. *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

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## CHAPTER FIVE

### VENUE

Art.		Art.	
2308.	Suits to be brought in the county of defendant's residence, except, etc.	2309.	Residence of single man.
		2312.	Where justice is disqualified.

**Article 2308. [1585] [1556] Suits to be brought in the county of defendant's residence, except, etc.**—Every suit in the court of a justice of the peace shall be commenced in the county and precinct in which the defendant, or one or more of the several defendants, resides, except in the following cases and such other cases as are or may be provided by law:

(1) Cases of forcible entry and detainer must be brought in the precinct where the premises, or a part thereof, are situated.

(2) Suits against executors, administrators, and guardians as such must be brought in the county in which such administration or guardianship is pending, and in the precinct in which the county seat is situated.

(3) Suits against counties must be brought in such county and in the precinct in which the county seat is situated.

In the following cases the suit may, at the plaintiff's option, be brought either in the county and precinct of the defendant's residence, or in that provided in each exception.

(4) Suits upon a contract in writing promising performance of any particular place, may be brought in the county and precinct in which such contract was to be performed, provided that in all suits to recover for labor actually performed, suit may be brought and maintained, where such labor is performed, whether the contract for same be oral or in writing.

(5) Suits for the recovery of rents may be brought in the county and precinct in which the rented premises, or a part thereof are situated.

(6) Suits for damages for torts may be brought in the county and precinct in which the injury was inflicted.

(7) Suits against transient persons may be brought in any county and precinct where such defendant is to be found.

(8) Suits against non-residents of the State, or persons whose residence is unknown, may be brought in the county and precinct where the plaintiff resides.

(9) Suits for the recovery of personal property may be brought in any county and precinct in which the property may be.

(10) Suits against private corporations, associations and joint stock companies may be brought in any county and precinct in which the cause of action or a part thereof arose, or in which such corporation, association or company has an agency or representative, or in which its principal office is situated.

(11) Suits against railroad and canal companies, or the owners of any line of mail stages or coaches, for any injury to person or property upon the road, canal or line of stages or coaches of the defendant, or upon any liability as a carrier, may be brought in any precinct through which the road, canal or line of stages or coaches may pass, or in any precinct where the route of such railroad, canal, stages or coaches may begin or terminate.

(12) Suits against fire, marine, or inland insurance companies may also be brought in any county and precinct in which any part of the insured property was situated; and suits against life and accident insurance companies or associations may also be brought in the county and precinct in which the persons insured, or any of them resided at the time of such death or injury.

(13) Suits against the owners of a steamboat or other vessel may be brought in any county or precinct where such steamboat or vessel may be found, or where the cause of action arose or the liability was contracted or accrued. In every suit commenced in a county or precinct in which the defendants or one of them may reside it shall be affirmatively shown in the citation or pleading (if any) that such suit comes within one of the exceptions named in this Act. [Act Aug. 17, 1876, p. 156, § 8; Act March 29, 1917, ch. 124, § 1.]

**Explanatory.**—The act amends art. 2308, ch. 5, title 41, Rev. Civ. St. 1911. The title of the act purports to amend said article "by adding thereto at the end of subdivision 4 thereof, 'Providing that in all suits to recover for labor performed or any kind of personal service rendered may, at the option of plaintiff, be brought and maintained where such labor is performed or personal service rendered,' and declaring an emergency." The last sentence of subdivision 13, beginning with the words "In every suit commenced," was added by the amendment, but the title of the act does not seem to be broad enough to cover it. The act took effect 90 days after March 21, 1917, date of adjournment.

Cited, *Thomas Goggan & Bros. v. Morrison* (Civ. App.) 163 S. W. 119; *Sublett v. Hurst* (Civ. App.) 164 S. W. 448.

**In general.**—Subsequent purchasers of property which had been mortgaged to secure a note payable in a county in which neither the maker nor the purchasers resided are entitled to be sued before a justice of the peace in the county of their residence, al-

though the maker may be sued in the other county, under this article. *Noble v. Broad* (Civ. App.) 167 S. W. 1.

In view of arts. 1903, 2308, articles 1831-1833 authorize the transfer, on defendant's plea of privilege, of a case pending in the justice court in one county, to such a court in another. *Dalhart Ice & Electric Co. v. Tinsley* (Civ. App.) 180 S. W. 619.

In suit against partnership on account, giving of check or any fact tending to show an alleged partner's interest in the business are merely evidentiary facts, going to question of liability, and do not destroy alleged partner's right to be sued in county of his residence, and are not competent to meet his plea of privilege. *Neal v. Barbee* (Civ. App.) 185 S. W. 1059.

**Contracts.**—Under subd. 4, held that, where feed was sold and the sellers attached drafts to the bill of lading, suit before a justice for shortage might be maintained in the county where the drafts were paid and the buyer acquired possession. *Harris v. Salvato* (Civ. App.) 175 S. W. 802.

Where a party elects to sue on a contract, rather than for his damages for fraud, trespass, or conversion in relation thereto, he waives the tort as a fact fixing the venue of his suit. *Neal v. Barbee* (Civ. App.) 185 S. W. 1059.

**Fraud.**—Under this article venue of action on itemized account for debt was properly changed to county of defendant's residence, though plaintiff charged fraud, conversion, and a swindle perpetrated upon him in another county by defendant; article 1830, subds. 7, 9, having no application. *Neal v. Barbee* (Civ. App.) 185 S. W. 1059.

**Jurisdiction.**—Waiver of objections to.—A defendant, in an action before a justice of the peace, who filed no plea of privilege until after judgment against him, and he had appealed to the county court, waived his right to be tried in the county of his residence. *Leventhal v. Hollamon* (Civ. App.) 165 S. W. 6.

**Plea of privilege.**—See *Anderson, Clayton & Co. v. Terry* (Civ. App.) 167 S. W. 1; and notes under arts. 1903, 1909.

#### Art. 2309. [1586] [1557] Residence of a single man.

Cited, *Gensberg v. Neely* (Civ. App.) 187 S. W. 247.

#### Art. 2312. [1589] [1560] Where justice is disqualified.

Not applicable to non-resident.—See *Dalhart Ice & Electric Co. v. Tinsley* (Civ. App.) 180 S. W. 619.

## CHAPTER SIX

### SECURITY FOR COSTS

**Article 2319. [1596] [1566] Rules of district courts, etc., apply as to security for costs.**

**Security for costs on defendant's appeal.**—A defendant appealing from an adverse judgment of justice's court held not entitled to compel plaintiff to give a cost bond. *Trinity County Lumber Co. v. Conner* (Civ. App.) 176 S. W. 911.

## CHAPTER EIGHT

### PROCESS AND SERVICE

**Art.**  
2322. Citation to be issued, when.

**Art.**  
2323. Citation shall contain, what.

#### Article 2322. [1599] [1569] Citation to be issued, when.

See *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

**Authority to make collections generally.**—In view of art. 2283, and under this article, a justice to whom a verified statement of an account was transferred for suit is not authorized to collect the account, and his collection is not an official act discharging the debtor. *Bray-Robinson-Curry Woolen Mills v. W. F. Walker & Son* (Civ. App.) 165 S. W. 107.

#### Art. 2323. [1600] [1570] Citation shall contain what.

**Requisites and sufficiency of citation.**—Under arts. 2322, 2326, held, that it affirmatively appeared that interest on the judgment only was sought, and that amount in controversy was within jurisdiction of justice's court. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

In justice court it is sufficient if the citation states the nature of the demand, under this article. *Vaughan Lumber Co. v. Bybee & Wood* (Civ. App.) 191 S. W. 827.

## CHAPTER NINE

## PLEADINGS

Art. 2326.	Pleadings oral but entered on docket.	Art. 2327.	Pleadings to be in writing and under oath.
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**Article 2326. [1603] [1573] Pleadings oral but entered on docket.**

**Pleadings in general.**—Pleadings are as essential to make an issue in the justice court as in a court of record. *Young Men's Christian Ass'n of Dallas v. Schow Bros.* (Civ. App.) 161 S. W. 931.

Pleadings in the justice court, and on appeal therefrom to the county court, may be oral. *Wertheimer v. Hargreaves Printing Co.* (Civ. App.) 180 S. W. 282.

Under this article, a pleading in justice court is sufficient if from all that is stated the court can ascertain what rights are asserted. *Texas Southeastern Ry. Co. v. Brown* (Civ. App.) 186 S. W. 273.

Under this article, pleadings need not, even if written, be so particular or full as in other courts. *Western Union Telegraph Co. v. Huffstutler* (Civ. App.) 188 S. W. 455.

In justice court cases, great informality of pleading is permissible. *Farmers' & Citizens' Sav. Bank v. Smith* (Civ. App.) 183 S. W. 1026.

In a justice court action, if from all that is stated orally or written, the court can ascertain what rights the plaintiff asserts or what defense the defendant interposes, the pleading is sufficient. *Vaughan Lumber Co. v. Bybee & Wood* (Civ. App.) 191 S. W. 827.

— **Petition or complaint.**—A petition held to state a cause of action on contract, and the claim, being for interest eo nomine and not as damages, does not oust the justice of jurisdiction. *Willett v. Herrin* (Civ. App.) 161 S. W. 26.

Under arts. 2322, 2326, held, that it affirmatively appeared that interest on the judgment only was sought, and that amount in controversy was within jurisdiction of justice's court. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133, 456.

An allegation by a plaintiff, suing on an insurance policy, that he had "duly performed all the conditions required of him by the terms of said policy," was sufficient in justice's court. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671.

Failure of petition in justice's court for loss of profit on resale contract due to failure to transmit prepaid message to allege the special damage does not render it demurrable; allegations of general damage being sufficient. *Western Union Telegraph Co. v. Huffstutler* (Civ. App.) 188 S. W. 455.

Since under this article justice court pleadings are oral, it is sufficient if the plaintiff lodges a claim or demand with the justice. *Vaughan Lumber Co. v. Bybee & Wood* (Civ. App.) 191 S. W. 827.

— **Conclusiveness of written pleading.**—When parties to action in justice court have filed written pleadings, issues are confined to those made by such pleadings, if no other pleadings are noted upon the docket. *Sharp v. Morgan* (Civ. App.) 192 S. W. 599.

**Docket entry of pleadings—Necessity and sufficiency.**—Where the notation of the pleadings of an action begun in justice court made on the docket in accordance with this article did not show whether the amount in controversy would give jurisdiction on an appeal from the county court, the Court of Civil Appeals may, under article 1593, inquire into the facts to ascertain whether it has jurisdiction. *A. J. Birdsong & Son v. Allen* (Civ. App.) 165 S. W. 46.

Pleadings in justice court, consisting of notation of demand on docket and citation, held sufficient. *Vaughan Lumber Co. v. Bybee & Wood* (Civ. App.) 191 S. W. 827.

**Art. 2327. [1604] [1574] Pleadings to be in writing and under oath.**

See art. 1903, as amended, relating to controverting of plea of privilege, including pleas in justice court.

**Judgment as evidence of nature of action.**—See *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

## CHAPTER ELEVEN

## APPEARANCE AND TRIAL

**Article 2330. [1607] [1577] Appearance day.**

**Setting aside judgment on appeal.**—Under this article, a judgment by default at first term after publication, whether void or voidable, will ordinarily be set aside on appeal. *Davenport v. Rutledge* (Civ. App.) 187 S. W. 983.



CHAPTER THIRTEEN

THE JUDGMENT

<p>Art. 2366. Judgment.</p> <p>2370. No judgment without citation, un- less.</p>	<p>Art. 2373. Same rules as govern district courts, etc.</p>
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**Article 2366. [1643] [1613] Judgment.**

**Void judgments.**—A judgment of a justice, showing on its face that the value of property on which a chattel mortgage was foreclosed exceeded his jurisdiction, was void. *Parker v. Watt* (Civ. App.) 178 S. W. 718.

Where a justice of the peace had jurisdiction of the parties and the subject-matter, his judgment is not void. *Vaughan Lumber Co. v. Bybee & Wood* (Civ. App.) 191 S. W. 827.

**Res judicata.**—Where a justice's judgment without jurisdiction adjudged against a lienor's right to a lien, and thereafter was corrected so as to state that the court had no jurisdiction to foreclose the alleged lien, the judgment as corrected was not res judicata of such issue. *Dickensheets v. Hudson* (Civ. App.) 167 S. W. 1097.

**Art. 2370. [1647] [1617] No judgment without citation, unless.**

Hartley's Dig. art. 1719, and Laws 1848, ch. 127, cited, *Mabee v. McDonald*, 107 Tex. 139, 175 S. W. 676.

**Art. 2373. [1650] [1620] Same rules as govern district courts, etc.**

**Amendment of judgment entry.**—Under arts. 2015, 2016, 2373, a justice of the peace could amend the entry of a judgment so as to show the disposition that was made of the cause as to two parties not mentioned therein, though an appeal was pending in the county court. *Thompson v. Field* (Civ. App.) 164 S. W. 1115.

CHAPTER FOURTEEN

NEW TRIALS, ETC.

<p>Art. 2374. Judgments by default, etc., may be set aside.</p> <p>2375. New trials may be granted.</p>	<p>Art. 2378. Where motion granted, cause con- tinued unless, etc.</p>
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**Article 2374. [1651] [1621] Judgments by default, etc., may be set aside.**

**In general.**—While a justice, under this article, has no authority to grant a new trial after ten days from the judgment, he can by article 2015, correct a mistake in the record of the judgment so as to make it speak the truth. *Dickensheets v. Hudson* (Civ. App.) 167 S. W. 1097.

A justice, under this article, has no authority to grant a new trial after ten days from the judgment. *Id.*

**Vacating judgment.**—Under this article, a default judgment cannot, after the expiration of ten days, be set aside by a justice of the peace. *Irwin v. Cunningham* (Civ. App.) 177 S. W. 986.

A justice having rightfully set aside a judgment by default, the case is properly before him for further proceedings. *Barton v. Jackson* (Civ. App.) 182 S. W. 365.

**Bill of review.**—Defendant, against whom a justice of the peace judgment had been rendered, held not to have exercised due diligence to sue out certiorari, and therefore not to be entitled to a bill of review. *Ferguson v. Sanders* (Civ. App.) 176 S. W. 782.

**Art. 2375. [1652] [1622] New trials may be granted.**

**Authority to set aside judgment.**—A justice's judgment being void, he can set it aside at any time; the statutes prescribing the conditions on which a justice may set aside a judgment and grant a new trial having no application. *Barton v. Jackson* (Civ. App.) 182 S. W. 365.

**Trial and judgment after setting aside former judgment.**—A justice could try the cause, and render judgment, at the term at which it properly declared a judgment rendered at the preceding term void, because sufficient time after the service had not elapsed. *Gulf, C. & S. F. Ry. Co. v. Wilshire* (Civ. App.) 178 S. W. 43.

**Art. 2378. [1655] [1625] Where motion granted, cause continued, unless, etc.**

Cited, *Irwin v. Cunningham* (Civ. App.) 177 S. W. 986.

## CHAPTER FIFTEEN

## EXECUTION

Art.  
2381. Execution.

Art.  
2384. Execution to issue after ten days.

**Article 2381. [1658] [1628] Execution.**

Validity as affected by designation of nature of writ.—That an execution on a justice's judgment to enforce a lien on attached land was called an order of sale did not affect its validity as an execution. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

**Art. 2384. [1661] [1631] Execution to issue after ten days.**

Cited, *Spaulding Mfg. Co. v. Blankenship* (Civ. App.) 191 S. W. 1167.

## CHAPTER SEVENTEEN

## APPEAL

Art.  
2391. Appeals may be taken.  
2392. Taken to district court, when.  
2393. Bond for appeal; appeal perfected.

Art.  
2395. When appeal perfected on affidavit.  
2396. Duty of justice in case of appeal.  
2397. Transcript, etc., to be transmitted to county court.

**Article 2391. [1668] [1638] Appeal may be taken. ◊**

Cited, *Harper v. Dawson* (Civ. App.) 167 S. W. 311; see, also, art. 1767 and notes.

In general.—In determining the jurisdiction of the county court upon an appeal from the justice's court, averments in plaintiff's supplemental petition, filed in answer to defendant's plea to the jurisdiction first filed in the county court, cannot be considered. *Standley v. Currey* (Civ. App.) 161 S. W. 416.

Injunction does not lie to restrain the enforcement of a void judgment of a justice, where the right of appeal has not expired. *Robinson v. Gibson* (Civ. App.) 168 S. W. 877.

Under arts. 2391 and 2393, the county court has no authority on appeal from a justice's court in absence of appeal bond. *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657.

On appeal to county court a plaintiff, by amending his pleadings, may enlarge the cause of action asserted in justice court, but cannot set up a new cause of action. *Dowell v. Rettig* (Civ. App.) 186 S. W. 281.

A judgment of county court upon the question of its jurisdiction of an appeal from justice court, although erroneous, is conclusive of that issue until set aside in a proper proceeding. *Farmer v. Witcher* (Civ. App.) 189 S. W. 293.

Final judgments.—When a judgment nunc pro tunc is entered by a justice of the peace, it becomes the final judgment of the court, and an appeal may be taken therefrom, and a revisal of the entire proceedings had. *Southwestern Land Corporation v. Neese* (Civ. App.) 161 S. W. 1090.

Where a judgment of a justice's court did not dispose of a plea in reconvention, the county court had no jurisdiction on appeal. *Anderson, Evans & Evans v. Smith* (Civ. App.) 167 S. W. 765.

A judgment in a justice court in favor of plaintiff, though it fails to expressly dispose of defendant's cross-action, or plea in reconvention, is yet a final judgment which will support an appeal. *Parker v. Emerson* (Civ. App.) 176 S. W. 146.

A judgment in a justice court in favor of plaintiff, though it failed to expressly dispose of the defendant's cross-action or plea in reconvention, held a "final judgment," which will support an appeal. *First Nat. Bank v. Herrell* (Civ. App.) 190 S. W. 797.

Amount or value in controversy.—The appellate jurisdiction of the county court cannot exceed in amount the jurisdiction of the justice court in appeals from the latter. *Houston & T. C. Ry. Co. v. Lewis* (Civ. App.) 185 S. W. 593; *Vicars v. Tharp* (Civ. App.) 174 S. W. 949; *St. Louis Southwestern Ry. Co. of Texas v. Berry & Slaughter* (Civ. App.) 177 S. W. 1187.

Where plaintiff in justice court claimed only \$152, an amendment on appeal claiming \$350 additional should have been stricken. *McKneely v. Beatty* (Civ. App.) 161 S. W. 18.

Where, in a suit by the assignee of wages, the debtor and the employer filed a counterclaim for \$90 usurious interest alleged to have been paid by the debtor to plaintiff, the counterclaim gave the county court jurisdiction on appeal, and its judgment for the employer was not subject to injunction, however erroneous. *Cotton v. Rhea*, 106 Tex. 220, 163 S. W. 2.

The county court has jurisdiction of an appeal from a justice's judgment for less than \$20, where the matter in controversy exceeds that amount. *Western Union Telegraph Co. v. Fricke & Boyd* (Civ. App.) 167 S. W. 6 (following *Brazoria County v. Calhoun*, 61 Tex. 223).

Where the set-off pleaded in a cross-action in justice's court was not within the jurisdiction of that court, the county court could not acquire jurisdiction thereof on appeal. *Dromgoole Bros. v. L. A. Epstein & Co.* (Civ. App.) 173 S. W. 1006.

Where, on appeal to the county court, the demand of plaintiff within the justice's

jurisdiction is by amendment increased beyond that amount, the county court is without jurisdiction. *Vicars v. Tharp* (Civ. App.) 174 S. W. 949.

The county court has jurisdiction of an appeal from the justice court involving \$94. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 175 S. W. 749.

Under arts. 2391, 2391L, amount claimed held to give jurisdiction to justice's court and county court on appeal, though judgments were in excess of \$200. *Freeman v. W. B. Walker & Sons* (Civ. App.) 175 S. W. 1133; *Id.*, 456.

Plaintiff filing a petition in county court on appeal from a justice's court may not remit part of the demand, authorizing recovery of more than \$200, to \$200. *St. Louis Southwestern Ry. Co. of Texas v. Berry & Slauter* (Civ. App.) 177 S. W. 1187.

The county court held not ousted of jurisdiction to render judgment for less than \$200 because after appeal from a justice the petition was amended to ask more because of accrual of interest pending the action. *Klabunde v. Vogt Hardware Co.* (Civ. App.) 182 S. W. 715.

As a justice court has no jurisdiction of suits for the recovery of more than \$200 under Const. art. 5, § 19, where a suit was for exactly \$200, a judgment of the county court on appeal from justice court for the principal and a penalty and items exceeding that amount was invalid. *North American Ins. Co. v. Jenkins* (Civ. App.) 134 S. W. 307.

Where interest from the time of accrual is claimed as damages, to ascertain whether the amount sued for does not exceed the jurisdiction of the trial court there must be added to the amount sued for the interest calculated to the time of filing the pleading. *Houston & T. C. Ry. Co. v. Lewis* (Civ. App.) 185 S. W. 593.

Where a case was removed from justice court to county court for trial *de novo*, and there the petition was amended and recovery exceeding the justice's jurisdiction was asked, the county court was without jurisdiction to render a judgment for the excess. *Id.*

The justice court being without jurisdiction, because of the aggregate amount of damages there pleaded as sustained exceeding \$200, the county court was without jurisdiction on appeal, though an amendment was there filed reducing the claim. *Texas & N. O. R. Co. v. Coleman* (Civ. App.) 185 S. W. 1053.

**Jurisdiction dependent on jurisdiction of justice court.**—Where case is appealed from justice court to county court, latter has no jurisdiction unless justice had jurisdiction. *Houston & T. C. R. Co. v. Patterson* (Civ. App.) 193 S. W. 691; *Willett v. Herrin* (Civ. App.) 161 S. W. 26; *St. Louis Southwestern Ry. Co. of Texas v. Berry & Slauter* (Civ. App.) 177 S. W. 1187.

**Right of appeal.**—Under this article, the plaintiff, who had requested a justice of the peace to render judgment for the defendant, may appeal from that judgment to the county court. *Cage v. King* (Civ. App.) 159 S. W. 174.

#### Art. 2392. [1669] Taken to district court, when.

**Effect of statute increasing jurisdiction of county courts pending appeal.**—Where Acts 34th Leg. c. 125, § 2, giving county courts of certain counties the civil jurisdiction of ordinary county courts, and repealing the act of Twenty-Third Legislature, took effect while an appeal from justice court was pending in district court, the jurisdiction of the district court terminated. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 183 S. W. 431.

**Art. 2393. [1670] [1639] Bond for appeal; appeal perfected.**—The party appealing, his agent or attorney, shall, within ten days from the date of the judgment, file with the justice a bond, with two or more good and sufficient sureties, to be approved by the justice, in double the amount of the judgment, payable to the appellee, conditioned that appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on appeal. When such bond has been filed with the justice, the appeal shall be held to be thereby perfected and all parties to said suit or to any suit so appealed shall make their appearance at the next term of court to which said case has been repealed without further notice. [Acts 1883, p. 91; Act March 23, 1915, ch. 113, § 1.]

**Explanatory.**—The act took effect 90 days after March 20, 1915, the date of adjournment. The act amends "article 2393, chapter 17, of the Acts of 1911" so as to read as above.

Cited, *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290; *Beverdorff v. Dienger* (Civ. App.) 174 S. W. 576.

**Bond on appeal—Necessity.**—Where plaintiffs' cause of action was dismissed and the only judgment against them was for costs, no bond is required to perfect an appeal to the county court; and hence a defect in the bond given was not ground for dismissal. *Willett v. Herrin* (Civ. App.) 161 S. W. 26.

Under arts. 2391 and 2393, the county court has no authority on appeal from a justice's court in absence of appeal bond. *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657.

Under this article, plaintiff, who was defeated in justice court and against whom judgment was rendered on defendant's counterclaim, must file the required bond in order to perfect his appeal to the county court. *Dupree v. Massey* (Civ. App.) 180 S. W. 668.

Where the appeal bond did not appear to have been filed or approved as provided under this article, held, that the county court has no jurisdiction over an appeal from justice court. *Texas & P. Ry. Co. v. Midland Mercantile Co.* (Civ. App.) 181 S. W. 270.

If an appellant did not file an appeal bond or affidavit in lieu thereof as required by

law, to take an appeal from a justice court to county court, county court never acquired jurisdiction of cause. *Dupree v. Massey* (Civ. App.) 192 S. W. 790.

Where county court did not acquire jurisdiction of an appeal from justice court because an appeal bond was not filed, property distrained in that suit should have been delivered to owner thereof, and its detention by constable was unlawful. *Id.*

— **Approval and filing.**—Under this article, an appeal is perfected when the bond is presented to the justice, and he promises to approve and file it, and his mere failure to indorse approval and file it does not affect its validity. *Galveston, H. & S. A. Ry. Co. v. Burris* (Civ. App.) 186 S. W. 381.

— **Form, requisites, and sufficiency.**—Where a justice received and promised to approve and file an appeal bond, the appeal was perfected under this article, whether the bond was in proper form or not, since the justice could have required one in proper form, and, even if he loses the bond, the appeal is nevertheless valid. *Galveston, H. & S. A. Ry. Co. v. Burris* (Civ. App.) 186 S. W. 381.

— **Effect of invalidity of judgment.**—Where proceedings in a justice's court were a nullity because in excess of jurisdiction, and afforded no ground for the county court's appellate jurisdiction, the filing of an appeal bond in the justice court did not avoid its judgment. *Parker v. Watt* (Civ. App.) 178 S. W. 718.

**Liability on bond.**—Where defendant, against whom judgment was recovered in justice court, appealed, and was then adjudicated a bankrupt and discharged, so that on appeal judgment went for him, sureties on his appeal bond were also protected. *Cisco Oil Mill v. Shepherd* (Civ. App.) 183 S. W. 13.

**Decisions reviewable.**—Under arts. 747, 2393, order of justice's court more than two years after judgment refusing to enter nunc pro tunc order setting aside the judgment, and granting new trial, held not appealable. *Southwestern Land Corporation v. Neese* (Civ. App.) 161 S. W. 1090.

#### Art. 2395. [1672] [1639b] When appeal perfected on affidavit.

**Effect of perfecting appeal.**—An appeal from a judgment of the justice's court annuls the judgment. *Southwestern Land Corporation v. Neese* (Civ. App.) 161 S. W. 1090.

An appeal from a justice to the county court abrogates the judgment of the justice's court and puts the case in the county court for trial de novo. *Harper v. Dawson* (Civ. App.) 167 S. W. 311.

Although, when an appeal from a justice to county court has been perfected, judgment of justice court is superseded, and is thereafter unenforceable, if case be one of which appellate court cannot take cognizance or if appeal was not legally perfected, judgment of the justice remains undisturbed. *Farmer v. Witcher* (Civ. App.) 189 S. W. 293.

Where county court failed to acquire jurisdiction of an appeal from justice court, and constable turned over distrained property to plaintiff and appellant in that suit, both constable and such plaintiff were guilty of a conversion and liable to owner of property for damages. *Dupree v. Massey* (Civ. App.) 192 S. W. 790.

Where county court did not acquire jurisdiction of an appeal from justice court, failure of constable to return property distrained in suit to owner was not excused by an order of county court directing sale of property as perishable, since, as county court acquired no jurisdiction in the cause, its acts ordering sale was void. *Id.*

#### Art. 2396. [1673] [1640] Duty of justice in case of appeal.

Cited, *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290; *Beck v. Arkansas Motor Co.* (Civ. App.) 180 S. W. 942; *Hernandez v. State* (Cr. App.) 183 S. W. 440; *Gilmore v. Waples* (Sup.) 188 S. W. 1037 (in dissenting opinion).

**Transcript—Amendment.**—A justice of the peace, in amending the entry of a judgment pending an appeal to show the way the cause was actually disposed of, had the right to certify an amended transcript to the county court, which properly refused to strike it out, or dismiss the appeal, because no final judgment was shown. *Thompson v. Field* (Civ. App.) 164 S. W. 1115.

— **Necessity of introducing in evidence.**—Transcript of proceedings in justice court on file with clerk of the county court held to give that court appellate jurisdiction without introducing transcript in evidence. *Grisham v. Connell Lumber Co.* (Civ. App.) 164 S. W. 1107.

— **Compelling transmission or perfecting of record.**—A suit in the county court for mandamus to compel a justice of the peace allowing judgment for \$79.65 to grant an appeal and to make a transcript of the case to the county court, if treated as a suit invoking the original jurisdiction of the county court, is not within its jurisdiction. *Knight v. Armstrong* (Civ. App.) 162 S. W. 448.

Where transcript of justice's court on appeal to county court showed what issues were joined and contained all entries on the docket, county court properly refused certiorari. *Trinity County Lumber Co. v. Conner* (Civ. App.) 176 S. W. 911.

**Judgment of justice as evidence of nature of action.**—See *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

#### Art. 2397. [1674] [1641] Transcript, etc., to be transmitted to county court.

Cited, *English v. Allen* (Civ. App.) 173 S. W. 1172.

**Dismissal.**—Under arts. 754, 2390, 2397, held, that motion to dismiss writ of certiorari for defect in bond was properly filed in the county court term succeeding that in which the justice had failed to file his transcript. *Beck v. Arkansas Motor Co.* (Civ. App.) 180 S. W. 942.

### DECISIONS RELATING TO APPEAL IN GENERAL

2. **Pleadings in justice's court—Evidence of.**—An amended petition in justice's court not praying for a foreclosure of a chattel mortgage nor withdrawing the original prayer

for foreclosure held not to show an abandonment by plaintiff of his claim to foreclosure, so as to confer jurisdiction on the court. *City Nat. Bank v. Watson* (Civ. App.) 178 S. W. 657.

4. **Pleadings on appeal.**—The strict rules of pleading in force in the district court are not applicable to an appeal from a justice to the county court. *McSpadden v. Eads* (Civ. App.) 163 S. W. 634.

Plaintiff's pleading in an action, originating in justice court, for injury to automobile, held to justify evidence of the item of damage for rent of a team during repair. *Wells Fargo & Co. Express v. Keeler* (Civ. App.) 173 S. W. 926.

Pleadings in the justice court, and on appeal therefrom to the county court, may be oral. *Wertheimer v. Hargreaves Printing Co.* (Civ. App.) 180 S. W. 282.

Where, in an action originating in a justice court, the pleadings were oral, the parties could orally replead in the county court, and the pleadings need not be as full as if the case originated in the county court. *Nacogdoches Compress Co. v. Hayter* (Civ. App.) 188 S. W. 506.

While technical rules of pleading do not apply on appeals from a justice court, yet where plaintiff states the issues, he is confined to his pleadings. *Quanah, A. & P. Ry. Co. v. Watkins* (Civ. App.) 193 S. W. 356.

5. — **Amendments in general.**—Either party to an appeal from a justice to the county court may plead new matter not presented to the justice, so long as a new cause of action is not set up by the amended pleading. *McSpadden v. Eads* (Civ. App.) 163 S. W. 634.

A plaintiff suing in justice's court may on appeal to the county court amend his petition so as to conform to the evidence at the trial. *Barnard & Moran v. Williams* (Civ. App.) 166 S. W. 910.

Where, on appeal from a judgment of the justice of the peace, the defendant claimed that the pleadings were insufficient, and plaintiff was allowed to amend merely to make explicit the ground of recovery, there was no prejudice to the defendant by reason of irregularities in pleading in the justice court. *Vaughan Lumber Co. v. Bybee & Wood* (Civ. App.) 191 S. W. 827.

6. — **New cause of action.**—See art. 759 and notes.

An amendment of the petition on appeal from a justice to the county court, which merely amplifies the statement of the cause of action alleged, is not objectionable as pleading a new cause of action. *McSpadden v. Eads* (Civ. App.) 163 S. W. 634.

It merely appearing that there was an amendment of the petition, in the district court on appeal from a justice, to meet a special exception, of the particular train killing plaintiff's cow, and the time of day of the killing not being alleged, it cannot be said the amendment was equivalent to bringing a new action, on the theory of the original petition stating no cause of action. *Southern Kansas Ry. Co. of Texas v. Crutchfield* (Civ. App.) 165 S. W. 551.

Where the amended account, filed in the county court on appeal from a justice's judgment, only amplified and enlarged the grounds of negligence originally alleged as a ground for recovery, and the county court determined that all the matters presented by the amended account had been orally pleaded in justice's court, refusal to strike out the amended account was proper. *Texas & N. O. R. Co. v. Cook* (Civ. App.) 167 S. W. 158.

On appeal from a judgment of a justice for services rendered at an agreed compensation, an amendment alleging employment without an agreed compensation sets up a new cause of action, contrary to art. 759. *Missouri, K. & T. Ry. Co. of Texas v. Ryan* (Civ. App.) 170 S. W. 858.

That an amendment of pleadings on appeal from a justice, which changed the cause of action, did not surprise the defendant does not authorize the Court of Appeals to disregard the statutory rule against such amendment. *Id.*

On appeal to county court a plaintiff, by amending his pleadings, may enlarge the cause of action asserted in justice court, but cannot set up a new cause of action. *Dowell v. Rettig* (Civ. App.) 186 S. W. 281.

On appeal by plaintiff from justice court, an amendment to his complaint alleging false and malicious defense in justice court entitling him to additional damages is demurrable as the assertion of a new cause of action. *Id.*

Where the original cause of action was on contract of a carrier to transport oats between two points, on appeal to the county court after judgment of the justice court for plaintiffs, an amended petition showing a second contract for shipment between the original destination and a third point set up a new cause. *Missouri, K. & T. Ry. Co. of Texas v. Wilson* (Civ. App.) 186 S. W. 432.

7. — **Names of parties.**—A railroad company appealing to the county court from an adverse judgment may amend its pleading and allege that at the time of injuries its railroad was operated by a receiver. *Ft. Worth & R. G. Ry. Co. v. Ballou* (Civ. App.) 174 S. W. 337.

9. — **New defenses.**—On appeal to the county court held, that plaintiffs could plead as defense to cross-action for breach of warranty, settlement of the controversy as to breach of warranty by arbitration, though such defense was not presented in the justice court. *Holcomb v. Blankenship* (Civ. App.) 180 S. W. 918.

12. — **Demurrers or exceptions on appeal.**—A petition, in an action in justice's court, which states a cause of action on a written contract and in addition thereto a cause of action based on a subsequent oral contract, is not subject to exceptions in the county court on appeal. *Barnard & Moran v. Williams* (Civ. App.) 166 S. W. 910.

13. **Evidence.**—On the trial of a case in the county court on appeal from a justice of the peace, the fact that judgment was rendered by the justice for plaintiff was not admissible. *Kelley v. Fain* (Civ. App.) 168 S. W. 869.

In an action for the conversion of a soda fountain, the reasonable value of which was alleged to be \$350, evidence of its actual or intrinsic value was admissible on appeal from a justice court. *Jeans v. Liquid Carbonic Co.* (Civ. App.) 180 S. W. 634, modifying judgment on rehearing 173 S. W. 643.

15. **Dismissal on appeal.**—Where an appeal bond did not vacate a void justice's judgment, and the county court had no appellate jurisdiction, its order would be construed merely as a dismissal or a striking from the docket of the appeal as such. *Parker v. Watt* (Civ. App.) 178 S. W. 718.

19. **Dismissal of appeal—Effect of dismissal.**—Where the county court dismissed an appeal from a justice because no final judgment had been rendered, the dismissal left the case in the justice's court, and he could proceed to trial thereof. *Harper v. Dawson* (Civ. App.) 167 S. W. 311.

23. **Harmless or immaterial error.**—Where defendant's counterclaim was beyond the jurisdiction, defendant cannot complain that the county court improperly allowed plaintiffs to interpose a defense thereto not pleaded in the justice court. *Willett v. Herin* (Civ. App.) 161 S. W. 26.

26. **Determination of cause on appeal.**—Where judgment is rendered on appeal from the justice of the peace against the appellant, it may be also rendered against the sureties on the appeal bond. *Trinity & B. V. Ry. Co. v. Voss* (Civ. App.) 160 S. W. 663.

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## CHAPTER EIGHTEEN

### GENERAL PROVISIONS

#### Article 2399. [1676] [1643] Duty of justice on service of writ of certiorari.

**Motion to dismiss.**—Under arts. 754, 2399, 2397, held, that motion to dismiss writ of certiorari for defect in bond was properly filed in the county court term succeeding that in which the justice had failed to file his transcript. *Beck v. Arkansas Motor Co.* (Civ. App.) 180 S. W. 942.

## TITLE 44

## DEPOSITORIES

Chap.

1. State depositories.

Chap.

2. County depositories.

## CHAPTER ONE

## STATE DEPOSITORIES

**Article 2425.** Deposit of bonds to secure state deposits; value; surety bond in lieu of deposit of securities; personal sureties; suit on bond; liquidated damages.—The State Treasurer shall also require the deposit as collateral security for such deposit required, United States, state, county, independent school district, common school district, and road improvement district, or municipal bonds, in an amount equal to the sum deposited with and received by each such bank or banking institution, which depository shall not be required, however, to receive on deposits more than fifty thousand dollars at any one time; but before any State, county, independent school district, common school district, road improvement district, or municipal bonds shall be received as collateral security in such cases, they must be registered with the Comptroller and approved by the Attorney General of the State of Texas, under the same rules and regulations as are now required for bonds in which the permanent school funds of the State are to be invested; provided, that the State Treasurer may accept such State, county, independent school district, common school district, road improvement district, or municipal bonds at their reasonable market value, said market value to be determined by the State Treasurer; and, provided, further, that the State Treasurer shall not accept any such bonds in which the permanent school fund of the State cannot be invested under existing laws.

Provided, however, that deposits in State depositories may be secured by bond executed by the depository bank in favor of the State Treasurer and his successors in office, for the use and benefit of the State of Texas, conditioned that the depository will pay over all funds due, or to become due, the State under the depository law, and in all respects comply with said law; such bond to be in form drawn by the Attorney General, and shall be due and performable in Travis County, Texas; it shall be in the usual form of such instruments and embrace within its terms the obligation imposed by law upon State depositories and the law governing State depositories, whether expressed in said bond or not, shall nevertheless become and be considered a part of the obligation.

Said bond shall be signed as surety by not less than one surety company, chartered under the laws of Texas, or having a permit to transact business under the laws of Texas. By "surety company" is meant a corporation having authority to become a surety on bonds of this character. Any one surety company shall not become a surety on the bond or bonds of any one depository for any bond or bonds aggregating a larger amount than ten per cent. of the paid-up capital and surplus of such surety company.

If any such bond or bonds be in proper form, in a company shown to be authorized to transact such business in Texas, either as a domestic or foreign company, and shown to be solvent, then the State Treasurer may approve the same and designate the applicant giving the same as a State depository.

It is further provided, however, that the aforescribed bond may be made by not less than three personal sureties, instead of a surety company or companies; and where such bond is made by personal sureties they shall own unencumbered real estate, other than city property, in the county in which such proposed depository is located of not less than twice the value of the amount of the bond. If a bond is tendered with such personal sureties there shall be tendered therewith full and sufficient proof that such personal sureties have the kind, character, quantity and value of real estate stated aforesaid.

In the event it should be necessary to bring suit on any bond given under this Act, the State shall recover in each and every instance, in addition to the amount found to be due thereon, an additional amount of ten per cent. thereof, as liquidated damages. [Acts 1905, p. 388, § 6; Acts 1911, ch. 3, § 1; Acts 1911, 1st C. S. ch. 15, § 1; Acts 1913, p. 330, § 1; Act March 1, 1915, ch. 30, § 1.]

**Explanatory.**—Acts 1915, ch. 30, § 1, amends sec. 1 of ch. 15, general laws, first called session, 32nd Leg., approved Aug. 31, 1911, amending sec. 6, ch. 3, general laws, regular session, 32nd Leg., approved Feb. 2, 1911. Sec. 6 of ch. 3, above referred to, amended sec. 6 of ch. 164, general laws, regular session, 29th Leg., approved May 1, 1905, which latter section was carried into the revision of 1911 as art. 2425. Art. 2425 of the Revised Civ. St. was amended by Acts 1913, p. 330, § 1.

## CHAPTER TWO

### COUNTY DEPOSITORIES

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| <p><b>Art.</b><br/>2440. Commissioners' court to receive proposals from banks; advertisement.</p> <p>2441. Bids when and how presented; to state what; deposit; failure to comply with bid.</p> <p>2442. Bids to be opened when, etc.; award; interest how computed and paid; disposition of proceeds; return of deposits.</p> <p>2443. Bond of depository; surety company; substitute security; venue of suits.</p> | <p><b>Art.</b><br/>2443a. Additional or special bond; failure to furnish; substitution of bonds.</p> <p>2444. Order designating depository; period; transfer of funds; penalty; deposits by tax collectors; interest; liability on bond of depository; effect of deposit of funds; what are "county funds."</p> <p>2445. If no bids, etc., funds deposited where; interest; bond.</p> |
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**Article 2440. Commissioners' Court to receive proposals from banks; advertisement.**—The commissioners' court of each county in this State is authorized and required at the February term thereof, next following each general election to receive proposals from any banking corporation, association, or individual banker in such county that may desire to be selected as the depository of the funds of such county. Notice that such bids will be received shall be published by and over the name of the county judge, once each week for at least twenty days before commencement of such terms, in some newspaper published in said county; and if no newspaper be published therein, then in any newspaper published in the nearest county; and, in addition thereto, notice shall be published by posting same at the courthouse door of said county. [Acts 1905, p. 392; Acts 1907, p. 208, § 20; Act Feb. 12, 1917, ch. 11, § 1.]

**Explanatory.**—The act amends arts. 2440 to 2445, inclusive, and adds art. 2443a. Became a law Feb. 12, 1917.

**Art. 2441. Bids when and how presented; to state what; deposit; failure to comply with bid.**—Any banking corporation, association or individual banker in such county desiring to bid, shall deliver to the county judge, on or before the first day of the term of the commissioners' court at which the selection of a depository is to be made, a sealed proposal, stating the rate of interest that said banking corporation, association, or individual banker and deposit offers to pay on the funds of the county for the term between the date of such bid and the next regular time for the selection of a depository. Said bid shall be accompanied by a certi-



fied check for not less than one-half of one per cent. of the county revenue of the preceding year as a guarantee of the good faith on the part of the bidder, and that, if his bid should be accepted, he will enter into the bond hereinafter provided; and upon the failure of the banking corporation, association or individual banker in such county that may be selected as such depository, to give the bond required by law, the amount of such certified check shall go to the county as liquidated damages, and the county judge shall readvertise for bids. [Acts 1905, p. 392, § 21; Act Feb. 12, 1917, ch. 4, § 1.]

See note under art. 2440.

**Art. 2442. Bids to be opened when; award of contract; interest how computed and paid; disposition of proceeds; return of deposits.**—It shall be the duty of the commissioners' court at 10 o'clock a. m., on the first day of each term, at which, by Article 2440, bids are required to be received, to publicly open such bids and cause each bid to be entered upon the minutes of the court, and to select as the depository of all the funds of the county the banking corporation, association or individual banker offering to pay the largest rate of interest per annum for said funds; provided, the commissioners' court may reject any and all bids. The interest upon such county funds shall be computed upon the daily balances to the credit of such county with such depository, and shall be payable to the county treasurer monthly, and shall be placed to the credit of the jury fund or to such funds as the commissioners' court may direct. When selection of a depository has been made, the checks of bidders whose bids have been rejected shall be immediately returned. The check of the bidder whose bid is accepted shall be returned when his bond is filed and approved by the commissioners' court, and not until such bond is filed and approved. [Acts 1905, p. 392, § 22; Act Feb. 12, 1917, ch. 11, § 1.]

See note under art. 2440.

**Art. 2443. Bond of depository; surety company; substitute security; venue of suits.**—Within five days after the selection of such depository, it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds, payable to the county judge and his successors in office, to be approved by the commissioners' court of said county, and filed in the office of the county clerk of said county, with not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond (or of as great value as the amount of all of said bonds when more than one bond); and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made; provided, that nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. And provided further, that the commissioners' court may accept in lieu of such real estate or surety company security, bonds of the United States, or of the State of Texas, or of any county, city, town or independent school district in the State, which shall be deposited as the commissioners' court may direct, the penalty of said bond or bonds not to be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depository by the county treasurer of the county and that said county funds shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected. [Acts 1905, p. 393; Acts 1909, p. 165, § 23; Act Feb. 12, 1917, ch. 11, § 1.]

See note under art. 2440.

**Art. 2443a. Additional or special bond; failure to furnish; substitution of bonds.**—Whenever, after the creation of a county depository as this chapter provided, there shall accrue to the county or any subdivision thereof, any funds or moneys from the sale of bonds or otherwise, the county commissioners' court of such county at its first meeting after such special funds shall have come into the treasury, or depository of such county, or so soon thereafter as may be practicable, may make written demand upon the duly accredited and established depository of the county for a special and additional bond as such depository in a sum equal to the whole amount of such special fund, to be kept in force so long as such fund remains in such depository, provided that such extra or special bond may be canceled and a new bond contemporaneously substituted therefor as such special fund may have been reduced, provided that such special bond shall at all times be sufficient in amount to cover such special fund then on hand, and provided that upon the failure of such depository to furnish such additional bond within thirty days from the date of such demand, the county commissioners' court may cause such special funds to be withdrawn upon the drafts of the county treasurer from such depository, and cause the same to be deposited in some solvent national bank or state bank whose combined capital stock and surplus is in excess of such special fund, and to leave the same or so much thereof as may not have been expended with such National bank or State bank of last deposit, until such time that such county depository may have filed with the county commissioners' court the required additional bond, when such special fund or so much thereof as shall not have been expended shall be forthwith returned to and deposited with such county depository; provided that the requiring of such additional or special bond shall be optional with such county commissioners' court; provided that any depository bond made under the provisions of this Act may be substituted for any prior existing depository bond at the time in operation or existence wherever the same may be agreeably done by and between such depository and the securities on such other existing depository bond. [Act Feb. 12, 1917, ch. 11, § 2.]

**Explanatory.**—The act provides "that there be added to article 2443 article 2443a," to read as above.

**Art. 2444. Order designating depository; period; transfer of funds; penalty; deposits by tax collectors; interest; liability on bond of depository; effect of deposit of funds; what are "county funds."**—As soon as said bond be given and approved by the commissioners' court, and the State Comptroller of Public Accounts, an order shall be made and entered upon the minutes of said court designating such banking corporation, association, or individual banker, as a depository of the funds of said county until sixty days after the time fixed for the next selection of a depository; and, thereupon, it shall be the duty of the county treasurer of said county, immediately upon the making of such order, to transfer to said depository all the funds belonging to said county, as well as all funds belonging to any district or other municipal subdivision thereof not selecting its own depository, and immediately upon the receipt of any money thereafter, to deposit the same with said depository to the credit of said county, district and municipalities; and, for each and every failure to make such deposit, the county treasurer shall be liable to said depository for ten per cent, upon the amount not so deposited, to be recovered by civil action against such treasurer and the sureties on his official bond in any court of competent jurisdiction in the county. And thereupon, it shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository or depositories, as soon as collected, pending the preparation of his report of such collections and settlement thereon, which shall bear

interest on daily balances at the same rate as such depository or depositories have undertaken to pay for the use of county funds, and the interest accruing thereon shall be apportioned by the tax collector to the various funds earning the same. The bond of such county depository or depositories shall stand as security for all such funds. If the tax collector of such county shall fail or refuse to deposit tax money collected as herein required, he shall be liable to such depository or depositories for ten per cent upon the amount not so deposited and shall in addition be liable to the State and county and its various districts and other municipal subdivisions for all sums which would have been earned had this provision been complied with, which interest may be recovered in a suit by the State.

Upon such funds being deposited as herein required the tax collector and sureties on his bonds shall thereafter be relieved of responsibility for its safe-keeping. All moneys subject to the control of the county treasurer or payable on his order belonging to districts or other municipal subdivisions, selecting no depository are hereby declared to be "county funds" within the meaning of this chapter and shall be deposited in accordance with its requirements and shall be considered in fixing the amount of the bond of such depository. [Acts 1905, p. 393, § 24; Act Feb. 12, 1917, ch. 11, § 3.]

See note under art. 2440.

**Art. 2445. If no bids, etc., funds deposited, where; interest; bond.**—If for any reason there shall be submitted no proposals by any banking corporation, association or individual banker to act as county depository, or in case no bid for the entire amount of the county funds shall be made, or in case all proposals made shall be declined, then in any such case the commissioners' court shall have the power, and it shall be their duty, to deposit the funds of the county with any one or more banking corporation, association or individual banker, in the county or in adjoining counties, in such sums and amounts and for such periods of time as may be deemed advisable by the court, and at the such rate of interest, not less than one and one-half per cent per annum, as may be agreed upon by the commissioners' court and the banker or banking concern receiving the deposit, interest to be computed upon daily balances due the county treasurer; and any banker or banking concern receiving deposits under this article shall execute a bond in the manner and form provided for depositories of all the funds of the county, with all the conditions provided for same, the penalty of said bonds to be not less than the total amount of county funds to be deposited with such banker or banking concern. [Acts 1905, p. 393, § 25; Act Feb. 12, 1917, ch. 11, § 3.]

See note under art. 2440.

## TITLE 45

## DESCENT AND DISTRIBUTION

<p>Art. 2461. Where intestate leaves no husband or wife. 2462. Where intestate leaves husband or wife. 2467. Advancement brought into hotchpotch.</p>	<p>Art. 2468. Per capita and per stirpes. 2469. Rule as to community estate. 2471. Jus accrescendi abolished. 2473. Bastards inherit from mother.</p>
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**Article 2461. [1688] [1645] Where intestate leaves no husband or wife.**

See *Yates v. Craddock* (Civ. App.) 184 S. W. 276.  
Cited, *Baker v. Stephenson* (Civ. App.) 174 S. W. 970.

**Inheritable estate.**—An “equity of redemption” is an interest in the land which will descend to the heir. *Hawkins v. Stiles* (Civ. App.) 158 S. W. 1011.

**Art. 2462. [1689] [1646] Where intestate leaves husband or wife.**  
Cited, *Allen v. Allen* (Civ. App.) 158 S. W. 1049.

**Art. 2467. [1694] [1651] Advancements brought into hotchpotch.**

**Advancement.**—Deed from father and mother to daughter, reciting that land conveyed was part of the daughter’s interest as an heir, held an advancement in spite of formal recital of consideration. *Lindley v. Lindley* (Civ. App.) 178 S. W. 782.

**Distribution before death held an advancement precluding plaintiff, heir of her mother, from sharing in other property belonging to the mother.** *Teal v. Lakey* (Civ. App.) 181 S. W. 759.

In a deed conveying the fee simple title to an heir of grantor, the recital of consideration of cash paid, and also that grantee’s stepdaughter should receive the same interest in land as his own children, was not contractual, and for that reason conclusive against another heir of grantor of the fact that the conveyance was not an advancement within this article. *Delano v. Delano* (Civ. App.) 189 S. W. 972.

**Art. 2468. [1695] [1652] Per capita and per stirpes.**

**Per capita.**—A devise to wife of life estate with power of disposition and division of remainder, “if any,” into moieties for his “heirs” and her “heirs,” referred to “heirs” living at wife’s death, being a contingent remainder, and distribution under this article, to be per capita. *Craig v. McFadden* (Civ. App.) 191 S. W. 203.

**Art. 2469. [1696] [1653] Rule as to community estate.**

Cited, *Allen v. Allen* (Civ. App.) 158 S. W. 1049.

**Rights of children or heirs.**—In view of arts. 1, 2, 5, relating to the adoption of children and giving the adopted child all the rights and privileges in law and equity of a legal heir, etc., held that the children of an adopted child may take the same as natural children under this article, providing that upon the death of either spouse intestate, the community property shall go one-half to the survivor and one-half to surviving children or their descendants. *Harle v. Harle* (Civ. App.) 166 S. W. 674.

Under arts. 2469, 2473, an illegitimate child of a married woman, her only surviving issue, inherits his mother’s share of community property. *Lee v. Frater* (Civ. App.) 185 S. W. 325.

**Rights of survivor.**—As to community property, the title to which is cast on survivor by this article, the surviving widow is not an “heir” within article 3690, relating to testimony as to transactions with persons since deceased, and hence in an action against the widow to declare a trust in favor of plaintiffs as against an absolute deed to the deceased husband, both parties may testify. *Briggs v. McBride* (Civ. App.) 190 S. W. 1123.

**Art. 2471. [1698] [1655] Jus accrescendi abolished.**

Cited, *Hagood v. Hagood* (Civ. App.) 187 S. W. 228 (in dissenting opinion).

**Art. 2473. [1700] [1657] Bastards inherit from mother.**

**Inheritance from mother.**—Under arts. 2469, 2473, an illegitimate child of a married woman, her only surviving issue, inherits his mother’s share of community property. *Lee v. Frater* (Civ. App.) 185 S. W. 325.

**Inheritance as between bastard children of same mother.**—Under this article children of the same mother inherit from each other without regard to whether their parents were legally married. *Perkins v. Perkins* (Civ. App.) 166 S. W. 915; *Yates v. Craddock* (Civ. App.) 184 S. W. 276.

## TITLE 47

## DRAINAGE

Chap.

1. Drainage by counties, separately or co-operating, assessments.
2. Drainage by counties, separately—Taxation.

Chap.

3. Drainage by districts, included in one or more counties—Bonds.
4. Drainage by districts, one or more in each county—Bonds.
5. Dissolution of drainage districts.

## CHAPTER ONE

## DRAINAGE BY COUNTIES, SEPARATELY, OR CO-OPERATING, ASSESSMENTS

**Article 2477. Commissioners' court authorized to construct drains, etc.**

**Constitutionality.**—As Const. art. 3, § 52, merely secures to the people of a drainage district the right to vote on whether to issue bonds, Vernon's Sayles' Ann. Civ. St. 1914, arts. 2477-2625r, prescribing the method of issuing drainage bonds, are not invalid, a vote being provided for. *David v. Timon* (Civ. App.) 183 S. W. 88.

## CHAPTER TWO

## DRAINAGE BY COUNTIES, SEPARATELY—TAXATION

**Article 2511. Commissioners' court authorized to construct drains, etc., within any of the counties of the state.**

**Constitutionality.**—As Const. art. 3, § 52, merely secures to the people of a drainage district the right to vote on whether to issue bonds, Vernon's Sayles' Ann. Civ. St. 1914, arts. 2477-2625r, prescribing the method of issuing drainage bonds, are not invalid, a vote being provided for. *David v. Timon* (Civ. App.) 183 S. W. 88.

## CHAPTER THREE

## DRAINAGE BY DISTRICTS, INCLUDED IN ONE OR MORE COUNTIES—BONDS

Art.

2542. County commissioners' court may establish drainage districts, to be included in one or more counties; incidental powers; election for bonds.

Art.

2561. Specifications for bids; advertisement; contract.

**Article 2542. County commissioners' court may establish drainage districts, to be included in one or more counties; incidental powers; election for bonds.**

**Constitutionality.**—Const. art. 3, § 52, relating to creation of drainage districts, held not to invalidate a statute empowering the commissioners' court to issue drainage district bonds and levy taxes when authorized by the voters of the district. *Holt v. State* (Civ. App.) 176 S. W. 743.

As Const. art. 3, § 52, merely secures to the people of a drainage district the right to vote on whether to issue bonds, Vernon's Sayles' Ann. Civ. St. 1914, arts. 2477-2625r, prescribing the method of issuing drainage bonds, are not invalid, a vote being provided for. *David v. Timon* (Civ. App.) 183 S. W. 88.

**Art. 2561. Specifications for bids; advertisement; contract.**

**Time of execution of contract.**—Although a drainage ditch was completed before execution of a construction contract calling for a complete drainage system, the drainage district obtaining the benefit of such ditch is liable to the contractor where the contract provided that its value should be estimated by the engineers. *San Benito Cameron County Drainage Dist. v. Farmers' State Guaranty Bank* (Civ. App.) 192 S. W. 1145.

## CHAPTER FOUR

DRAINAGE BY DISTRICTS, ONE OR MORE IN EACH COUNTY  
—BONDS

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| <p>Art.<br/>2567. Drainage districts established, how; scope; may make improvements; bonds for.</p> <p>2568. Petition for drainage district, requisites; notice; fees.</p> <p>2569. Hearing of petition; contest; exclusive and final jurisdiction of commissioners' court over subject matter, except, etc.</p> <p>2570. Findings of commissioners' court, and record of same.</p> <p>2571. If finding for petitioners, civil engineer appointed; assistants; pay.</p> <p>2573. Survey and location of canals, drains, etc.; designation of streams, etc.; estimates; report to commissioners.</p> <p>2576. Hearing before county commissioners; notice; objections.</p> <p>2577. Action of court on report.</p> <p>2578. Election to be ordered after approval of engineer's report.</p> <p>2580. Regulations for holding elections.</p> <p>2581. Same subject.</p> <p>2589. Drainage commissioners may employ counsel, etc.</p> <p>2590. Right of eminent domain; outlets beyond boundary, etc.</p> | <p>Art.<br/>2595. Drainage bonds; order for issuance; amount.</p> <p>2596. Bonds; validation of bonds issued under former acts; issuance of bonds not sold.</p> <p>2597a. No suit contesting validity of district or bonds, except, etc.; invalidity of this not to affect other provisions.</p> <p>2600. Sale of bonds, and disposition of proceeds; issuance of unsold bonds at discount.</p> <p>2601. Bond of county judge before sale; compensation.</p> <p>2602. Construction and maintenance fund; interest and sinking fund; expenses how paid; defeat of proposition affecting payment.</p> <p>2603. Tax for interest, sinking fund, and expenses; reports and estimates; sale of remaining bonds; readjustment of funds; investment of sinking fund.</p> <p>2603a. Assessment, equalization, and collection of taxes; lien; when due; penalty.</p> <p>2612. Contracts, how made.</p> |
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**Article 2567. Drainage districts established, how; scope; may make improvements; bonds for.**

**Constitutionality.**—As Const. art. 3, § 52, merely secures to the people of a drainage district the right to vote on whether to issue bonds, Vernon's Sayles' Ann. Civ. St. 1914, arts. 2477-2625r, prescribing the method of issuing drainage bonds, are not invalid, a vote being provided for. *David v. Timon* (Civ. App.) 183 S. W. 88.

**Purposes of creation.**—A statute, providing for the creation of drainage districts, authorizes the creation of a district to straighten and develop streams and construct a levee. *Holt v. State* (Civ. App.) 176 S. W. 743.

**Territory which may be included.**—Const. art. 3, § 52, providing for drainage districts, authorizes the creation of a drainage district out of any defined territory. *Holt v. State* (Civ. App.) 176 S. W. 743.

**Art. 2568. Petition for drainage district; requisites; notice; fees.**

**Contest of validity of established district.**—In a contest of a bond election held under arts. 2580, 2581, the validity of the established drainage district under articles 2568-2571, 2573, 2576, 2577, cannot be questioned. *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2569. Hearing of petition; contest; exclusive and final jurisdiction of commissioners' court over subject matter, except, etc.**

Cited, *Hebert v. Scurlock*, 178 S. W. 711.

**Jurisdiction of district court over contest.**—Under Const. art. 5, § 8, and Rev. St. 1911, art. 3050, touching jurisdiction of contested elections, district court of county had jurisdiction of contest of election for establishment of drainage district, despite this article. *McFarlane v. Westley* (Civ. App.) 186 S. W. 261.

**Collateral attack.**—See *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2570. Findings of commissioners' court and record of same.**

**Collateral attack.**—See *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2571. If finding for petitioners, civil engineer appointed; assistants; pay.**

See *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2573. Survey and location of canals, drains, etc.; designation of streams, etc.; report.**

See *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2576. Hearing before county commissioners; notice; objections.**

See *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2577. Action of court on report.**

See *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2578. Election to be ordered after approval of engineer's report.**

**Constitutionality.**—Const. art. 3, § 52, relating to creation of drainage districts, held not to invalidate a statute empowering the commissioners' court to issue drainage district bonds and levy taxes when authorized by the voters of the district. *Holt v. State* (Civ. App.) 176 S. W. 743.

**Power to issue bonds.**—Const. art. 3, § 52, vests in the voters of a drainage district power to determine whether bonds shall issue and issuance of bonds and levy and collection of taxes may be done as authorized by the Legislature. *Holt v. State* (Civ. App.) 176 S. W. 743.

**Issuance of bonds not conforming to proposition submitted.**—Where drainage bonds to run 40 years were authorized by vote of taxpayers, the commissioners' court cannot issue bonds running only 25 years. *David v. Timon* (Civ. App.) 183 S. W. 88.

**Art. 2580. Regulations for holding elections.**

See *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Qualifications of voters.**—Under Rev. St. 1911, art. 2580, one who is in fact a property owner within a drainage district is entitled to vote at a bond election, though not shown by the tax rolls to be a property owner. *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2581. Same subject.**

**Validity of election.**—An election for the issuance of drainage bonds is not invalid because the oath required by Rev. St. 1911, art. 2581, was not taken by electors. *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Resident taxpayer of proposed drainage district, not permitted to vote at election on formation on account of nonresidence, who did not offer to make affidavit of residence, required by Acts 32d Leg. c. 118, § 15, while judges would not have permitted him to make it, had he offered, or to vote, had he made it, was wrongfully prevented from voting.** *McFarlane v. Westley* (Civ. App.) 186 S. W. 261.

Where one offering to vote at election on formation of drainage district showed he did not know whether he resided within district, and so could not have made affidavit of residence, required by Acts 32d Leg. c. 118, § 15, refusal of ballot was not wrong he could complain of, or requiring election to be set aside. *Id.*

Ballot cast at election on formation of drainage district held insufficient expression of voter's intention, and properly refused consideration. *Id.*

**Collateral attack on organization of district.**—See *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Art. 2589. Drainage commissioners may employ counsel, etc.**

Cited, *Kerbow v. Wooldridge*, 184 S. W. 746.

**Employment of attorney.**—In an action by an attorney for compensation for services under a contract entered into between him and a drainage district with the approval of the county judge, evidence held sufficient to sustain a finding that the attorney made the contract solely for himself, and not jointly with or as a partner of the county judge. *Hidalgo County Drainage Dist. No. 1 v. Swearingen* (Civ. App.) 158 S. W. 211.

Drainage Act of 1907, §§ 43, 44, post, arts. 2612, 2613, requiring contracts by drainage commissioners to be reduced to writing, do not apply to contracts for the employment of attorneys, which are governed by section 51 of the act (this article). *Id.*

Where the county judge was present at a conversation between an attorney and the drainage commissioners, at which an oral contract was made for the employment of the attorney on behalf of the district, and was then approved by the judge, it was not necessary for him thereafter to make a formal approval thereof. *Id.*

In an action upon an oral contract, for attorney fees against an irrigation district, evidence held sufficient to show an intent of the parties that the contract should be binding without being reduced to writing. *Id.*

**Art. 2590. Right of eminent domain; outlets beyond boundary, etc.**

**Necessity of payment of compensation in general.**—While drainage laws give the commissioners' court jurisdiction over the establishment of drainage districts, such courts do not have jurisdiction in adopting the specifications for a drain to authorize the taking of private property without due compensation. *Matagorda County Drainage Dist. No. 5 v. Borden* (Civ. App.) 181 S. W. 780.

**Restraining construction.**—The construction of a drain which would overflow private property will be enjoined, where there is no provision for compensation to the owner, and the drainage district has no funds to make compensation. *Matagorda County Drainage Dist. No. 5 v. Borden* (Civ. App.) 181 S. W. 780.

Where the construction of a drainage ditch would destroy a dam on plaintiff's property, greatly to his injury, and the drainage district had not and was unable to make compensation for the injury, the work will be enjoined. *Matagorda County Drainage Dist. No. 5 v. Robbins* (Civ. App.) 181 S. W. 781.

**Art. 2595. Drainage bonds; order for issuance; amount.**

**Limitation of indebtedness.**—Under Const. art. 3, § 52, and Rev. St. 1911, art. 2595, the aggregate indebtedness of any one territory for the two purposes of drainage and road building cannot exceed 25 per cent. of the assessed valuation of such territory's real estate. *Munson v. Looney* (Sup.) 172 S. W. 1102, rehearing denied 177 S. W. 1193.

**Art. 2596. Bonds; validation of bonds issued under former acts; issuance of bonds not sold.**—All bonds issued under the provisions of this Act shall be issued in the name of the drainage district, signed by the

County Judge and attested by the Clerk of the County Court, with the seal of the county commissioners' court affixed thereto. Such bonds shall be issued in denominations of not less than one hundred dollars and not more than one thousand dollars each, and shall bear interest at a rate not to exceed six (6) per cent per annum, payable annually or semi-annually. Such bonds shall by their terms provide the time, place or places, manner and conditions of their payment, the rate of interest thereon and its payment, as may be determined and ordered by the County Commissioners' Court, provided that none of such bonds shall be made payable more than forty years after the date thereof. Provided, however, in all drainage districts heretofore created, and which have issued and registered bonds with the State Comptroller, under the provisions of Chapter 40 of the Acts of the Thirtieth Legislature of Texas, approved March 23rd, 1907, and under the Acts of the Thirty-first Legislature, Chapter 13, House Bill No. 89 [Rev. Civ. St. 1911, arts. 2567-2625. See Vernon's Sayles' Civ. St. 1914, arts. 2567-2625] that all proceedings had and done under such laws in connection with and leading up to the creation of such drainage districts, and the issuance of such bonds so registered, except such bonds as were issued and registered with the State Comptroller under Chapter 40 of the Thirtieth Legislature of Texas, which were in excess of the estimate considered by the County Commissioners' Court when the election was ordered and held, be and the same are hereby held, deemed and declared to be and to have been regular, valid and legal proceedings under the full intent and purpose of the law; and all such bonds so issued thereunder are hereby held, deemed and declared to be valid and binding obligations upon such drainage district or districts so issuing the same.

Provided further that where any district has authorized the issuance of drainage bonds providing for a rate of interest less than hereinbefore provided, which said bonds have not been sold, when so authorized by an election held for that purpose in such drainage district, the County Commissioners' Court may issue such bonds to bear interest at a rate not to exceed six (6) per cent per annum. [Acts 1911, p. 345, § 24; Act March 5, 1915, ch. 33, § 1.]

**Art. 2597a. No suit contesting validity of district or bonds, except, etc.; invalidity of this not to affect other provisions.**

**Constitutionality.**—Despite Vernon's Sayles' Ann. Civ. St. 1914, art. 2597a, a citizen taxpayer may, on his own initiative, attack the constitutionality of drainage laws, or enjoin an officer from issuing drainage bonds where he has not complied with the law. *David v. Timon* (Civ. App.) 183 S. W. 88.

**Collateral attack on validity of drainage district.**—Under this article validity of a drainage district cannot be questioned in an action for the collection of delinquent drainage district taxes. *Holt v. State* (Civ. App.) 176 S. W. 743.

**Suit in district court to contest election.**—Under art. 3077, and this article resident of county can bring suit in district court to contest election on formation of drainage district. *McFarlane v. Westley* (Civ. App.) 186 S. W. 261.

**Art. 2600. Sale of bonds; disposition of proceeds; issuance of unsold bonds at discount.**—When such bonds shall have been registered, as provided for in the preceding sections of this Act, the County Judge shall, under the direction of the County Commissioners' Court, advertise and sell said bonds on the best terms and for the best price possible to be obtained, but in no event shall said bonds be sold for less than the face par value thereof together with the accrued interest thereon, and as said bonds are sold, all moneys received therefor shall be turned over and paid by the County Judge to the County Treasurer or to the Treasurer of such drainage district as the case may be and shall be by him placed to the credit of such drainage district in the construction and maintenance thereof; provided, that where drainage districts already organized have authorized the issuance of bonds bearing interest at a rate not exceeding five per cent, the county judge may sell said bonds at not less than ninety



per cent of their par face value and accrued interest. [Acts 1911, p. 245, § 28; Act March 5, 1915, ch. 33, § 1.]

**Constitutionality.**—Under Const. art. 1, § 16, Acts 34th Leg. c. 33, providing that bonds already authorized to be issued might be sold at 90 per cent. when they were voted under a law providing for sale at par, is invalid. *David v. Timon* (Civ. App.) 183 S. W. 88.

Under Const. art. 1, § 16, Acts 34th Leg. c. 33, providing that bonds already authorized to be issued might be sold at 90 per cent. when they were voted under a law providing for sale at par, is invalid, being retroactive. *Id.*

**Provision mandatory.**—Rev. St. 1911, art. 2600, forbidding sale of drainage bonds below par, is mandatory, and an agreement contemplating that a drainage district contractor shall sell drainage bonds and pay the difference between the market and par values is illegal. *Wilson v. Hebert* (Civ. App.) 174 S. W. 861.

#### Art. 2601. Bond of county judge before sale; compensation.

**Necessity of bond.**—Unless the county judge has given the bond required by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2601, he may be enjoined from disposing of drainage bonds. *David v. Timon* (Civ. App.) 183 S. W. 88.

**Art. 2602. Construction and maintenance fund; interest and sinking fund; expenses how paid; defeat of proposition affecting payment.**—All legal and just expenses, debts, and obligations arising and created, after the filing of the original petition with the County Commissioners' Court and necessarily incurred in the creation, establishing, operation and maintenance of such district organized under the provisions of this Act, other than that of the bonds and the interest thereon, shall be paid out of the "Construction and Maintenance Fund" of such district which said fund shall consist of all money, effects, property and proceeds received by such district from any and all sources whatsoever, except that portion of the tax collections which shall be necessary to pay the interest on the bonded indebtedness as it shall fall due and the cancellation and retirement of the bonds as they shall mature, which said funds shall be placed into and paid out of the "Interest and Sinking Fund" of such drainage district.

Provided, that should the proposition of the creation of such drainage district and the issuance of the bonds be defeated at the election called to vote upon the same, then all expenses created up to and including said election shall be paid in the following manner: When the original petition praying for the establishing of a drainage district is filed with the County Commissioners' Court, it shall be accompanied by (\$200.00) Two Hundred Dollars in cash, which shall be deposited with the Clerk of said Commissioners' Court and by him held until after the result of the election is officially made known. Should the result of such election be in favor of the establishment of said district, then the said \$200.00 shall be by said clerk returned to the petitioners, their agent or attorney; but should the result of such election be against the establishment of such drainage district, then the said clerk shall pay out of the said \$200.00 upon vouchers approved and signed by the County Judge, all costs and expenses pertaining to said proposed district up to and including said election, and the balance thereof, if any, shall be returned to the petitioners, their agent or attorney. [Acts 1911, p. 245, § 30; Act March 5, 1915, ch. 33, § 1.]

Cited, *Hebert v. Scurlock* (Civ. App.) 178 S. W. 711.

**Return of deposit.**—Mandamus lies to compel clerk of commissioners' court to return deposit made with original petition for the establishment of a drainage district, in accordance with the provisions of the statute. *Jefferson v. McFaddin* (Civ. App.) 178 S. W. 714.

Mandamus held not to lie in such case where the signers of the petition, at whose request plaintiff made the deposit, were not parties respondent. *Id.*

Plaintiff not the signer to a petition for the establishment of a drainage district, but who, at the request of signers thereto, made such deposit held entitled to its return. *Id.*

**Art. 2603. Tax for interest, sinking fund, and expenses; reports and estimates; sale of remaining bonds; readjustment of funds; investment of sinking fund.**—Whenever any such drainage district bonds shall have been voted, the County Commissioners' Court shall levy and cause to be assessed and collected taxes upon all property within such drainage dis-

tract whether real, personal or otherwise, and sufficient in amount, annually, to pay the interest on such bonds as it shall fall due, together with an amount to be annually placed in a sinking fund with which to redeem and retire such bonds as they shall mature, and said taxes when so collected shall be placed in the "Interest and Sinking Fund" for such district. And in all drainage districts heretofore created, or that may hereafter be created, under the provisions of this law, the County Commissioners Court shall at the same time levy and cause to be assessed and collected, taxes upon all property within such district, whether real, personal or otherwise, sufficient in amount to maintain, keep in repair, and to preserve the improvements in such district so made and constructed and to pay all legal, just and lawful debts, demands and obligations, if any, against such district, which said levy shall never, in any one year, exceed one-half of one per cent on the total assessed valuation of such district for such year and such taxes when so collected shall be placed in the "Construction and Maintenance Fund" for such district. Provided, however, that the Commissioners of such drainage district shall annually, on or before the first day of July in each year prepare and file with the County Commissioners' Court a full detailed report of the condition of the improvements theretofore made in such district, with an estimate of the probable cost of maintenance and needed repairs during the ensuing year, together with an inventory of all funds, effects, property and accounts belonging to such drainage district, and a list of all lawful demands, debts and obligations, if any, against such district, which report shall be verified by the drainage commissioners, and shall be carefully investigated and considered by the County Commissioners' Court before any levy of taxes shall be made as herein provided.

Provided further, that should there remain any of the bonds so voted and issued by such district and which are not required for the completion of the improvements so made or to be made in such district, then and in that event, by and with the consent of the County Commissioners' Court duly made of public record, such remaining bonds or a portion thereof, may be sold for the purposes herein named and the proceeds from the sale thereof placed in the "Maintenance and Construction Fund" of such district to be used for the maintenance and preservation of the improvements therein. Provided, further that any such drainage district where any money in either the "Maintenance and Construction Fund" or the "Interest and Sinking Fund" has been improperly paid out for the benefit of either of the funds of such district, the County Commissioners Court may cause the County Treasurer to make proper transfer of such amount in the accounts of such district, to the end that each of said funds shall be held for the purposes for which it was created. The sinking fund may, from time to time, be invested in such bonds and securities as shall be approved by the Attorney General of the State of Texas, for the benefit of such district. [Acts 1911, p. 245, § 31; Act March 5, 1915, ch. 33, § 1.]

**Power to levy taxes.**—Const. art. 3, § 52, does not prohibit the levy and collection of drainage district taxes on property in a city or town which has previously issued bonds in the full amount permitted by other constitutional provisions. *Holt v. State* (Civ. App.) 176 S. W. 743.

**When levy should be made.**—Where drainage bonds were voted during the middle of the year, held that, under *Vernon's Sayles' Ann. Civ. St. 1914, art. 2603*, taxes should be levied immediately, and the assessment cannot be questioned on the ground that it was for only part of the year. *David v. Timon* (Civ. App.) 183 S. W. 88.

**Suit for delinquent taxes.**—Under Rev. St. 1911, arts. 2603, 7688, suits for delinquent drainage taxes must be brought in the name of the state. *Holt v. State* (Civ. App.) 176 S. W. 743.

A petition, in an action for delinquent drainage taxes and exhibits attached thereto, held to sufficiently describe the land. *Id.*

**Art. 2603a. Assessment, equalization, and collection of taxes; lien; when due; penalty.**—In the assessment and collection of the taxes authorized by this Act, and in all matters pertaining thereto or connected therewith, the County Tax Assessor and the County Tax Collector shall

have the same powers and shall be governed by the same rules, regulations and proceedings as are provided by the laws of this State for the assessment and collection of County and State Taxes, unless otherwise provided for in this law. And the County Commissioners' Court shall constitute a board of equalization for such drainage district or districts, and all laws governing boards of equalization for county and State taxing purposes shall govern such board or boards for drainage districts.

The taxes authorized to be levied and collected under the provisions of this Act shall be a lien upon all property against which the same are or may be assessed, and it shall be the duty of the County Commissioners' Court and said court shall have the authority, to fix the time and determine the date when such taxes shall become due and payable, otherwise such taxes shall become due and payable at the same time as State and county taxes mature and fall due. And upon the failure to pay such taxes when due, the penalty provided by the laws of Texas for failure to pay State and County Taxes at maturity shall in every respect apply to the taxes herein authorized to be levied, assessed and collected. [Act March 5, 1915, ch. 33, § 1.]

**Explanatory.**—The title of this act purports "to amend sections 24, 28, 30 and 31 of chapter 118," etc., while the first section following the enacting clause declares that the sections above enumerated are amended as set forth, "and by adding thereto section 31a to read" as above set forth. The act became effective 90 days after adjournment, which occurred March 20, 1915.

#### Art. 2612. Contracts, how made.

**Application.**—Drainage Act of 1907, §§ 43, 44, requiring contracts by drainage commissioners to be reduced to writing, do not apply to contracts for the employment of attorneys, which are governed by section 51 of the act. Hidalgo County Drainage Dist. No. 1 v. Swearingen (Civ. App.) 158 S. W. 211.

**Approval of contract.**—Where the county judge was present at a conversation between an attorney and the drainage commissioners, at which an oral contract was made for the employment of the attorney on behalf of the district, and was then approved by the judge, it was not necessary for him thereafter to make a formal approval thereof. Hidalgo County Drainage Dist. No. 1 v. Swearingen (Civ. App.) 158 S. W. 211.

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## CHAPTER FIVE

### DISSOLUTION OF DRAINAGE DISTRICTS

Art. 2625a.	Drainage district may dissolve; frequency of elections.	Art. 2625o.	Trustee may employ counsel, etc.
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**Article 2625a. Drainage district may dissolve; frequency of elections.**—Any drainage district heretofore organized, or that may hereafter be organized, under the General Laws of this State, may voluntarily abolish its corporate existence in the manner hereinafter provided; provided, however, that when an election has been or may be held in the manner hereinafter provided for, which has resulted, or may result, in the failure to abolish such drainage district, no other election shall be held in said district under the provisions of this chapter seeking the dissolution of the same within two years after the results of such election shall have been declared. [Acts 1913, S. S. p. 41, § 1; Act March 22, 1915, ch. 75, § 1.]

**Explanatory.**—Sec. 2 repeals laws in conflict. The act took effect 90 days after March 20, 1915, the date of adjournment of the Legislature.

**Constitutionality.**—Acts 33d Leg. (1st Called Sess.) c. 28, authorizing an election to determine whether a drainage district once established may be abolished, is not void or unconstitutional. Wharton County Drainage Dist. No. 1 v. Bowen (Civ. App.) 165 S. W. 513.

#### Art. 2625o. Trustee may employ counsel, etc.

**Performance by attorney of contract for services.**—Evidence showing that an attorney for a drainage district performed without complaint or cause for complaint all services required of him under the contract is sufficient to support a finding that he complied with the terms of his contract, regardless of the quality or value of the services rendered. Hidalgo County Drainage Dist. No. 1 v. Swearingen (Civ. App.) 158 S. W. 211.

TITLE 48

EDUCATION—PUBLIC

“A”—STATE INSTITUTIONS

- Chap.
- 2. Agricultural and Mechanical College.
- 7. West Texas State Normal College.
- 7a. South Texas State Normal College and Stephen F. Austin State Normal College.
- 7b. East Texas Normal College.
- 7c. Sul Ross Normal College.
- 8a. John Tarleton College of Stephenville, Erath County, Texas.

“B”—THE PUBLIC FREE SCHOOLS

- 9. Available fund.
- 10. State board of education.
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- Chap.
- 13. Scholastic census.
- 13a. Compulsory education.
- 14. Teachers' certificates and examinations.
- 15. Common school districts.
- 15a. Public high schools in common school districts.
- 16. Independent districts.
- 17. Exclusive control by cities and towns—Independent districts.
- 18. Independent district school trustees.
- 19. General provisions.
- 19a. Public school buildings.
- 19b. Free text books in school districts.
- 20. The Texas State Textbook Commission.
- 22. Free kindergartens.
- 23. Vocational education.

CHAPTER TWO

AGRICULTURAL AND MECHANICAL COLLEGE

- Art.
- 2676cc. Expenditures, how made.
- 2676d. Board of directors to appoint state forester; salary; duties.
- 2676e. Same; co-operation with municipalities, etc.
- 2676f. Same; gifts; purchase of land.
- 2676g. Same; proceeds of sale of products.
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JOHN TARLTON AGRICULTURAL COLLEGE

- 2676¼. College established.
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GRUBBS VOCATIONAL COLLEGE

- 2676½. College established; donations.

- Art.
- 2676½a. Shall be under direction of directors of agricultural and mechanical college; local board of managers.
- 2676½b. Vacancies in board of managers.
- 2676½c. Board of managers subject to approval of directors of agricultural and mechanical college.
- 2676½d. Organization of board of managers.
- 2676½e. Powers of board of managers; purposes of school.
- 2676½f. Faculty of institutions; tuition; courses of instruction; rules, etc.
- 2676½g. Compensation of board of managers.
- 2676½h. Entrance requirements.
- 2676½i. Salaries of officers, professors and employes.

PERPETUAL FUND

- 2677. Perpetual fund.
- 2680, 2681.

**Article 2676cc. Expenditures, how made.**—All expenditures for the Agricultural and Mechanical College of Texas may be made by the order of the board of directors, and the same shall be paid on warrants from the Comptroller based on vouchers approved by the president of the board of directors, or by some officer or officers of the College designated by him in writing to the Comptroller. [Act March 15, 1915, ch. 55, § 1.]

**Explanatory.**—Sec. 2 of the act repeals all laws in conflict. The act took effect 90 days after the legislature adjourned on March 20, 1915.

**Art. 2676d. Board of Directors to appoint State Forester; salary; duties.**—That there shall be appointed by the Board of Directors of the Agricultural and Mechanical College of Texas a State Forester, who shall be a technically trained forester of not less than two years' experience in professional forestry work; his compensation shall be fixed by said board at not to exceed three thousand (\$3,000) dollars per annum, and he shall be allowed reasonable traveling and field expenses incurred in the performance of his official duties. He shall, under the general su-

pervision of said board, have direction of all forest interests and all matters pertaining to forestry within the jurisdiction of the State. He shall appoint, subject to the approval and confirmation of said board, such assistants and employés as may be necessary in executing the duties of his office and the purposes of said board, the compensation of such assistants and employés to be fixed by the said board. He shall take such action as may be deemed necessary by said board to prevent and extinguish forest fires, shall enforce all laws pertaining to the protection of forest and woodlands, and prosecute for any violation of such laws; collect data relative to forest conditions, and to co-operate with land owners as described in Section 2 of this Act [Art. 2676e]. He shall prepare for said board annually a report on the progress and condition of State forestry work, and recommend therein plans for improving the State system of forest protection, management and replacement. [Act March 31, 1915, ch. 141, § 1.]

**Explanatory.**—See arts. 4443, 4880. The act took effect 90 days after March 20, 1915, date of adjournment. Sec. 7 repeals all laws in conflict.

**Art. 2676e. Same; co-operation with municipalities, etc.**—That the State Forester shall, upon request, under the sanction of the Board of Directors, and whenever he deems it essential to the best interests of the people of the State, co-operate with counties, towns, corporations or individuals in preparing plans for the protection, management and replacement of trees, woodlots and timber tracts, under an agreement that the parties obtaining such assistants pay at least the field expenses of the men employed in preparing said plans. [Id., § 2.]

**Art. 2676f. Same; gifts; purchase of land.**—That the Governor of the State is authorized, upon the recommendation of the Board of Directors, to accept gifts of land to the State, same to be held, protected and administered by said board as State forests, and to be used so as to demonstrate the practical utility of timber culture and water conservation, and as refuges for game. Such gifts must be absolute except for the reservation of all mineral and mining rights over and under said lands, and a stipulation that they shall be administered as State forests.

The Board of Directors shall have the power to purchase lands in the name of the State, suitable chiefly for the production of timber, as State forests, using for such purposes any special appropriation or any surplus money not otherwise appropriated, which may be standing to the credit of the State forestry fund.

The Attorney General of the State is directed to see that all deeds to the State of land mentioned in this section are properly executed before the gift is accepted or payment of the purchase money is made. [Id., § 3.]

**Art. 2676g. Same; proceeds of sale of products.**—That all moneys received from the sale of wood, timber, minerals or other products from the State forests, and penalties for trespassing thereon, shall be paid into the State Treasury, and shall constitute a State forestry fund, and the moneys in said fund are hereby appropriated for purposes of forestry in general, under the direction of the Board of Directors. [Id., § 4.]

**Art. 2676h. Appropriation.**—That for the maintenance, use and extension of the work under the Board of Directors, and for forest fire protection, there is hereby appropriated the sum of ten thousand (\$10,000) dollars annually out of any moneys in the State Treasury not otherwise appropriated, to be placed to the credit of the State forestry fund. [Id., § 5.]

**Art. 2676i. Co-operation with federal authorities.**—That the Board of Directors may co-operate with the Federal Forest Service under such terms as may seem desirable. [Id., § 6.]

## JOHN TARLTON AGRICULTURAL COLLEGE

**Art. 2676 $\frac{1}{4}$ .** **College established.**—That the John Tarlton College, located at Stephenville, in Erath county, is hereby taken over by the State, under the terms and conditions set forth elsewhere in this Act, and the same established as a Junior Agricultural College, to be known as the John Tarlton Agricultural College, a co-educational State institution of agriculture and home economics. [Act Feb. 20, 1917, ch. 33, § 1.]

See arts. 2724a-2724i, post.

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2676 $\frac{1}{4}$ a.** **Government of college.**—The government and direction of policies of said John Tarlton Agricultural College shall be vested in the Board of Directors of the Agricultural and Mechanical College of Texas. The said Board is hereby given authority to accept such lands, buildings and gifts of money as may be made a consideration in the acceptance of said college, and it is understood that this Act shall not become effective until the conditions set forth in the following sections have been accepted and complied with. [Id., § 2.]

**Art. 2676 $\frac{1}{4}$ b.** **Donations.**—The donations and conditions referred to in Section 2 are as follows: The citizenship of Stephenville and Erath county hereby donate to the State of Texas what is known now as the John Tarlton College, consisting of a main or administrative building, a dormitory for girls, and a Fine Arts building; all modern new brick buildings and estimated to be worth, including the equipment, \$85,000; and also a campus of forty acres of land, located in about 400 yards of the railroad station at Stephenville, and within less than one mile of the court house of Erath County, valued at approximately \$40,000; also 500 acres of land located near the campus of the John Tarlton College, nearly all tillable and now cultivated and being good farming land within one mile of the town of Stephenville, and valued at approximately \$50,000.00; also the sum of \$75,000 to be used by the Board of Directors of the Agricultural and Mechanical College as a student loan fund to be lent to students who cannot otherwise attend said college, at a rate of interest not to exceed 5 per cent per annum, on such terms and conditions as may be deemed advisable by said governing board. [Id., § 3.]

**Art. 2676 $\frac{1}{4}$ c.** **Acceptance of donations.**—The Board of Directors of the Agricultural and Mechanical College is hereby given authority to accept the land, money and buildings referred to in Section 3 [Art. 2676 $\frac{1}{4}$ b], and it shall be the duty of the citizens of Stephenville and Erath county to furnish a good and merchantable title to all of said property, and the said Board is hereby given authority to sign and execute all deeds and other official papers necessary in connection with the acceptance of the offer of the citizens of Stephenville and Erath county, and when all of said formalities have been complied with it shall be the duty of the Board of Directors of the Agricultural and Mechanical College to make an official report to the Governor of this State, setting forth the fact that all promises and pledges of said citizens of Stephenville and Erath county, have been complied with, and on receipt of said report the Governor of this State shall formally accept, in writing, the said John Tarlton Agricultural College as a Junior Agricultural College as a part of the educational system of Texas. [Id., § 4.]

**Art. 2676 $\frac{1}{4}$ d.** **Rank of college; courses of study; students.**—The said John Tarlton Agricultural College shall rank as a Junior Agricultural College, which for the purposes of this Act is designated as an institution offering four year courses, beginning with the Junior year of a four year High School and extending to and including the Sophomore year of a standard four year college, provided that nothing in this Act shall pre-

clude the offering of such preparatory courses or short courses as may be deemed advisable. The said John Tarlton Agricultural College shall be co-educational and instruction shall be offered in Agriculture, including the arts and sciences connected therewith; and home economics, including the arts and sciences connected therewith. [Id., § 5.]

**Art. 2676 $\frac{1}{4}$ e. Power of eminent domain.**—The Board of Directors of said College, as constituted by Section 2 of this Act [Art. 2676 $\frac{1}{4}$ a], is hereby vested with the power of eminent domain to acquire for the uses of said College such lands as may be necessary or proper for carrying out its purposes, by condemnation proceedings, such as are now provided for railroad companies by Articles 6506 to 6530, inclusive, of the Revised Statutes of Texas of 1911. [Id., § 6.]

#### GRUBBS VOCATIONAL COLLEGE

**Art. 2676 $\frac{1}{2}$ . College established; donations.**—That there is hereby established a Junior Agricultural, Mechanical and Industrial College, to be known as the Grubbs Vocational College, to be located at or near the town of Arlington, Tarrant county, Texas, provided the citizens of said town and county shall first donate to the State for the use and benefit of said college at least one hundred acres of good tillable land with perfect title, together with the college property, known as the Carlisle Military School property, with all buildings, dormitories, barracks, etc., belonging thereto. [Act March 26, 1917, ch. 97, § 1.]

**Explanatory.**—Sec. 11 makes an appropriation. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2676 $\frac{1}{2}$ a. Shall be under direction of directors of Agricultural and Mechanical College; local board of managers.**—Be it further enacted that said Junior Agricultural, Mechanical and Industrial College shall be under the direction of the board of directors of the present Agricultural and Mechanical College in connection with a local board of managers composed of five members to be appointed by the Governor by and with the advice and consent of the Senate, who shall serve for two years from the date of their appointment. [Id., § 2.]

**Art. 2676 $\frac{1}{2}$ b. Vacancies in board of managers.**—In all cases of vacancy in said local board of managers the appointment shall also be made from time to time as provided in the Sections of this Act, provided that if the Legislature shall not be in session, the Governor may fill such vacancy by appointment until the next session of the Legislature, when if the Senate shall not confirm the appointment some other person shall be named. [Id., § 3.]

**Art. 2676 $\frac{1}{2}$ c. Board of managers subject to approval of directors of Agricultural and Mechanical College.**—That the board of local managers hereinbefore provided for shall be subject to the approval of the board of directors of the Agricultural and Mechanical College, with which this Junior College shall be closely affiliated, perform all the duties required in the efficient and successful management of said institution in like manner as other governing boards of the same character. [Id., § 4.]

**Art. 2676 $\frac{1}{2}$ d. Organization of board of managers.**—That the board of managers shall meet as soon after their appointment as convenient at Arlington, Texas, and organize by the election of a presiding officer, a Secretary and a Treasurer, whose duties shall be the same as the officials of other similar boards in this State, except that their action in all matters and especially in the formulation of courses of study, shall be subject to approval, modification or rejection by the Board of Directors of the Agricultural and Mechanical College. [Id., § 5.]

**Art. 2676 $\frac{1}{2}$ e. Powers of board of managers; purposes of school.**—That the board of managers shall have and possess all powers necessary

subject to the supervision of the board of directors of the Agricultural and Mechanical College of Texas as to accomplish and carry out the provisions of this Act the establishment of a Junior Agricultural, Mechanical and Industrial College for the education of white boys and girls in this State in the arts and sciences in which such boys and girls may acquire a good literary education of academic grade, at least, together with a knowledge of agriculture, horticulture, floriculture, stock raising and domestic arts and sciences, including the several branches and studies usually taught in the established institutions of like character with such limitations as may be imposed by the governing board of the Agricultural and Mechanical College of Texas, having in view the training of the youth for the more important industrial activities of life, while acquiring facilities for the acquirement of a good practical literary education not below the academic grade. [Id., § 6.]

**Art. 2676½f. Faculty of institution; tuition; courses of instruction; rules, etc.**—That the board of managers in connection with the board of directors of the Agricultural and Mechanical College of Texas, shall appoint a president and professors of the Grubbs Vocational College and such officers as they may think proper and necessary to put the same into successful operation and to make such rules and regulations for the government of said officers and the proper management of said institution as they may deem advisable. They shall regulate rates of tuition with the course of discipline necessary to enforce the faithful discharge of the duties of all officers, professors and students. They shall in connection with the faculty divide the courses of instruction into departments so as to secure a thorough education of the academic grade and the best possible industrial training, selecting careful and efficient professors in each department, giving preference to Texas teachers, if available, and shall adopt all such rules, by-laws and regulations as they may deem necessary to carry out all the purposes and objects of said institution. [Id., § 7.]

**Art. 2676½g. Compensation of board of managers.**—The board of managers shall receive such compensation as may be determined upon by the board of directors of the Agricultural and Mechanical College of Texas. [Id., § 8.]

**Art. 2676½h. Entrance requirements.**—The terms upon which pupils may be admitted, including the entrance requirements, shall be determined by the board of managers and the board of directors of the said Agricultural and Mechanical College of Texas, and in that respect they are empowered to fix or remit tuition, fees and charges as they may deem best for said institution and the people for whose benefit it is established. [Id., § 9.]

**Art. 2676½i. Salaries of officers, professors, and employes.**—The board of managers and the board of directors of the Agricultural and Mechanical College shall determine and fix the salary of each officer, professor and employé, provided that the salaries of professors in any department shall not exceed that which is now fixed for the professors of the Agricultural and Mechanical College or the College of Industrial Arts, with which this institution is closely affiliated. [Id., § 10.]

#### REPEALED ACTS CREATING BRANCH COLLEGES

Act Feb. 20, 1917, ch. 29, created the West Texas Agricultural and Mechanical College, to constitute a branch of the Agricultural and Mechanical College of Texas. This act was repealed by Act Oct. 11, 1917, 3d C. S., 35th Legislature, which annulled and canceled all acts, contracts, etc., growing out of the former act.

Act April 9, 1917, ch. 204, created the North-East Texas Agricultural College, to constitute a branch of the Agricultural and Mechanical College of Texas. This act was repealed by Act Oct. 11, 1917, 3d C. S., 35th Legislature, which annulled and canceled all acts, contracts, etc., growing out of the former act.



PERPETUAL FUND

**Art. 2677. [3872] Perpetual fund.**

Note.—Act April 7, 1915, c. 154, provides for a reissue of state bonds in order to comply with the provision of the federal donation act as to rate of interest of bonds held by the Agricultural and Mechanical College. See, also, House Concurrent Resolution No. 2, approved Jan. 29, 1915 (Acts 1915, Reg. Sess. p. 273).

Act Feb. 17, 1917, c. 27, makes an appropriation in furtherance of the carrying out of Act 34th Legislature, ch. 154.

**Arts. 2680, 2681.**

See art. 2676d.

CHAPTER SEVEN

WEST TEXAS STATE NORMAL COLLEGE

**Article 2712. Name and location.**

Note.—Act March 22, 1915, c. 96, p. 150, makes an appropriation for the erection of temporary buildings to replace those destroyed by fire.

CHAPTER SEVEN A

SOUTH TEXAS STATE NORMAL COLLEGE AND STEPHEN F. AUSTIN STATE NORMAL COLLEGE

<p>Art. 2717¼a. Colleges created. 2717¼b. When ready for reception of students. 2717¼c. Locating committee; local claims and donations.</p>	<p>Art. 2717¼d. Duties of attorney general. 2717¼e. Construction of buildings. 2717¼f. Control and regulations of colleges. 2717¼g. Appropriations; disbursements.</p>
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**Article 2717¼a. Colleges created.**—That two State Normal Schools for the education of white teachers are hereby established at places in Texas located as follows: One in the territory composed of all of that part of the State of Texas lying south of the twenty-ninth parallel of latitude with the counties of Kinney, Uvalde and Medina added, and the name of said Normal School shall be "South Texas State Normal College;" the other in the territory composed of all that part of the State of Texas lying east of the ninety-sixth meridian, and the name of said Normal College shall be "Stephen F. Austin State Normal College." [Act April 4, 1917, ch. 191, § 1.]

**Explanatory.**—Took effect 90 days after March 21, 1917, the date of adjournment of the legislature. This act evidently supersedes Act March 22, 1915, ch. 66, p. 116, establishing three state normal colleges, including the two above named, and another to be known as the Central West Texas Normal College.

**Art. 2717¼b. When ready for reception of students.**—Said two Normal Schools shall be created and ready for reception of students on October 1st, 1918. [Id., § 2.]

**Art. 2717¼c. Locating committee; local claims and donations.**—The Governor of Texas, the State Superintendent of Public Instruction and the State Normal School Board of Regents are hereby designated a locating committee to locate the said two normal colleges; provided that if any one member of this said committee resides within the territory in which either of these normals is to be located that member shall not take part in the locating of said normal in the territory in which he lives. The majority of said committee shall constitute a quorum for the transaction of business, and no member of said committee who has material or pecuniary interest of any kind in any town or place offered for the location of said normals shall be qualified or authorized to act on said committee.

Provided that if any member of said locating board shall die, resign or refuse to act before both of said Normal Colleges are located, the Governor shall be, and is hereby authorized and empowered to appoint any person or persons on said committee, who shall become members thereof, and are hereby authorized and empowered to assist the remaining members of said committee in the locating of said Normal Schools.

In considering the claims of any place that may apply for the location of either of said colleges, said committee shall consider the healthfulness, accessibility, general physical conditions and environments, together with the general moral tone, educational system and social qualities of the people of said place. No donation or bonus of any kind or character shall be considered by said locating committee of either of said colleges, except such donations of land as may be offered by any place as a site for the building or buildings of said colleges, and in no event shall a building site of less than fifty (50) acres be considered or accepted. After the passage of this Act, any city or town within either of said Normal School Districts named in Section One of this Act [Art. 2717 $\frac{1}{4}$ a], desiring the location of said college in that respective district, may file its application with the chairman of said locating committee, together with the description of the land it has to offer, requesting the committee to view the site said city or town has to offer; and it shall be the duty of said committee to visit said cities or towns making such requests, and to view the sites they have to offer, and as soon as practical after said committee shall have viewed all sites offered, such locating committee shall meet and select a location for each of said normal colleges; provided that said locating committee shall locate said normal colleges not later than August 1st, 1917, and for the purpose of traveling expenses and other expenses of said Board, including clerk hire, there is hereby appropriated out of the funds of the treasury, not otherwise appropriated, the sum of one thousand (\$1,000.00) dollars. Such committee may employ a clerk at a salary not to exceed one hundred (\$100.00) dollars per month, for such services as may be needed. Said Committee, as soon as the locations are made for said colleges, shall make a full report of all of its actions in carrying out the provisions of this Act in regard to location, including an itemized statement of all moneys paid out, and also an itemized descriptive list of all donations of land made and accepted for said normal colleges. [Id., § 3.]

**Art. 2717 $\frac{1}{4}$ d. Duties of Attorney General.**—It shall be the duty of the Attorney General of the State of Texas, to examine and approve all abstracts of title, to be furnished by the owner, to any and all real estate, that may be donated either for the site for the buildings of said colleges or for any other purpose, and the abstracts of the title to the real estate of the building sites of such colleges which may be selected by said locating committee shall be so examined by the said Attorney General, and approved by him before any location is finally made; provided, however, that nothing herein shall prevent said locating committee from selecting a location and announcing same conditioned upon the approval of the title thereto, by the Attorney General. After examination and approval of the title to the lands donated for said colleges the Attorney General shall cause to be prepared and duly executed proper deed or deeds of conveyance to said land selected, which deed or deeds shall be held in escrow by the State Treasurer conditioned upon the erection and opening of said colleges. [Id., § 4.]

**Art. 2717 $\frac{1}{4}$ e. Construction of buildings.**—As soon as funds are available under proper appropriation, the State Normal School Board of Regents shall proceed to secure plans and specifications for a building or buildings and equipment of each of said colleges, which building or buildings and equipment of each college shall be sufficient to accommodate at

least four hundred pupils, and to let the contract for such building or buildings and equipments to the lowest responsible bidder or bidders; said State Normal School Board of Regents shall meet October 1st, 1917, or as soon thereafter as practical for the purpose of receiving said plans and specifications for said building or buildings and equipments to be completed on or before October 1st, 1918, on which date the said colleges shall be opened and ready for the reception of students. [Id., § 5.]

**Art. 2717 $\frac{1}{4}$ f. Control and regulations of colleges.**—The control and regulation of said colleges is hereby vested in the State Normal School Board of Regents under the law now in force governing said Board, or which may hereafter be enacted, and such Board of Regents shall meet as soon as practical after the first day of January, 1918, and make rules and regulations for the organization and maintenance of said colleges, and to elect such officers and teachers and instructors and employés as may be necessary for properly carrying out the work of said colleges. [Id., § 6.]

**Art. 2717 $\frac{1}{4}$ g. Appropriations; disbursements.**—The sum of one hundred and fifty thousand (\$150,000.00) dollars is hereby appropriated out of any funds in the State Treasury not otherwise appropriated, to be expended in the payment of accounts legally contracted in constructing and equipping the building or buildings of said South Texas State Normal College; and the sum of one hundred and fifty thousand (\$150,000.00) dollars is hereby appropriated out of any funds in the State Treasury not otherwise appropriated, to be expended in the payment of accounts legally contracted in constructing and equipping the building or buildings of said Stephen F. Austin State Normal College; said accounts to be paid upon warrants issued by the Comptroller of Public Accounts after the accounts shall have been audited and approved by the State Normal School Board of Regents, and the sum of thirty thousand (\$30,000.00) dollars is hereby appropriated out of any funds in the State Treasury not otherwise appropriated, for the maintenance of said South Texas State Normal College for the fiscal year ending August 31, 1919; and the sum of thirty thousand (\$30,000.00) dollars is hereby appropriated out of any funds in the State Treasury not otherwise appropriated, for the maintenance of said Stephen F. Austin Normal College for the fiscal year ending August 31, 1919; and the Legislature shall, after the taking effect of this Act, from time to time, and after the fiscal year ending August 31st, A. D. 1919, make such appropriation for the maintenance and government of said colleges as may be necessary, which shall be paid out upon vouchers drawn in such manner as may be approved by the laws now in force governing the State Normal School Board of Regents, or which may hereafter be enacted. [Id., § 7.]

**Note.**—The expenditure of the appropriation made hereby is postponed by Acts 1917, 3rd C. S., ch. 32.

## CHAPTER SEVEN B

### EAST TEXAS NORMAL COLLEGE

**Art.**  
2717 $\frac{1}{2}$ . Purchase of college.  
2717 $\frac{1}{2}$ a. Creation of college; name.

**Art.**  
2717 $\frac{1}{2}$ b. Management and control.  
2717 $\frac{1}{2}$ c. Expenditure of appropriation.

**Article 2717 $\frac{1}{2}$ . Purchase of college.**—That the State Normal School Board of Regents is hereby authorized and empowered to purchase the aforesaid property of said East Texas Normal College insofar as the appropriations herein made provides for a purchase, in the event said Board shall find the facts stated herein substantially true, and that said property including said five acres of land and brick dormitory thereon, is reasonably worth the said sum of \$175,000.00. But if in the opinion of said

Board said property is not reasonably worth said sum of \$175,000.00, then they are authorized in their discretion to purchase said property by paying therefor such pro rata part of \$80,000.00 as the value of said property, as they may determine it, shall bear to said sum of \$175,000.00, provided, that said citizens of Commerce shall donate to the state of Texas, for and as part of said Normal school said five acres of ground and the city of Commerce shall enter into a valid contract to furnish free of charge to the state for said Normal school all water used by said institution. In the event said purchase of said property, said Board shall cause the title thereto to be examined by the Attorney General, and if approved, then shall take deeds covering all of said land and bill of sale covering said Library and other personal property belonging to said East Texas Normal College, in which deeds and bills of sale, said property shall be conveyed to the Governor of the State of Texas, and his successors in office for the use and benefit of the State of Texas, and said school. [Act April 4, 1917, ch. 195, § 1.]

**Explanatory.**—Took effect 90 days after March 21, 1917, date of adjournment. The act is preceded by the following preamble:

Whereas, there is in existence and being maintained and operated at Commerce within this state an independent and privately owned normal college known as the "East Texas Normal College" which has been in existence some 23 years and has educated many thousand young men and young women of the State and particularly during said period of time has had in attendance upon it many thousand young men and young women who have taken the examinations provided for teachers of the State in obtaining certificates, and among others, 7,463 who, during the last ten years have attended the summer sessions of this school alone, and taken the examinations for teachers' certificates, which said record in the education of teachers compares favorably with the various normal schools of the State for the same period of time jointly and severally, and,

Whereas, said school is one already equipped for educational purposes, having, among other properties, the following to-wit: 30 acres of land for campus and school purposes of the reasonable value of \$15,000.00; a 3 story brick administration building with concrete foundations and basement of the reasonable value of \$50,000.00; a 3 story girl's dormitory of similar construction of the reasonable value of \$50,000.00, containing 130 outside rooms, together with a dining hall capacity, and which has furnished a dining capacity of 600 students at one time; a 3 story brick boy's dormitory of similar construction with 116 outside rooms, of the reasonable value of \$30,000.00; a 3 story frame dormitory furnishing sufficient room occupancy for 60 students valued at \$5000.00; said three dormitories having a capacity to care for 560 students; a 3 story brick science hall commodious and ample for instruction and experiments in the natural sciences sufficient to accommodate an average student body of 1000 students, of the reasonable value of \$10,000.00; a library of 10,000 well selected volumes, well housed and accessible in the administration building, and physical and chemical laboratory furnishings and apparatus, which with the library aforesaid is of the reasonable value of \$15,000.00; making a total valuation of said educational plant in the sum of \$175,000.00, and, the citizens of Commerce, Texas, further obligate themselves to purchase and present to the State ten (10) acres of land either joining said campus of said East Texas Normal College, or of such proximity to the said campus, as to be of use to the said institution as a part of the campus, making forty acres as the total amount of land in said campus, and,

Whereas, the growth and success of said school has demonstrated the necessity for its existence and the utility of its location, and,

Whereas, the citizens of Commerce have proposed to the Legislature the donation of said school to the State as a normal school, provided, the Legislature will pay therefor, the sum of \$80,000.00 to the founder of said school who has his life savings invested therein, and,

Whereas, the citizens of said town of Commerce own a plot of ground consisting of about five acres on which there is a three-story brick dormitory, also owned by the citizens of said town of Commerce which they propose to donate to the State for use by the Normal College hereinafter referred to, and, the said five acres above referred to being a part of the land herein referred to as the campus of said institution, and,

Whereas, said town of Commerce is also willing to make a valid contract to furnish such water as may be needed in the operation of said Normal school, and,

Whereas, said citizens of Commerce have proposed to the Legislature a donation of said property herein above described; provided, that the state will pay therefor the sum of \$80,000.00 to the founder of said school, and who is now owner thereof, except the said five acres of land and the brick dormitory thereon, now therefore,

**Art. 2717½a. Creation of college; name.**—There is hereby created a normal school to be one of the State Normals of this state to be located at Commerce, in Hunt County, Texas, and to consist in original equipment of the properties and buildings, and furnishing and equipment to be purchased as herein provided from the owners of the East Texas Normal College heretofore referred to. [Id., § 2.]

**Art. 2717½b. Management and control.**—Said normal college shall be conducted as the other State Normals of this State are conducted;

shall be under the management and control of the State Normal School Board of Regents, and all laws of this state applicable to State Normal schools, both in creating rights and prescribing limitations, and in all other respects shall be applicable to the said East Texas Normal College. [Id., § 3.]

**Art. 2717 $\frac{1}{2}$ c. Expenditure of appropriation.**—The appropriation herein provided shall not be paid over in the consummation of the purchase of the properties here referred to prior to the 31st day of August A. D., 1918, nor shall the properties referred to become the property of the State until the deeds are received after the date above named and the money paid therefor. It is further provided, that the said Board, after the purchase of said property as aforesaid, shall have authority to permit the school to continue under its present management and as a private institution under the direction of the State Normal School Board of Regents; and the citizens of Commerce obligate themselves to pay for the maintenance of said institution under its present management until the 36th Legislature makes an appropriation for its support and maintenance, at which time the Board of Regents shall then take complete charge and operate the same as the State's school. [Id., § 4.]

Sec. 5 makes an appropriation of \$80,000.

## CHAPTER SEVEN C

### SUL ROSS NORMAL COLLEGE

Art. 2717 $\frac{3}{4}$ . College established; donation of site, etc.	Art. 2717 $\frac{3}{4}$ b. Erection of buildings.
2717 $\frac{3}{4}$ a. Duties of attorney general as to examination and approval of title.	2717 $\frac{3}{4}$ c. Control and regulation of college.
	2717 $\frac{3}{4}$ d. President of college.
	2717 $\frac{3}{4}$ e. Appropriations.

**Article 2717 $\frac{3}{4}$ .** College established; donation of site, etc.—That there shall be established at Alpine, in Brewster County, Texas, a normal school to be known as "Sul Ross Normal College," provided, that citizens of Brewster County shall, within sixty days after this Act takes effect, convey or cause to be conveyed to the State of Texas, by an immediate and perfect title, a building site, to be located somewhere within three miles of the county court house of said county, which tract of land shall be located and designed by the State Normal School Board of Regents of the State of Texas. No donation or bonus of any kind or character shall be considered by said State Normal School Board of Regents, except such donations of land as may be offered as a site for the buildings or building of said college, and such buildings as may be located on the land donated, and in no event shall a building site of less than one hundred (100) acres be considered or accepted, provided, that if the donation and proposition mentioned herein is not fully complied with by the citizens of Brewster County to the satisfaction of the State Normal School Board shall be open to such other places in the Twenty-fifth Senatorial District as the State Normal School Board of Regents may deem most satisfactory and advantageous to the State. [Act April 4, 1917, ch. 197, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2717 $\frac{3}{4}$ a. Duties of Attorney General as to examination and approval of title.**—It shall be the duty of the Attorney General of the State of Texas, to examine and approve all abstracts of title, to be furnished by the owner of any and all real estate that may be donated, either for a site for the buildings or said college or for any other purpose in connec-

tion with the establishment of said school, the abstracts of title to the real estate of the building site of said college which may be selected by said State Normal School Board of Regents shall be so examined by the Attorney General and approved by him before any location is finally made; provided, however, that nothing herein shall prevent said State Normal School Board of Regents from selecting a location and announcing same conditioned upon the approval of the title thereto, by the Attorney General. After examination and approval of the title to the lands donated for said college, the Attorney General shall cause to be prepared and duly executed proper deed or deeds of conveyance to said lands selected, which deed or deeds shall be held in escrow by the State Treasurer conditioned upon the erection and opening of said college. [Id., § 2.]

**Art. 2717<sup>3</sup>/<sub>4</sub>b. Erection of buildings.**—As soon as funds are available under proper appropriations, the State Normal School Board of Regents shall proceed to secure plans and specifications for a building or buildings, and equipment of said State Normal College, which building or buildings and equipment shall be sufficient to accommodate at least five hundred pupils, and to let the contract for such building or buildings and equipments to the lowest responsible bidder or bidders; said State Normal School Board of Regents shall meet October 1, 1917, or as soon thereafter as practical for the purpose of receiving said plans and specifications for said building or buildings and equipments to be completed on or before October 1, 1918, on which date the said Sul Ross Normal College shall be opened and ready for the reception of Students. [Id., § 3.]

**Art. 2717<sup>3</sup>/<sub>4</sub>c. Control and regulation of college.**—The control and regulation of said Sul Ross Normal College is hereby vested in the State Normal School Board of Regents under the laws now in force governing said Board, or which may hereafter be enacted, and such Board of Regents shall meet as soon as practical after the first day of January, 1918, and make rules and regulations for the organization and maintenance of said college, and to elect such officers and teachers and instructors and employés as may be necessary for properly, carrying out the work of said college. [Id., § 4.]

**Art. 2717<sup>3</sup>/<sub>4</sub>d. President of college.**—It shall be the duty of the State Normal School Board of Regents to elect a president of the Sul Ross Normal College at any time after sixty days after the location of such Normal College shall have been made; provided, that he shall be elected at least six months before the date fixed for the opening of said normal college; and he shall draw his salary from the date of his acceptance of said election. [Id., § 5.]

**Art. 2717<sup>3</sup>/<sub>4</sub>e. Appropriations.**—The sum of two hundred thousand (\$200,000) dollars is hereby appropriated out of any funds in the State Treasury, not otherwise appropriated, to be expended in the payment of accounts legally contracted in constructing and equipping the building or buildings of the Sul Ross Normal College; said accounts to be paid upon warrants issued by the Comptroller of Public Accounts after the accounts shall have been audited and approved by the State Normal School Board of Regents, and the sum of forty thousand (\$40,000) dollars is hereby appropriated out of any funds in the State Treasury, not otherwise appropriated, for the maintenance of said Sul Ross Normal College for the fiscal year ending August 31, 1919, and for the payment of the president's salary for the year August 31, 1918; and the Legislature shall, after the taking effect of this Act, from time to time after the fiscal year ending August 31, A. D. 1919, make such appropriations for the maintenance and government of said Sul Ross Normal College as may be necessary which shall be paid out upon vouchers drawn in such manner as

may be approved by the laws now in force governing the State Normal School Board of Regents, or which may hereafter be enacted. [Id., § 6.]

Note.—The expenditure of the appropriation made hereby is postponed by Acts 1917, 3rd C. S., ch. 32.

## CHAPTER EIGHT A

### JOHN TARLETON COLLEGE OF STEPHENVILLE, ERATH COUNTY, TEXAS

#### Articles 2724a–2724i.

Note.—By Act Feb. 20, 1917, ch. 33, the "John Tarlton College, located at Stephenville, in Erath county," is made a junior agricultural college, to be known as the John Tarlton Agricultural College. See ante, arts. 2676 $\frac{1}{4}$ –2676 $\frac{1}{4}$ e.

## CHAPTER NINE

### AVAILABLE PUBLIC FREE SCHOOL FUND

Art.	Art.
2726a. State aid appropriation.	2726f. Second aid.
2726b. Distribution of aid.	2726g. Warrants and reports.
2726c. Standards and requirements.	2726h. Apportionment privileges.
2726d. General power of state board of education.	2726i. Rural school supervisors.
2726e. Duties of superintendent of public instruction.	2726j. Conflicting laws and opinions.

**Article 2726a. State aid appropriation.**—For the purpose of promoting the country public school interests of the State and of aiding the people in providing adequate school facilities for the education of their children, \$1,000,000, or such part thereof as may be necessary, is hereby appropriated out of any money in the State Treasury not otherwise appropriated for the school year ending August 31, 1918, and \$1,000,000, or such part thereof as may be necessary, for the year ending August 31, 1919, to be used in accordance with the provisions of this Act in maintaining country schools. [Act March 15, 1917, ch. 80, § 1.]

**Explanatory.**—The above act, though limited in its operation for the two fiscal years covered by the appropriation, is set forth in this compilation for the reason that it appears to be the policy of the state to renew the aid from year to year under substantially the same requirements as contained herein. A similar act was passed at the first called session of the 34th Legislature, chapter 10, page 22, in which the appropriation for each of the two years ending Aug. 31, 1916, and Aug. 31, 1917, is fixed at \$500,000. In the present act the evident intent of the Legislature was to fix the annual appropriation at \$1,000,000, but by a clerical error the appropriation for the year ending Aug. 31, 1918, is made "\$1,000.00" instead of \$1,000,000. The act took effect 90 days after March 21, 1917, date of adjournment.

Act May 14, 1917, ch. 6, 1st C. S., 35th Leg., corrects the error as to the amount appropriated for the year ending Aug. 31, 1918, by adding an appropriation of \$999,006.00.

**Art. 2726b. Distribution of aid.**—The State Board of Education is hereby authorized and directed to supplement the State apportionment to any district coming within the provisions of this Act with an amount not more than \$500 in any one year, the amount to be determined by the Board upon the merits and needs of the school.

All applications for State aid under this Act shall be made upon the form prescribed by the State Board of Education and furnished by the State Department of Education. Before any application is presented to the State Board of Education for its consideration, the State Superintendent shall make careful investigation regarding its completeness, and his certificate that each district applying for State aid meets substantially the requirements of the law shall be required by the Board before aid in any amount is granted. [Id., § 2.]

**Art. 2726c. Standards and requirements.**—Any school district meeting the following standards shall be entitled to receive State aid:

- (1) Location. Each such school receiving State aid shall be well lo-

cated on a plot of ground not less than one acre in extent, properly drained and suitably laid out.

(2) School House. There shall be provided a suitable school house, erected in accordance with the school house building law of Texas, or meeting substantially the requirements thereof.

(3) Equipment. Each such school shall be provided with necessary desks, seats and blackboards; and with such library, books, maps and globes as recommended in the State course of study, as in the opinion of the State Superintendent said school may be able to purchase.

(4) Teachers. Teachers employed in country schools shall furnish to the State Superintendent satisfactory evidence of professional training to their credit, and all teachers must render efficient service of a high grade.

(5) Attendance. In order to receive State aid, the school district must not have a scholastic enrollment of more than three hundred pupils, exclusive of transfers, and the attendance record of all such districts for the previous year must not be less than fifty per cent of the entire time that the school was in session, and said district must maintain an attendance record during the year in which it receives such aid of at least seventy-five per cent, unless it can be shown to the satisfaction of the State Board of Education that the non-attendance is due to one or more of the following causes: (1) attendance elsewhere; (2) completion of the course; (3) extreme poverty of the family; (4) physical or mental incapacity; (5) lack of transportation facilities beyond a two and one-half mile limit; and provided that no school receiving aid under the provisions of this Act shall be located in a town or city having more than one thousand population according to the last Federal census.

(6) Local Tax. The school district must have levied and be collecting a local school tax of not less than fifty cents on the one hundred dollars valuation; and that in no case shall the assessed valuation be less than the valuation of the county assessor, as a requirement before the district can derive benefits from this fund; provided, that for the school year 1917-1918 any district which having voted the required tax, whether being collected for that year or not, shall be entitled to receive the benefits of this Act; provided, that the State Board of Education shall, when it is necessary to extend the term of school, for one time only, apportion any amount not to exceed two hundred dollars, whether any tax has been levied or not, and State aid may be continued upon condition that the district levy and collect the required local tax.

(7) Subjects. Each country school shall teach the common school subjects as prescribed by law. [Id., § 3.]

**Art. 2726d. General power of State Board of Education.**—The State Board of Education shall be authorized and it shall be their duty to make such rules and regulations, not inconsistent with the terms of this Act, as in its opinion may be necessary to carry out the provisions and intentions of this Act. [Id., § 4.]

**Art. 2726e. Duties of Superintendent of Public Instruction.**—It shall be the duty of the State Superintendent of Public Instruction to go in person or to send one of the rural school supervisors authorized by this Act to assist the school communities who may desire the privileges of this Act in their efforts to meet the necessary requirements in order that they may participate in the distribution of the funds herein appropriated. Before approving any application he shall make a thorough investigation in person or through his representative of the grounds, buildings, equipment and possibilities of each school applying for State aid by appropriation from the State Board of Education. [Id., § 5.]

**Art. 2726f. Second aid.**—Before State aid shall be granted a second time to the same district, it shall be necessary that all reports as required



of the school officials of said district shall have been received and approved; that the State Superintendent of Public Instruction or one of the rural school supervisors shall have visited said district and the State Superintendent of Public Instruction has advised the State Board of Education that in his judgment the school officials of such district have made diligent efforts to meet the requirements and standards as set forth in this Act, that the district receiving State aid has made satisfactory progress under existing conditions, and that, in his opinion further aid would prove a good and desirable investment for the State in promoting the educational interests of the people of such district, provided that no school shall be granted State aid a second time until all applications on file for first aid from schools entitled to aid under this Act shall have been acted upon. [Id., § 6.]

**Art. 2726g. Warrants and reports.**—Warrants for all money granted under the provisions of this Act shall be transmitted by the State Superintendent of Public Instruction to treasurers or depositories of school districts to which State aid is granted in the same manner as warrants for State apportionment are now transmitted, and it shall be the duty of all treasurers or depositories to make annually itemized reports under oath to the State Superintendent of Public Instruction of the expenditure of all money granted under the provisions of this Act. [Id., § 7.]

**Art. 2726h. Apportionment privileges.**—Country schools shall be entitled to share in the distribution of State and county available school funds, and in all other school funds in the same manner as other school districts; and in case high school grades are maintained the community schools shall still be entitled to participate in the distribution of any State aid that may be extended by the Legislature of Texas for vocational or industrial purposes to high schools of the State, though it accept the provisions of this Act. [Id., § 8.]

**Art. 2726i. Rural school supervisors.**—For the purpose of carrying out the provisions of this Act in a businesslike manner and in order that State aid may be administered judiciously to the schools of the State, the State Board of Education is hereby authorized to appropriate four thousand dollars annually out of the appropriation herein provided to pay the salaries to rural school supervisors, who shall be appointed by the State Superintendent of Public Instruction because of their special fitness to help, aid and assist rural communities in meeting the requirements and maintaining the standards set forth in the provisions of this Act; and the State Board of Education is further authorized and directed to appropriate four thousand dollars additional, or such part thereof as may be necessary, out of the appropriation provided for in this Act to defray the traveling expenses of the rural school supervisors in making personal visits to communities applying for State aid and in performing the supervisory duties made incumbent upon the Department of Education by the provisions of this Act. [Id., § 9.]

**Art. 2726j. Conflicting laws and opinions.**—All laws or parts of laws in conflict with this Act are hereby repealed, and in case it is held that any section or provision of this Act is unconstitutional, such ruling shall not impair other parts and provisions of this Act. [Id., § 10.]

## CHAPTER TEN

## STATE BOARD OF EDUCATION

Art.  
2729. Shall make apportionment.

Art.  
BOARD AUTHORIZED TO INVEST  
SCHOOL FUND

2736. Authorized to invest permanent school fund.

**Article 2729. Shall make apportionment.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

## BOARD AUTHORIZED TO INVEST SCHOOL FUND

**Art. 2736. Authorized to invest permanent school fund.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

## CHAPTER ELEVEN A

## COUNTY SCHOOL TRUSTEES

Art.  
2749a. Powers of trustees; election; tenure; appointment by commissioners court in certain counties; duties of state superintendent of public instruction as to elections.  
2749b. Classification of schools; course of study for schools.  
2749c. Subdivision of county into school districts and change of district lines; annual meeting of district school trustees; call of other meetings; consolidation of common school districts; record of proceedings; duties of state superintendent; transfer of school children.  
2749d. Supervisory powers of district court.

Art.  
2749e. Trustees as body corporate; powers; title to school property.  
2749f. County school superintendent as secretary and executive officer; record of proceedings.  
2749g. Apportionment of school funds.  
2749h. Appeals.  
2749i. Meetings; compensation.  
2749j. County superintendent to keep record of terms of office of trustees of common school districts; qualifications of county school trustees; election; oath; organization.  
2749k. Vacancies; quorum.  
2749l. Repeal; partial invalidity.

**Article 2749a. Powers of trustees; election; tenure; appointment by commissioners court in certain counties; duties of State Superintendent of Public Instruction as to elections.**—The general management and control of the public free schools in each county of the State shall be vested in five county school trustees elected from the county, one of whom shall be elected from the county at large by the qualified voters of the common school districts of the county, and one from each commissioner's precinct by the qualified voters of each commissioners' precinct, who shall hold office for a term of two years, or until their successors are elected or appointed and qualified. The time for the election of county school trustees shall be the same as that for the election of trustees of the common school districts, the first Tuesday in April of each year; the order for the election of county school trustees to be made by the county judge at least thirty days prior to the date of said election, and there shall be one voting place designated by the order for each common school district. The election officers appointed to hold the election for trustees in each common school district shall hold the election at the same place therein for the county school trustees. The county school trustees now in office shall continue in office for the terms for which they were chosen and qualified. The first election under this Act shall be held on the first Tuesday in April, 1916, at which time there shall be elected two county school trustees for a term of two years, and the second election under this Act shall be held on the first Tuesday in April, 1917, at which time there shall be elected in each county three county school trustees; and each year there-

after there shall be elected alternately two county school trustees and three county school trustees in each county. If there be any county in Texas at the time of the taking effect of this Act which has no county school trustees as provided for in Chapter 26, Acts of the Thirty-second Legislature, Regular Session [Vernon's Sayles' Civ. St. 1914, arts. 2849a-2849o], the county commissioners court thereof shall appoint five county school trustees, two to serve until the election and qualification of their successors in 1916 and three to serve until the election and qualification of their successors in 1917; and the qualified electors of the common school districts of each county shall annually thereafter elect county school trustees as are required under the provisions of this Act. The State Superintendent of Public Instruction is hereby directed and required to prepare a proper form of the ballot to be used in the election of county school trustees, and such other explanation of the laws as, in his judgment, may be necessary, and transmit the same to the county judge of each county at least sixty days prior to the date of the election of county school trustees. [Act March 5, 1915, ch. 36, § 2.]

**Explanatory.**—The above act amends chapter 26 of the Acts of the Regular Session of the 32nd Leg. (Vernon's Sayles' Civ. St. 1914, arts. 2849a-2849o). As the powers of the county school trustees are clearly extended beyond the management and control of the public high schools in common school districts, provisions relating to its functions in the management of the schools in general are placed under a separate chapter. The provisions of the amendatory act relating specifically to high schools are classified to chapter 15A of this title in accordance with the former disposition of the act amended. Took effect 90 days after adjournment of Legislature on March 20, 1915.

**Submission of question of annexing territory to popular vote.**—Under Acts 34th Leg. c. 36, giving county school trustees general management and control of free public schools in each county, question of annexing territory of a school district abolished to other districts need not be submitted to a vote of districts to be affected, in absence of a specific requirement. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

**Mandamus to control discretion.**—Under Acts 34th Leg. c. 36, giving county school trustees general control of public free schools in each county, held, that county school trustees have a broad discretion, and trustees of a district could not prevent proposed abolishment of district and its annexation to other districts by writ of mandamus. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

**Art. 2749b. Classification of schools; course of study for schools.—**

It shall be the duty of the county school trustees to classify the schools of the county in accordance with such regulations as may be prescribed by the State Superintendent of Public Instruction into elementary schools and high schools for the purpose of promoting the efficiency of the elementary schools and of establishing and promoting high schools at convenient and suitable places. In classifying the schools and in establishing high schools the county school trustees shall confer and advise with the County Superintendent of Public Instruction and the school trustees of each district at interest, and shall give due regard to schools already located, to the distribution of population, and to the advancement in their studies. The county trustees shall not so classify any school as to deprive any child of scholastic age of its right to receive instruction in the grades to which it belongs in the public school of the district in which it resides, unless arrangements are made by the county school trustees for the said child to attend a school of proper classification free of charge in another district which is within reasonable walking distance of the home of said child; that is, a school of proper classification which is not more than three miles from the home of said child; the distance to be computed according to the route or road commonly traveled in going from the home of said child to the school building, or unless the county school trustees shall arrange for the free transportation daily of said child to and from the school of proper classification, in which case the expense of such transportation shall be paid for by the district trustees out of the funds of the district in which the child actually resides; and it is hereby made the duty of the County Superintendent of Public Instruction and of the county school trustees to see that every child of scholastic age is properly provided for as herein required, and the State

Superintendent of Public Instruction is hereby directed and required to transmit definite and specific instructions to the County Superintendent of Public Instruction, the county school trustees and the district school trustees with respect to the proper observance and administration of this law, to the end that no child shall be deprived of its right to attend school. The county school trustees shall, in co-operation with the County Superintendent of Public Instruction, prescribe a course of study for the public schools of the county conforming to the law and the requirements of the State Superintendent of Public Instruction. [Id., § 3.]

**Free transportation of pupils.**—Acts 34th Leg. c. 36, does not authorize free transportation of children to and from common schools. *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

**Art. 2749c. Subdivision of county into school districts and change of district lines; annual meeting of district school trustees; call of other meetings; consolidation of common school districts; record of proceedings; duties of state superintendent; transfer of school children.**—The county school trustees are authorized to exercise the authority heretofore vested in the county commissioners court with respect to subdividing the county into school districts, and to making changes in school district lines. The county school trustees shall call an annual meeting of the district school trustees of the county, to be held at the county seat at some convenient season in August or September of each year, at which meeting shall be considered by the said county school trustees and the district school trustees in joint meeting, presided over by the chairman of the county school trustees, questions dealing with the location of high schools and the teaching of high school subjects, the classification of schools and such other matters as may pertain to the location, conduct, maintenance and discipline of schools, the terms thereof and other matters of interest in school affairs of the county, and the county school trustees shall be guided in their action by the result of the deliberation of such meeting, not inconsistent with law. The county school trustees may also call other meetings of the district school trustees, when deemed necessary by them, or on the petition of a majority of such district school trustees. The county school trustees shall have authority to consolidate two or more common school districts into a larger common school district where a majority of the qualified electors of each common school district at interest shall petition the county school trustees for consolidation in order that a high school may be established for the children of high school advancement in the common school districts so consolidated. The County Superintendent, as secretary of the county school trustees, shall keep an accurate and complete record in a well-bound book provided for that purpose, the field notes of all changes made in school district lines, and of all proceedings of the county school trustees, including the consolidation of school districts. A certified copy of such change in a school district line and also of the record in effecting the consolidation of school districts shall be made and transmitted by the County Superintendent to the county clerk, and it shall be the duty of the county clerk to record the field notes and certified copy of such change in a well-bound book to be designated as the "Record of School Districts." It is hereby made the duty of the State Superintendent of Public Instruction to prepare and transmit all necessary instructions and forms for use of the county school trustees and the people of common school districts in effecting the consolidation of school districts for high school purposes. In providing better schooling for the children and in carrying out the provisions of Section 2 of this Act [Art. 2749a] the County Superintendent of Public Instruction shall, on the recommendation of the county school trustees, transfer children of scholastic age from one school district to another, and the amount of funds to be transferred with each child of scholastic

age shall be the amount to which the district from which the child is transferred is entitled to receive. [Id., § 4.]

See art. 2815 and notes.

**Grounds of objection to change of districts.**—That a maintenance tax has been voted in a common school district does not affect the power of the county school trustees to reduce the district's area. *Oliver v. Smith* (Civ. App.) 187 S. W. 528.

The fact that the value of property would be lessened by a change in the lines of a common school district, although possibly admissible to show result of proposed change, could not prevent the change, if for best interests of schools. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

**Remedy of taxpayers and other persons interested.**—Under Const. 1876, art. 5, § 8, as amended in 1891, Acts 33d Leg. c. 129, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), and Acts 34th Leg. c. 36, the district court can supervise the action of school trustees in refusing to create a new district. *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

Taxpayers, not having objected to order creating school district, cannot, after taxes have been assessed, have the order creating district declared void on ground that it was not formed for convenience of scholars; but the validity of the order can only be questioned by quo warranto against the trustees in accord with acts 34th Leg. c. 36, declaring them a corporation. *Minear v. McVea* (Civ. App.) 185 S. W. 1048.

Any power of the court to correct abuse of discretion of county school trustees, in changing territory of one school district to another, can be exercised only in quo warranto instituted by a proper party. *Oliver v. Smith* (Civ. App.) 187 S. W. 528.

**Art. 2749d. Supervisory powers of district court.**—The district court shall have general supervisory control of the actions of the county board of school trustees in creating, changing and modifying school districts. [Id., § 4a.]

**Constitutionality.**—This article is not void because not expressed in the preamble. *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

**Power of court to compel action.**—This article does not give the district court authority to compel the school trustees to create a new district, but under Const. 1876, art. 5, § 8, as amended in 1891, Acts 33d Leg. c. 129, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), and art. 2749c the district court can supervise the action of school trustees in refusing to create a new district. *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

**Direct appeal from order of trustees.**—Under this act appeals to the district court may be made direct from action of the county board of school trustees in consolidating districts. *Clark v. Hallam* (Civ. App.) 187 S. W. 964. See, also, *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

In view of this article and art. 2749h, post, and Vernon's Sayles' Ann. Civ. St. 1914, arts. 4509, 4510, held that appeals from action of school trustees may be made to district court, since appeal provided by art. 2749h has reference to administrative acts. *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216.

This article held not controlled by section 10 of the act, post, art. 2749h, providing for appeals to state superintendent, and thence to state board of education. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

**Restraining action of trustees.**—Under this article district court had jurisdiction of a petition to enjoin action of county school trustees in abolishing a school district and annexing it to two other districts. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

**Art. 2749e. Trustees as body corporate; powers; title to school property.**—The county school trustees of each county shall constitute a body corporate, by the name of the county school trustees of \_\_\_\_\_ County, State of Texas, and in that name may acquire and hold real and personal property, sue and be sued, and may receive bequests and donations or other moneys or funds coming legally into their hands, and may perform other acts for the promotion of education in the county. The title to any school property belonging to the county, the title of which has heretofore been vested in the county judge and his successors in office, or any school property that may be acquired, shall vest in the county school trustees and their successors in office for public free school purposes. [Id., § 7.]

See *Minear v. McVea* (Civ. App.) 185 S. W. 1048.  
Cited, *Clark v. Hallam* (Civ. App.) 187 S. W. 964.

**Art. 2749f. County school superintendent as secretary and executive officer; record of proceedings.**—The county school trustees shall designate the County Superintendent as their secretary and executive officer, and it shall be the duty of the County Superintendent to keep a true and correct record of all the proceedings of said county school trustees in a well-bound book, which shall be open to public inspection. [Id., § 8.]

See *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

**Art. 2749g. Apportionment of school funds.**—Upon receiving notice from the State Superintendent of Public Instruction of the amount of State available school funds apportioned to the county, exclusive of all independent districts having each more than one hundred and fifty scholastics, it shall be the duty of the county school trustees, acting with the County Superintendent, to apportion all available State and county funds to the school districts as prescribed by law. [Id., § 9.]

See art. 2755, post.

**Art. 2749h. Appeals.**—All appeals from the decisions of the County Superintendent of Public Instruction shall lie to the county school trustees and from the said county trustees to the State Superintendent of Public Instruction, and thence to the State Board of Education. [Id., § 10.]

See arts. 2752, 4509, 4510, as to appeals to and from superintendent.

**Appeals to district court.**—Under Acts 34th Leg. c. 36, amending Acts 32d Leg. c. 26 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 2849a-2849o) §§ 4, 4a, 8, 10, a party aggrieved by the act of school trustees in creating districts may seek relief from the district court without first appealing to the state superintendent and board of education. *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

In view of this article and art. 2749d and *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4509, 4510, held, that appeals from action of school trustees may be made to district court, since appeal provided by this article has reference to administrative acts. *Collin County School Trustees v. Stiff* (Civ. App.) 199 S. W. 216.

Art. 2749d, giving district court general supervisory control over action of county school trustees in creating, etc., school districts, held not controlled by this article or *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4509, 4510, providing for appeals to state superintendent, and thence to state board of education. *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

**Art. 2749i. Meetings; compensation.**—The county school trustees shall hold meetings once each quarter, on the first Monday in August, in November, in February and in May, or as soon thereafter as practicable, and at other times when called by the president of the county school trustees or at the instance of any two members of the county school trustees and the County Superintendent, the meeting place to be at the county seat and in the office of the County Superintendent of Public Instruction. Each county school trustee shall be paid three (\$3.00) dollars per day for the time spent in attending meetings provided for in this section, such payments to be made from the general fund of the county by warrants drawn on order of the commissioners court, after approval of the account, properly sworn to, by the president of the county school trustees; provided, that no county school trustee shall receive more than thirty-six dollars for any one year. [Id., § 11.]

**Art. 2749j. County superintendent to keep record of terms of office of trustees of common school districts; qualifications of county school trustees; election; oath; organization.**—The County Superintendent of Public Instruction, as secretary of the county board of education, shall be required to keep an accurate record of the terms of office of the school trustees of each common school district and of the county school trustees, and shall furnish to the county judge at least sixty days prior to the date of the election of district and county school trustees the number of trustees to be elected in each common school district and the number of county school trustees to be elected from each commissioners precinct or in the county at large, as the case may be. The county school trustees shall be qualified voters of the precinct or county from which they are elected, and four of them shall reside in different commissioners' precincts. They shall be of good moral character, able to read and speak the English language, shall be persons of good education, and shall be in sympathy with public free schools. The county school trustees shall be elected as prescribed in Section 2 of this Act [Art. 2749a], and the returns of the election for county school trustees shall be made to the county clerk within five days after such election shall have been held, to be delivered by him to the commissioners court at its first meeting thereafter to

be canvassed and the results declared as in cases of other elections; and the county clerk, on behalf of the commissioners court, shall issue to the county school trustees their commissions and impress thereon the seal of the said court. The oath of office prescribed by the Constitution of the State for State and county officers must be taken by the county school trustees before the commission shall be issued, the said oath of office to be filed in the office of the county clerk. At the regular meeting in May, and after the qualification of new members the county school trustees shall organize by electing one of their number president. [Id., § 12.]

**Art. 2749k. Vacancies; quorum.**—All vacancies in the office of county school trustees shall be filled by election by the remaining county school trustees. Three of the county school trustees shall constitute a quorum, and all questions shall be decided by a majority vote. [Id., § 13.]

**Art. 2749l. Repeal; partial invalidity.**—All laws and parts of laws in conflict with this Act are hereby repealed, and in case it is declared by the courts that any part of this Act is unconstitutional, such decision shall not impair other parts and provisions of this Act. [Id., § 15.]

## CHAPTER TWELVE

### COUNTY SUPERINTENDENT AND OTHER OFFICERS

<p>Art. 2752. Shall have immediate supervision of schools.</p> <p>2755. Shall apportion funds among school districts.</p> <p>2756. Shall approve contracts and vouchers.</p> <p>2759. Authority of county superintendent as to transfers.</p> <p>2760. Application of parent or guardian.</p> <p>2761. To district in adjoining county.</p>	<p>Art. TREASURERS OF SCHOOL FUNDS</p> <p>2769. Depository shall keep accounts.</p> <p>2771. Treasurer of independent districts; best bidder of interest on average daily balances; tenure; bond.</p> <p>2772. Purposes for which the funds may be expended.</p> <p>2773. Treasurers shall make reports.</p>
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**Article 2752. Shall have immediate supervision of schools.**

**Note.**—By Act March 5, 1915, amending Act 1911, p. 34 (art. 2749h, ante), all appeals from the decisions of the county superintendent shall lie to the county school trustees and from such trustees to the state superintendent, and thence to the State Board of Education.  
Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 2755. Shall apportion funds among school districts.**

See art. 2749f.  
Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 2756. Shall approve contracts and vouchers.**

See post, art. 1513h, Penal Code.  
Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Approval of contracts and vouchers.**—Under this article the county superintendent's power as to teachers' contracts is not confined merely to a revision of the matter of salary, but he has full discretion to examine and decide as to the propriety of every such contract, and to approve or reject same as his sound judgment may direct. *Thomas v. Taylor* (Civ. App.) 163 S. W. 129.

It was not an abuse of discretion for the county judge, as ex officio county superintendent, to reject a contract between trustees of a school district and a teacher, where it appeared that the teacher was under criminal charges for misappropriating school money, and that the contract employed him for nine months while the other teachers were employed for only eight, and that it gave him a salary which the judge deemed excessive. *Id.*

Failure of teacher to compel by mandamus approval of her contract by county judge held an acquiescence in the refusal, and there was no valid contract to teach. *Boyles v. Potter County* (Civ. App.) 177 S. W. 210.

Existence of valid contract between trustees of a school district and a teacher is a condition precedent to right to issue vouchers and of county treasurer to pay them. *Id.*

Where a bank received money of a school district and paid the same out on warrants for the benefit of the district, that the county superintendent did not approve the warrants as provided by this article did not authorize the district to recover the money. *Moody v. Chesser* (Civ. App.) 183 S. W. 23.

**Art. 2759. Authority of county superintendent as to transfers.**

**Forgery of check for school funds.**—Under Pen. Code 1911, arts. 924-926, 929, 931, 933, Rev. St. 1911, arts. 2759-2761, Act March 6, 1911, art. 2849a et seq., post, the county superintendent who drew a check for school funds and then wrongfully signed the name of the payee, held guilty of forgery. *Carrell v. State* (Cr. App.) 184 S. W. 217.

**Art. 2760. Application of parent or guardian.**

See *Carrell v. State* (Civ. App.) 184 S. W. 217.  
Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 2761. To district in adjoining county.**

See *Carrell v. State* (Cr. App.) 184 S. W. 217.  
Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

## TREASURERS OF SCHOOL FUNDS

**Art. 2769. Depository shall keep accounts.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 2771. Treasurer of independent district; best bidder of interest on average daily balances; tenure; bond.**—In an independent district of more than 150 scholastics, whether it be a city which has assumed control of the schools within its limits or a corporation for school purposes only, the treasurer of the school fund shall be that person or corporation who offers satisfactory bond and the best bid of interest on the average daily balances for the privilege of acting as such treasurer. The treasurer when thus selected shall be required to serve until his successor shall have been duly selected and qualified, and he shall be required to give bond in double the estimated amount of the receipts coming annually into his hands. Said bond shall be made payable to the president of the board and his successors in office, conditioned for the faithful discharge of the treasurer's duties and the payment of the funds received by him upon the draft of the president of the school board drawn upon order duly entered of the board of trustees. Said bond shall be further conditioned that the treasurer shall safely keep and faithfully disburse all funds coming into his hands as treasurer, and shall faithfully pay over to his successor all balances remaining in his hands. It shall be approved by the school board and the State Department of Education shall be notified of the treasurer by the president of the school board filing a copy of said bond in said department. [Acts 1905, p. 263, § 165; Added Acts 1909, p. 17, § 154a; Act March 30, 1917, ch. 160, § 1.]

**Explanatory.**—The act amends art. 2771, tit. 48, ch. 12, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2772. Purposes for which funds may be expended.**

See arts. 2904r-2904w, as to operative effect of this article in respect to purchase of free text books.

Cited, *Board of Trustees of Alpine Independent Dist. v. Jacob* (Civ. App.) 170 S. W. 795.

**Payment to principal as janitor.**—This article does not authorize payment from free school fund to principal as janitor. *Dodson v. Jones* (Civ. App.) 190 S. W. 253.

**Employment of attorney.**—Under arts. 2772, 2822, 2823, 2856, 2892, as to school districts and powers of school trustees, trustees of an independent school district incorporated by the Legislature could employ and pay from the special maintenance fund an attorney to sue to cancel a teacher's contract. *Arrington v. Jones* (Civ. App.) 191 S. W. 361.

**Art. 2773. Treasurers shall make reports.**

See Penal Code, art. 1513h, post.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Scope of act.**—This article embraces all treasurers of school funds, including the treasurer of an independent school district organized under article 2851. *Hall v. State* (Cr. App.) 188 S. W. 1002.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Actions for funds.**—Where the legal depository of county funds refused to sue for money deposited elsewhere by former trustees of a school district, the existing trustees themselves may maintain the suit. *Moody v. Chesser* (Civ. App.) 173 S. W. 917.



be canvassed and the results declared as in cases of other elections; and the county clerk, on behalf of the commissioners court, shall issue to the county school trustees their commissions and impress thereon the seal of the said court. The oath of office prescribed by the Constitution of the State for State and county officers must be taken by the county school trustees before the commission shall be issued, the said oath of office to be filed in the office of the county clerk. At the regular meeting in May, and after the qualification of new members the county school trustees shall organize by electing one of their number president. [Id., § 12.]

**Art. 2749k. Vacancies; quorum.**—All vacancies in the office of county school trustees shall be filled by election by the remaining county school trustees. Three of the county school trustees shall constitute a quorum, and all questions shall be decided by a majority vote. [Id., § 13.]

**Art. 2749l. Repeal; partial invalidity.**—All laws and parts of laws in conflict with this Act are hereby repealed, and in case it is declared by the courts that any part of this Act is unconstitutional, such decision shall not impair other parts and provisions of this Act. [Id., § 15.]

## CHAPTER TWELVE

### COUNTY SUPERINTENDENT AND OTHER OFFICERS

Art.		Art.	
2752.	Shall have immediate supervision of schools.		<b>TREASURERS OF SCHOOL FUNDS</b>
2755.	Shall apportion funds among school districts.	2769.	Depository shall keep accounts.
2756.	Shall approve contracts and vouchers.	2771.	Treasurer of independent districts; best bidder of interest on average daily balances; tenure; bond.
2759.	Authority of county superintendent as to transfers.	2772.	Purposes for which the funds may be expended.
2760.	Application of parent or guardian.	2773.	Treasurers shall make reports.
2761.	To district in adjoining county.		

#### **Article 2752. Shall have immediate supervision of schools.**

**Note.**—By Act March 5, 1915, amending Act 1911, p. 34 (art. 2749h, ante), all appeals from the decisions of the county superintendent shall lie to the county school trustees and from such trustees to the state superintendent, and thence to the State Board of Education.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

#### **Art. 2755. Shall apportion funds among school districts.**

See art. 2749f.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

#### **Art. 2756. Shall approve contracts and vouchers.**

See post, art. 1513h, Penal Code.

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Approval of contracts and vouchers.**—Under this article the county superintendent's power as to teachers' contracts is not confined merely to a revision of the matter of salary, but he has full discretion to examine and decide as to the propriety of every such contract, and to approve or reject same as his sound judgment may direct. *Thomas v. Taylor* (Civ. App.) 163 S. W. 129.

It was not an abuse of discretion for the county judge, as ex officio county superintendent, to reject a contract between trustees of a school district and a teacher, where it appeared that the teacher was under criminal charges for misappropriating school money, and that the contract employed him for nine months while the other teachers were employed for only eight, and that it gave him a salary which the judge deemed excessive. *Id.*

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**Art. 2760. Application of parent or guardian.**

See *Carrell v. State* (Civ. App.) 184 S. W. 217.  
Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Art. 2761. To district in adjoining county.**

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**Explanatory.**—The act amends art. 2771, tit. 48, ch. 12, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2772. Purposes for which funds may be expended.**

See arts. 2904r-2904w, as to operative effect of this article in respect to purchase of free text books.

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**Payment to principal as janitor.**—This article does not authorize payment from free school fund to principal as janitor. *Dodson v. Jones* (Civ. App.) 190 S. W. 253.

**Employment of attorney.**—Under arts. 2772, 2822, 2823, 2856, 2892, as to school districts and powers of school trustees, trustees of an independent school district incorporated by the Legislature could employ and pay from the special maintenance fund an attorney to sue to cancel a teacher's contract. *Arrington v. Jones* (Civ. App.) 191 S. W. 361.

**Art. 2773. Treasurers shall make reports.**

See Penal Code, art. 1513h, post.  
Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Scope of act.**—This article embraces all treasurers of school funds, including the treasurer of an independent school district organized under article 2851. *Hall v. State* (Cr. App.) 188 S. W. 1002.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Actions for funds.**—Where the legal depository of county funds refused to sue for money deposited elsewhere by former trustees of a school district, the existing trustees themselves may maintain the suit. *Moody v. Chesser* (Civ. App.) 173 S. W. 917.

## CHAPTER THIRTEEN

## SCHOLASTIC CENSUS

**Article 2774. Time and manner of taking census.**—The County Superintendent of Public Instruction shall, and the Board of Trustees of the independent school districts, on the first day of January of each year, or as soon as practicable thereafter, appoint one of the trustees of each school district, or some other qualified person, to take the scholastic census, who shall be known as the census trustee of the district. "It shall be the duty of the census trustee to take, between the first day of March and the first day of April, after his appointment, a census of all the children that will be over seven and under eighteen years of age on the first day of the following September," and who are residents of the school district on said first day of April, and to make report under oath to the County Superintendent on or before the first day of June next thereafter. In taking the said census he shall visit each home, residence, habitation and place of abode, and shall, by actual observation and interrogation, enumerate the children thereof in the following manner: He shall use for each parent, or guardian or person having control of any such children, a prescribed form showing the name, color and nationality of the person rendering such children, the name and number of the school district in which the children reside, and the name, sex and date of birth of each child of which he is a parent or guardian, or of which he has control, and which child will be over seven and under eighteen years of age on the first day of September next following. The census trustee shall require such form to be subscribed and sworn to by the person rendering the children, and he is hereby authorized to administer oaths for this purpose. When the census trustee visits any home or house or place of abode of a family, and fails to find either the parent or any person having legal control, it shall be the duty of the census trustee to leave the prescribed census blank for the use of parents at such home or place of abode, with a note to the parent or guardian having legal control of such child or children, requiring that the form be filled out, sworn and subscribed to before the census trustee, or any officer authorized to administer oaths, and that the blank, when so filled out, shall be delivered by the parent or person having legal control of the child or children to the census trustee. [Acts 1905, p. 263, § 89; Act March 22, 1915, ch. 121, § 1.]

Took effect 90 days after March 20, 1915, date of adjournment.

## CHAPTER THIRTEEN A

## COMPULSORY EDUCATION

Art.	Art.
2779a. Attendance requirements and provisions.	districts; salary; performance of duties by other officers.
2779b. Exemptions.	2779f. Powers and duties of attendance officer.
2779c. Public aid to indigent parents.	2779g. Duties of school superintendents; list of school children; forms and blanks; reports by teachers.
2779d. Excuses for absences.	2779h. Repeal; partial invalidity.
2779e. Attendance officers; election; appointment in independent school	

**Article 2779a. Attendance requirements and provisions.**—Every child in this State who is eight years and not more than fourteen years old shall be required to attend the public schools in the district of its residence, or in some other district to which it may be transferred, as provided by law, for a period of not less than sixty days for the scholastic year,

beginning September 1, 1916, and for a period of not less than eighty days for the scholastic years beginning September 1, 1917, and for the scholastic year 1918-19, and each scholastic year thereafter a minimum attendance of 100 days shall be required. The period of compulsory school attendance at each school shall begin at the opening of the school term unless otherwise authorized by the district school trustees and notice given by the trustees prior to the beginning of such school term; provided, that no child shall be required to attend school for a longer period than the maximum term of the public school in the district where such child resides. [Act March 13, 1915, ch. 49, § 1.]

Took effect 90 days after adjournment of legislature on March 20, 1915.

**Validity of ordinance.**—In view of Acts 34th Leg. c. 49, held, that ordinance of municipality requiring vaccination of children as condition precedent to their attendance at school cannot be sustained under article 838, giving municipality power to enact health legislation, or on the ground that there were Mexicans and others in the vicinity who were subject to and carried smallpox. *Waldschmit v. City of New Braunfels* (Civ. App.) 193 S. W. 1077.

**Computation of age.**—The provision that every child of 8 years and not more than 14 years old shall be required to attend public schools, etc., held not applicable to child whose fourteenth birthday came October 12th; school term in district of his residence not beginning until October 30th. *Butler v. State* (Cr. App.) 194 S. W. 166.

**Art. 2779b. Exemptions.**—The following classes of children are exempt from the requirements of this Act:

(a) Any child in attendance upon a private or parochial school or who is being properly instructed by a private tutor.

(b) Any child whose bodily or mental condition is such as to render attendance inadvisable, and who holds definite certificate of a reputable physician specifying this condition and covering the period of absence.

(c) Any child who is blind, deaf, dumb or feeble-minded, for the instruction of whom no adequate provision has been made by the school district.

(d) Any child living more than two and one-half miles by direct and traveled road from the nearest public school supported for children of the same race and color of such child, and with no free transportation provided.

(e) Any child more than twelve years of age who has satisfactorily completed the work of the fourth grade of a standard elementary school of seven grades, and whose services are needed in support of a parent or other person standing in parental relation to the child, may, on presentation of proper evidence to the County Superintendent of Public Instruction, be exempted from further attendance at school. [Id., § 2.]

Cited, *Odum v. State* (Cr. App.) 194 S. W. 829.

**Art. 2779c. Public aid to indigent parents.**—If any parent, guardian or custodian of any child or children who are not exempt from attendance by some of the foregoing provisions of this bill shall make satisfactory proof to the board of trustees that they are financially unable to furnish such child or children with the necessary books with which to attend school, the County Superintendent of Public Instruction of the county where such parent, guardian or custodian resides, shall furnish, upon the recommendation of the district trustees, text books for such purposes to such child or children, which books shall be furnished and paid for upon the certificate of such officers by the board of county commissioners of the county in which such child or children reside, and which said payment for books shall be made out of the general fund of the county. [Id., § 3.]

**Art. 2779d. Excuses for absences.**—Any child not exempted from the provisions of this Act may be excused for temporary absence due to personal sickness, sickness or death in the family, quarantine, severe storm which has destroyed bridges and made the regular means of travel dangerous, or for unusual causes acceptable to the teacher, principal or superintendent of the school in which said child is enrolled; provided that

the excuses are in writing and signed by the parent or guardian of said child; but any case so excused may be investigated by the authorities discharging the duties of attendance officer for the school from which said child is so excused. [Id., § 4.]

**Note.**—Sec. 5 of the act makes it an offense to employ children under 14 who are not excused from attendance on school, and is set forth in Vernon's Pen. Code 1916, as art. 1513f.

**Art. 2779e. Attendance officer; election; appointment in independent school districts; salary; performance of duties by other officers.**—The county school trustees of any county having a scholastic population of more than three thousand may elect a school attendance officer for said county upon petition of at least fifty resident freeholders of said county setting forth reasons good and valid in the judgment of the county school trustees why said county shall have an attendance officer; provided, that a public hearing shall be had on said petition after due notice of such hearing shall have been given by publishing said notice in a newspaper published at the county seat for three consecutive weeks, if there be such a newspaper, and if there be no such newspaper, then by posting written or printed notices in at least three public places within the county, one of which notices shall be posted at the courthouse door of said county, and if, after said hearing of said county board of trustees, in their judgment said county board of trustees believe that a school attendance officer is necessary to the proper enforcement of the provisions of this Act, and that the schools of said county will be benefited by having said attendance officer, the said board may elect such officer as herein provided.

The board of trustees of any independent district having a scholastic population of more than two thousand may, after being petitioned and having hearing on said petition, as provided in this section for election of county attendance officer, elect an attendance officer for said independent district, if, in the judgment of said board of trustees, said attendance officer is necessary to the proper enforcement of the provisions of this Act.

Any attendance officer that may be elected by the county school trustees of any county, or by the board of school trustees of any independent school district, may have his salary paid from the available school funds belonging to said county or district, not exceeding two dollars per day for the time actually employed in discharging his duty as such attendance officer; and in any county or independent district where such attendance officer is not elected as provided for in this section, the duties of said attendance officer shall devolve upon the school superintendents and peace officers of such county or district who shall perform the duties of such attendance officer without additional pay. Counties or independent school districts which may avail themselves of the option to elect school attendance officers may elect the probation officer or some officer or officers of the juvenile court of said county to serve as such attendance officer for said county or for said independent district or independent districts located in said county. [Id., § 6.]

**Art. 2779f. Powers and duties of attendance officer.**—The person or persons performing the duties of attendance officer or officers for any county or district shall have power to investigate all cases of unexcused absences from school, to make and file in the proper court complaint in due form against any person or persons violating the provisions of this Act, to administer oaths and to serve legal process, to enforce the provisions of this Act, to keep records of all cases of any kind investigated by him in the discharge of his duties, and to make reports of his work as the State Superintendent may require, providing that nothing in this Act shall be construed to authorize any attendance officer to invade or enter without permission of the owner or tenant thereof, or the head of any family residing therein, any private home, or private residence, or any

room or apartment thereof, except to serve lawful process upon any parent, guardian or other person standing in parental relation to any child affected by this Act, or to forcibly take corporal custody of any child anywhere without the permission of the parent or guardian thereof, or other person standing in parental relation to such child, except in obedience to valid process issued by a court of competent jurisdiction, and provided that otherwise than as hereinbefore provided, such attendance officer shall have the power to enforce the provisions of this Act. [Id., § 7.]

**Art. 2779g. Duties of school superintendents; list of school children; forms and blanks; reports by teachers.**—It shall be the duty of the County Superintendent of Public Instruction to furnish to the Superintendent of Schools of each school district in the county, and to the principal of the school in case there be no superintendent, a complete list of all children of scholastic age belonging in said district, as shown by the last scholastic census and the record of transfers to and from said district. The superintendents and principals of the various schools of said county shall, within five days from the date that the provisions of the compulsory attendance act applies to said school, report to said County Superintendent the names of all children subject to the provisions of this Act who have not enrolled in said school, and it shall be the duty of the Superintendent, principal or other official of private, denominational or parochial schools to furnish to said County Superintendent a list of all children of scholastic age enrolled in the school presided over by said official and the district in which said child was enumerated in the public school census. From the reports received from the Superintendents and principals of the public schools and from the officials of the private, denominational and parochials schools, the County Superintendent shall make up a complete list of all children within scholastic age enrolled in the various districts of said county who have not enrolled in some school and are complying with the compulsory attendance act, and said list shall be furnished to the authorities to whom has been delegated the power to enforce the provisions hereof for said county or district, which authorities shall proceed to carry out their respective duties as prescribed in Section 6 of this Act [Art. 2779e]. All notices, forms and blanks to be used by any of the Superintendents, principals or officials of any school shall be prescribed by the State Superintendent of Public Instruction. It shall be the duty of any teacher giving instruction to any child within compulsory attendance age to report promptly to the attendance officer or other person acting in his stead as herein provided, any unexcused absences, for his action. [Id., § 8.]

**Note.**—Sec. 9 of the act makes it a misdemeanor for any parent to fail to comply with the act, and is set forth in Vernon's Pen. Code 1916, as art. 1513g. The section further provides for proceedings in the juvenile court to compel compliance with the act, and this provision is set forth in Vernon's Code Cr. Proc. 1916, as art. 1207c.

**Art. 2779h. Repeal; partial invalidity.**—All laws and parts of laws in conflict with this Act are hereby repealed, and in case it is declared by the courts that any section or provision of this Act is unconstitutional, such decision shall not impair other sections or provisions of this Act. [Id., § 10.]

## CHAPTER FOURTEEN

## TEACHERS' CERTIFICATES AND EXAMINATIONS

<p>Art. 2780. Shall present valid certificate. 2781. Salaries of teachers. 2783. Prescribed studies; summer normal schools and county teachers' institutes. 2784. Shall keep records and make reports. 2786. County board of examiners, etc.</p>	<p>Art. 2806. Teachers' certificates; classification of schools. 2811. State kindergarten certificates; state permanent kindergarten certificates. 2814. Cancellation of certificate; appeal; reinstatement.</p>
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**Article 2780. Shall present valid certificate.**

**Validity of contract.**—Under arts. 2780 and 2786, and Pen. Code 1911, art. 1512, first-grade certificate granted by county superintendent and not by the state superintendent held void, and where teacher, when contracting, had no other certificate, the contract was void, though he subsequently obtained a first-grade certificate from the state superintendent. *Richards v. Richardson* (Civ. App.) 168 S. W. 50.

Where court found that contract to pay \$75 a month to relator as school principal and \$50 a month as janitor was made to evade arts. 2780, 2781, and that another was employed as janitor, vouchers for the additional salary as janitor were properly rejected. *Dodson v. Jones* (Civ. App.) 190 S. W. 253.

**Art. 2781. Salaries of teachers.**

See *Dodson v. Jones* (Civ. App.) 190 S. W. 253; note under art. 2780.

**Art. 2783. Prescribed studies; summer normal schools and county teachers' institutes.**—All public schools in this state shall be required to have taught in them orthography, reading in English, penmanship, arithmetic, English grammar, modern geography, composition, physiology and hygiene, including the effects of alcoholic stimulants and narcotics on the human system, mental arithmetic, Texas history, United States history, civil government, elementary agriculture, cotton grading and other branches as may be agreed upon by the trustees or directed by the State Superintendent of Public Instruction; provided, that the subject of elementary agriculture shall not be required to be taught in independent school districts having a scholastic population of three hundred or more, unless so ordered by the school boards; provided, further, that suitable instruction shall be given in the primary grades once each week regarding kindness to animals of the brute creation and the protection of birds and their nests and eggs; provided, further, that in the meaning of this Act elementary agriculture shall include with the present adopted text certain practical field studies and laboratory experiments as prescribed by the county school trustees in conformity to law and the requirements of the State Superintendent of Public Instruction; provided, further, that each summer normal institute and each county teachers' institute shall employ at least one instructor, who shall be selected because of his special preparation to give instruction in the subject of agriculture. [Acts 1905, p. 262, § 100; Acts 1907, p. 316; Act March 22, 1915, ch. 83, § 1.]

The act took effect 90 days after March 20, 1915, date of adjournment.  
See art. 2749b.

**Art. 2784. Shall keep records and make reports.**

See Penal Code, art. 1513h, post.

**Art. 2786. County board of examiners, etc.**

**Validity of contract.**—Under art. 2780, Pen. Code 1911, art. 1512, and this article, first-grade certificate granted by county superintendent and not by the state superintendent held void, and where teacher, when contracting, had no other certificate, the contract was void, though he subsequently obtained a first-grade certificate from the state superintendent. *Richards v. Richardson* (Civ. App.) 168 S. W. 50.

**Art. 2806. Teachers' certificates; classification of schools.**—A teacher's diploma conferred by the University of Texas upon a student who has satisfactorily completed at least four full courses in the Department of Education, and who has satisfied the requirements for the degree of Bachelor of Arts, when presented to the State Department of Education

with satisfactory evidence of having done the required work in education, shall entitle the holder to receive a State permanent certificate valid for life unless cancelled by lawful authority.

A person who has satisfactorily completed four full courses in the College of Arts and one full course in the Department of Education of the University of Texas, or in any college or university, or in any junior college in Texas ranked as first class by the State Superintendent of Public Instruction, upon the recommendation of the State Board of Examiners, shall, upon presentation of satisfactory evidence of having done the required work, be entitled to receive from the State Department of Education a State first-grade certificate valid until the fourth anniversary of the thirty-first day of August of the calendar year in which the certificate was issued, unless cancelled by lawful authority.

Any school applying for approval under the provisions of this Act shall pay a fee of twenty-five dollars, and each applicant for teacher's certificate on college credentials shall pay a fee of one dollar to cover the expenses of inspection and standardization of approved colleges.

It shall be the duty of the State Superintendent of Public Instruction to appoint a suitable person or persons of recognized college standing, who shall make a thorough inspection of the equipment and standards of instruction maintained in each school applying for approval under this Act, and who shall make a detailed report to the State Board of Examiners for their consideration before any recommendation is made to the State Superintendent of Public Instruction for his approval.

The State Superintendent shall have each school receiving the benefits of this Act thoroughly inspected from year to year as to its standards and facilities of instruction, and he shall have authority to suspend any school from the benefits of this Act which fails for any reason to maintain the approved standards of classification. [Acts 1911, p. 189, § 1 (116); Act Feb. 2, 1917, ch. 8, § 1.]

**Explanatory.**—The act amends sec. 116, ch. 96, Acts Regular Session 32nd Leg., so as to read as above. The act took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2811. State kindergarten certificates; state permanent kindergarten certificates.**

See arts. 2909½-2909½b, and note thereunder.

**Art. 2814. Cancellation of certificate; appeal; reinstatement.**—Any certificate may be cancelled for cause by the authority issuing it; and the State Superintendent of Public Instruction shall have power to cancel any certificate upon satisfactory evidence that the holder thereof is conducting his school in violation of the laws of the State or is a person unworthy to instruct the youth of this State; provided, if any teacher holding a certificate to teach in the public schools of this State, shall enter into a written contract with any board of trustees to teach in any public school of this State, and shall, after making such contract and without the consent of the trustees, abandon said contract, except for good cause, such abandonment shall be considered sufficient grounds for the cancellation of said teacher's certificate, and the same may be cancelled upon the complaint of said trustees, or either of them; provided, that before any certificate shall be cancelled, the holder thereof shall be notified, and shall have an opportunity to be heard, and he shall have the right of appeal from such decision to the State Superintendent, and the State Board of Education; provided, that when the State Superintendent shall have cancelled the certificate, the appeal shall be to the State Board of Education; and provided further that the State Superintendent shall have the authority, upon satisfactory evidence being presented, to reinstate any teacher's certificate theretofore cancelled under the provisions of this Article, and upon a refusal of the Superintendent to so reinstate such certificate, the applicant shall have the right of appeal to the



State Board of Education. [Acts 1905, p. 297, § 127; Act March 30, 1917, ch. 157, § 1.]

**Explanatory.**—The act amends art. 2814, Rev. Civ. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

CHAPTER FIFTEEN

COMMON SCHOOL DISTRICTS

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| <p><b>Art.</b><br/>                 2815. Establishment of districts.<br/>                 2815a. Common county line districts.<br/>                 2815b. Rights, powers and privileges of common county line districts; management; taxes; bonds, etc.<br/>                 2815c. Land taken into city or town constituting independent school district shall constitute part of city districts; adjustment of bonded indebtedness and property rights.<br/>                 2815d. Town or village incorporated for free school purposes only shall be liable for proportion of bonded indebtedness of part of common school district within its limits.<br/>                 2816. Commissioners' court may change district lines.<br/>                 2817. Court shall give metes and bounds of district.<br/>                 2817a. Validation of districts.</p> | <p><b>Art.</b><br/>                 2822. District trustees a body corporate.<br/>                 2823. Shall have management and control of schools.<br/>                 2824. Make contracts for the district.<br/>                 2825. Contracts with teachers.</p> |
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- LOCAL TAX**
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| <p>2827. Special tax authorized.<br/>                 2828. Partition for tax election.<br/>                 2829. Presiding officer; ballots.<br/>                 2831. Who entitled to vote.<br/>                 2833. Election to abrogate, increase or diminish tax.<br/>                 2835. Form of ballot for increase.<br/>                 2836. Levy of tax.</p> | <p><b>SCHOOLHOUSE BONDS</b><br/>                 2837. Election for issuance of bonds.<br/>                 2838. Ballots.<br/>                 2839. Issuance and sale of bonds.<br/>                 2841. Levy of bond tax.<br/>                 2842. Tax must be levied until bonds are paid.<br/>                 2843. Expenditure of proceeds of bonds.</p> |
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- SCHOOL PROPERTY**
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| <p>2819. Election officers; returns; compensation; notice of election; appointment of substitute; eligibility of school trustees.<br/>                 2820. Returns of election.<br/>                 2821. Qualifications of trustees; suit to remove trustee not qualified; appointment of temporary trustee; vacancy.</p> | <p>2844. Trustees to contract for building.<br/>                 2845. Lien may not be acquired.<br/>                 2846. Sale of school property.<br/>                 2847. Control of school property.<br/>                 2849. Title to property.</p> |
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**Article 2815. Establishment of districts.**

**Note.**—The authority given to the Commissioners' Court by this article is conferred on the county school trustees by Act March 5, 1915 (art. 2749c, ante).

Cited, *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140; *Ferguson v. Leigh* (Civ. App.) 193 S. W. 206.

**Change of lines in general.**—Under this article, the commissioners did not abuse their discretion in transferring 2,500 acres of land from one school district to another on a petition of citizens interested, after a hearing of the people from both districts. *Chastain v. Hoskins* (Civ. App.) 168 S. W. 421.

**Effect of existence of bonded indebtedness.**—Vouchers issued by the trustees of a school district for the erection of a school were not "bonded indebtedness" within Rev. St. 1911, art. 2815, inhibiting a reduction of the area of a school district where a bonded indebtedness exists. *Chastain v. Hoskins* (Civ. App.) 168 S. W. 421.

**Petition as prerequisite.**—The power conferred upon county commissioners by this article, to alter or subdivide school districts, is very general, and a petition of citizens is not a prerequisite to its exercise. *Chastain v. Hoskins* (Civ. App.) 168 S. W. 421.

**Shape and extent of district.**—Taxpayers and residents of a school district consolidated by the county commissioners with another to form one so large as to violate this article, held entitled to temporary injunction restraining the commissioners from issuing bonds, etc. *Cleveland v. Gainer* (Civ. App.) 184 S. W. 593.

Under this article, consolidation, in a county of less than 10,000 population, of two districts, to form one 30 miles in length and 16 in width, held illegal. *Id.*

A common school district as established by the county school trustees by adding territory so that the farthest line thereof is more than four miles from its center, contrary to this article, can have no legal existence. *Oliver v. Smith* (Civ. App.) 187 S. W. 528.

**Recognition of districts.**—Retrospective curative provision of Acts 33d Leg. c. 129 (*Vernon's Sayles' Ann. Civ. St. 1914, art. 2815*), validating previously formed school districts, which became effective in July, 1913, held not to apply to an illegal consolidation of two school districts effected February 11, 1915. *Cleveland v. Gainer* (Civ. App.) 184 S. W. 593.

A curative act validating school districts previously established and recognized will not be construed to validate the action of county commissioners, in consolidating two districts illegally, which was a fraud upon residents and taxpayers in one of them. *Id.*

Though order of commissioners' court attempting to transfer 1,000 acres from school district No. 44, to No. 51, was void as former contained less than nine square miles, it

was validated by Acts 33d Leg. c. 129 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815). *Ogburn Orchard Co. v. Bozeman* (Civ. App.) 194 S. W. 1155.

**Review of action.**—See *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

An exercise of power by county commissioners under this article is not reviewable except where there is an abuse of discretion. *Chastain v. Hoskins* (Civ. App.) 168 S. W. 421.

An injunction against the issuance of school bonds which, under Acts 33d Leg. c. 129, § 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 2815), would prevent alteration of the district and a mandatory injunction for the creation of a new district held proper. *Jennings v. Carson* (Civ. App.) 184 S. W. 562.

Taxpayers, not having objected to order creating school district, cannot, after taxes have been assessed, have the order creating district declared void on ground that it was not formed for convenience of scholars; but the validity of the order can only be questioned by quo warranto against the trustees in accord with Acts 34th Leg. c. 36, arts. 2749c, 2749e, declaring them a corporation. *Miner v. McVea* (Civ. App.) 185 S. W. 1048.

**Art. 2815a. Common county line districts.**—The boards of county school trustees of the several counties of the State of Texas shall have full power and authority to create common school districts, to contain territory within two or more counties of this State. In creating a common county line school district the boards of county school trustees of each county having territory in the school created, shall each pass an order describing the territory desired to be created into such school district by metes and bounds, giving the course and direction with the exact length of each line contained in such description and locating each corner called for upon the ground, and shall also give the acres of each survey and parts of survey of lands contained in such district, together with a map showing the conditions upon the ground as described in the field notes, giving the number of acres of land contained in each survey and parts of survey contained in each county; also showing the exact position and location of the county line in the territory created into a common county line school district. The said order of each board of county school trustees shall also designate and name some one of the counties having territory included in the description of such common county line school district to manage and have control of the public school in such common county line school district.

The said common county line school district shall have no authority or power until the said order of the board of county school trustees has been passed by the board of county school trustees of each county having territory included in such common county line school district; provided, that no common county line school district shall be created with a less area than nine square miles, and shall be laid out in as near the shape of a square as possible, and in no event shall the length of such district be greater than the width plus one-half of the width of such district. [Acts 1909, ch. 12; Acts 1911, p. 200, § 50a; Act April 4, 1917, ch. 196, § 1.]

**Explanatory.**—The act amends sec. 50a, ch. 100, Acts 32nd Legislature. Sec. 2 repeals all laws in conflict and provides that the act shall not affect litigation pending growing out of county line boundaries.

**Art. 2815b. Rights, powers and privileges of common county line districts; management; taxes; bonds, etc.**

Cited, *Oliver v. Smith* (Civ. App.) 187 S. W. 528.

**Art. 2815c. Land taken into city or town constituting independent school district shall constitute part of city district; adjustment of bonded indebtedness and property rights.**—Whenever the limits of any incorporated city or town within this state, which city or town constitutes an independent school district, shall be so extended or enlarged, or shall have been so extended or enlarged, as to embrace within the limits of such incorporated city or town the whole or any part of any independent or common school district adjacent to such incorporated city or town, that portion of such adjacent independent or common school district so embraced within the corporate limits of such incorporated city or town, shall thereafter become a part and portion of the independent school district constituted by such incorporated city or town.

Provided, however, that if such independent or common school district so brought, in whole or in part, within the limits of such incorporated city or town, shall have an outstanding bonded indebtedness, then such incorporated city or town shall become bound and liable for the payment of such proportion of the bonded indebtedness of such independent or common school district, as the assessed value of the portion of such independent or common school district so brought within the incorporated limits of such city or town, shall bear to the whole assessed values of such independent or common school district, so encroached upon, as such assessed values are shown upon the last preceding county tax assessment rolls, and thereafter such incorporated city or town shall pay, either directly or through the officers of such independent or common school district, the proportion of the interest and principal of such bonded indebtedness for which they so become liable.

If within the portion of such independent or common school district so brought within the limits of an incorporated city or town, there should be situated any real property belonging to such independent or common school district, such city or town may acquire the same upon such terms as may be mutually agreed upon between the city council of such city and the authorities of such independent or common school district. [Act May 19, 1917, 1st C. S., ch. 28, § 1.]

**Explanatory.**—The act amends ch. 15, tit. 48, Rev. Civ. St., by adding thereto, after art. 2815b, a new article to read as above. The act contains another section, designated 1a, embraced within the title of the act, and set forth below as art. 2815d. Became a law May 19, 1917.

**Art. 2815d. Town or village incorporated for free school purposes only shall be liable for proportion of bonded indebtedness of part of common school district within its limits.**—In all cases where any town or village has heretofore been incorporated or may hereafter be incorporated for free school purposes only and which shall include within the limits thereof any portion or portions of any common school district which has an outstanding bonded indebtedness, than such town or village incorporated for school purposes only shall become bound and liable for the payment of such proportion of the bonded indebtedness of the common school district as the assessed value of the portion of such common school district included within the limits of the district so incorporated for free school purposes only shall bear to the entire assessed value of the common school district from which the same was taken, as such assessed values are shown upon the last preceding county tax assessment roll; and thereafter such incorporated town or village shall pay either directly or through the officers of such common school district the proportion of the interest and principal of such bonded indebtedness for which it is liable. [Id., § 1a.]

See note under art. 2815c.

**Art. 2816. Commissioners' court may change district lines.**

**Note.**—The authority given by this section to the commissioners' court is conferred on the county school trustees by Act March 5, 1915 (art. 2749c, ante).

Cited, *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

**Art. 2817. Court shall give metes and bounds of each district.**

Cited, *Oliver v. Smith* (Civ. App.) 187 S. W. 528. See notes under art. 2815.

**Order establishing boundaries.**—Where order establishing school district described its boundaries, stating acreage of each survey, fact that territory was taken out of district as originally constituted and allotted to other districts, without describing them by metes and bounds, does not render invalid order creating district. *Minear v. McVea* (Civ. App.) 185 S. W. 1048.

**Art. 2817a. Validation of districts.**—All common school districts in this State heretofore laid out and attempted to be established by the proper officers of any county and heretofore recognized by said county authorities as school districts of said county are hereby validated in all

respects as though they had been duly and legally established in the first instance. [Act June 4, 1915, 1st C. S., ch. 28, § 1.]

Took effect 90 days after May 28, 1915, date of adjournment.

### TRUSTEES

**Art. 2819. Election officers; returns; compensation; notice of election; appointment of substitutes; eligibility of school trustees.**—The board of trustees of the common school district shall appoint three persons, qualified voters of the district, to hold such election and shall make returns thereof to the board of trustees of the common school district within five days after such election shall have been held. The three persons holding said election shall receive as compensation for their services the sum of one dollar each, to be paid out of the general fund of the county in which said election was held. The board of trustees, when ordering such election and appointing persons to hold election, shall give notice of the time and place where such election will be held, which notice shall be posted at three public places within the district at least twenty days prior to the date of holding said election. If, at the time and place for holding such election, any or all of the persons so appointed to hold such election are absent or refuse to act, then the electors present may select of their number a person or persons to act in the place of those absent or refusing to act. No person shall be eligible to service as a school trustee who cannot read and write and has not been a resident of the school district for six months prior to the election held for trustee. [Acts 1905, p. 263, § 68; Act March 30, 1915, ch. 132, § 1.]

**Explanatory.**—The title of the act purports to amend articles 2819, 2820, chapter 15, title 48, and articles 2887 and 2889, chapter 18, title 48, Rev. St. 1911. Sec. 1, after the enacting clause, follows the title, except that the number "2819" is erroneously stated as "2918," though the correct number is employed in setting forth the article in its amended form. Sec. 2 repeals all laws in conflict. The act took effect 90 days after March 20, 1915, date of adjournment.

**Art. 2820. Returns of election.**—The returns of the election of the trustees to be elected as heretofore provided for the control and management of the schools of the district shall be made to the board of trustees where such election is held, and the board of trustees shall meet and canvass the returns of said election within five days after returns have been made and declare the result of said election and issue to the persons so elected their commissions as such trustees, and shall notify the county judges or the county superintendent, if the county has a superintendent. [Acts 1905, p. 263, § 93; Acts 1907, p. 204; Act March 30, 1915, ch. 132, § 1.]

See note under art. 2819.

**Art. 2821. Qualifications of trustees; suit to remove trustee not qualified; appointment of temporary trustee; vacancy.**—The trustees elected must be able to read and write intelligently the English language, and read, comprehend and interpret the laws of the State of Texas relating to the public school system; and in the event of trustee elected, in the opinion of the county superintendent or the county judge, who is ex-officio county superintendent, is not qualified to serve under the provisions of this article, it shall be the duty of the county superintendent, or such county judge who is ex-officio county superintendent, to refuse to recognize such person who has been so elected as such school trustees, and to make written request within twenty days after such election, of the county attorney, or district attorney in case there be no county attorney, to institute and prosecute with dispatch such suit, in the name of the State of Texas, for the removal of such trustee, in the district court of the county where such trustee resides, at the option of the county attorney or district attorney in case there be no county attorney; provided

it shall be lawful under the provisions of this Article, upon good cause shown within the discretion of the court where such suit is pending, to enjoin and restrain such person from acting as such trustee during the pendency of such suit for his removal. It shall be lawful under the provisions of this Article to summon such trustee so elected before the court in the trial of such cause, and there make examination of him as to his qualifications to serve as such trustee as defined by this Article, and, in case such trustee, after having been duly cited to answer in said cause and summoned as herein above provided to appear for examination, shall fail, neglect or refuse to obey said summons and fail to appear for the purpose of examination, and fail or refuse to submit to such examination, such failure, neglect or refusal shall be prima facie evidence of his disqualification under the terms of this Article, and because thereof the court trying such cause, shall be authorized to render thereupon judgment by default against such trustee so defaulting removing him from his said office of school trustee, and declaring the same vacant. It shall be the duty of the county board of education of the county where such trustee has been elected to appoint some suitable person, who is qualified as herein defined, to act as such trustee during the pendency of such suit to remove such trustee so elected, if he shall be enjoined from so acting, and, in case such trustee so elected shall be removed by such suit brought by the county attorney, or district attorney in case there be no county attorney, then such trustee, so appointed by the county board of education of said county, shall continue to serve until the next regular election of school trustees for such district; provided, however, that such trustee so appointed may be removed for the causes and in the manner provided by this Article. In case of vacancy in said office of trustee, by resignation or otherwise, the county board of education of the county shall appoint a suitable person qualified under the provisions of this Article to so act as such trustee until the next regular election of school trustees for such district; and in case such county board of education, under the provisions hereof, should appoint some person not qualified, suit for his removal shall be brought by the county attorney, or district attorney in case there be no county attorney, of the State, in the name of the State of Texas, in the manner and upon the same terms and conditions as has been herein provided for in case of the election of persons who are not qualified to act as such trustees. [Acts 1905, p. 263, § 93; Acts 1907, p. 204; Act April 4, 1917, ch. 199, § 1.]

**Explanatory.**—The act amends art. 2821, tit. 48, ch. 15, Rev. Civ. St. Took effect 90 days after March 21, 1917, date of adjournment.

#### **Art. 2822. District trustees a body corporate.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Employment of attorney.**—Under arts. 2772, 2822, 2823, 2856, 2892, trustees of an independent school district incorporated by the Legislature could employ and pay from the special maintenance fund an attorney to sue to cancel a teacher's contract. *Arrington v. Jones* (Civ. App.) 191 S. W. 361.

**Reversion of school building to grantor of land.**—See *Allen v. Franks* (Civ. App.) 166 S. W. 384.

**Actions.**—Under this article making school districts bodies politic and corporate, with power to sue and be sued, it was necessary to join the district as a party to a suit to restrain the collection of a special tax levied for a school district. *Renshaw v. Arnett* (Civ. App.) 158 S. W. 1197.

Under this article a school district may be sued in other courts than those of its domicile, under circumstances authorizing defendants in general to be thus sued. *Crowell Independent School Dist. v. First Nat. Bank of Benjamin* (Civ. App.) 174 S. W. 878.

As this article makes trustees of school district a body corporate, they are necessary parties to suit to declare organization of district void. *Minear v. McVea* (Civ. App.) 185 S. W. 1048.

To proceedings to declare invalid common school districts, as established by county school trustees through change of boundary, the trustees of the districts, by this article, constituted bodies corporate, are necessary parties. *Olivér v. Smith* (Civ. App.) 137 S. W. 528.

**Art. 2823. Shall have management and control of schools.**

See art. 2749a. See Pen. Code, art. 1513e.  
Cited, *Adkins v. Heard* (Civ. App.) 163 S. W. 127.

**Employment of attorney.**—See *Arrington v. Jones* (Civ. App.) 191 S. W. 361; note under art. 2822.

**Judicial supervision.**—Where the aggrieved patrons of a school district appealed to all the school authorities for relief against alleged illegal action of the trustees, the district court had jurisdiction to supervise the acts of the trustees if they abused their discretion. *Barton v. Vickery* (Civ. App.) 189 S. W. 1103.

**Art. 2824. Make contracts for the district.**

Cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Indebtedness.**—A petition, showing that school district trustees intend to spend unnecessarily school funds in buying a new site, which would inconvenience a majority of patrons, and which was not at the population center, and that the trustees acted for their own pecuniary advantage, warrants the court in granting a stay of proceedings at least. *Barton v. Vickery* (Civ. App.) 189 S. W. 1103.

Under this article empowering trustees of school districts to fix times and terms of school, held, that the trustees could not by making an eight-months contract fix the length of term without regard to the funds of the district. *Jones v. Dodd* (Civ. App.) 192 S. W. 1134.

**Art. 2825. Contracts with teachers.**

Cited, *Adkins v. Heard* (Civ. App.) 163 S. W. 127; *Thomas v. Taylor* (Civ. App.) 163 S. W. 129.

**Remedies of teachers.**—A teacher may not resort to the courts to recover for services rendered without first resorting to the remedies provided in the school law. *Boyles v. Potter County* (Civ. App.) 177 S. W. 210.

## LOCAL TAX

**Art. 2827. Special tax authorized.**

**Retroactive operation.**—Laws authorizing taxes are not retrospective, so far as the year in which they are authorized is concerned. *Cadena v. State* (Civ. App.) 185 S. W. 367.

**Assessment of property.**—Under art. 2862, an independent school district, having its own assessor and collector of taxes, could assess property for school taxes at a valuation other than made by the county assessor for state and county purposes; this article having no application. *Avery v. Cooper* (Sup.) 180 S. W. 734, affirming judgment (Civ. App.) *Cooper v. Avery*, 168 S. W. 412.

**Amount of tax.**—Acts 31st Leg. c. 12, which repealed the second proviso in Acts 29th Leg. c. 124, § 57, held to remove from independent school districts the inhibition against assessing property at a rate in excess of that fixed for state and county purposes. (Civ. App.) *Cooper v. Avery*, 168 S. W. 412, judgment affirmed (Sup.) *Avery v. Cooper*, 180 S. W. 734.

**Art. 2828. Petition for tax election.**

**Order for election.**—Failure of order for school district election to vote on levying tax to state the purpose of the tax or designate the points at which the election was to be held held not to invalidate the election. *Mecaskey v. Ratliff* (Civ. App.) 159 S. W. 115.

**Notice of election.**—Under Acts 31st Leg. c. 12, § 1, amending Acts 29th Leg. c. 124, § 58, the validity of an election to vote on a school tax to supplement the state school fund may be attacked for failure to give the statutory notice in a suit to enjoin the collection of the tax. *Cochran v. Kennon* (Civ. App.) 161 S. W. 67.

Said act held neither strictly nor substantially complied with by posting two notices within the district and one notice outside the district. *Id.*

In suit to enjoin collection of such tax burden held on defendants to show that all or a substantial majority of the qualified voters had actual knowledge of the election. *Id.*

Where one of the notices of election was posted outside the district, subsequent annexation of territory, including the place where it was posted, to such district, held not to render the notice sufficient. *Id.*

**Art. 2829. Presiding officer; ballots.**

Cited, *Beeman v. Mays* (Civ. App.) 163 S. W. 358.

**Form of ballot.**—Under this article, school district election to determine whether special tax should be levied held not invalidated because ballots cast were for or against the tax instead of reading for or against school tax. *Mecaskey v. Ratliff* (Civ. App.) 159 S. W. 115.

**Returns of election.**—Where the only returns of a school election were placed in paper boxes tied with cotton strings, which contained the ballots and list or tally sheet, held that the failure to comply with arts. 2829, 3024, 3027, and 3031, did not invalidate the election. *Mecaskey v. Ratliff* (Civ. App.) 159 S. W. 115.

**Art. 2831. Who entitled to vote.**

**Ownership of property.**—In view of Const. art. 3, § 1, a person who owned any property subject to taxation was a property tax payer within this article. *Lane v. Herring* (Civ. App.) 190 S. W. 778.

A thing without value is not subject to taxation, and therefore its ownership does not make the owner a property tax payer qualified to vote at a school bond election. *Id.*

**Improper rejection and acceptance of votes.**—Property owners of school district could have successfully contested election to determine whether special tax should be levied and collected on property in district, resulting in affirmative vote of 24 to 22, by proving that negative votes of two qualified voters were illegally thrown out, and that another qualified voter was not permitted to vote. *Robertson v. Haynes* (Civ. App.) 190 S. W. 735.

#### Art. 2833. Election to abrogate, increase or diminish tax.

**When election may be held.**—Where a school district had voted a 20-cent school tax in 1902, and in June, 1913, voted an additional tax of 30 cents on the \$100 valuation, an election could not be held to abrogate the tax of 1902 until two years after the June, 1913, election, as provided by this article. *Beeman v. Mays* (Civ. App.) 163 S. W. 358.

#### Art. 2835. Form of ballot for increase.

**Form of ballot.**—Where a petition requested an election to determine whether an additional school tax should be levied, ballots printed "for school tax" and "against school tax," though not in conformity with this article, prescribing the form to be "for increase of school tax" and "against increase of school tax," were not so misleading as to invalidate the election. *Beeman v. Mays* (Civ. App.) 163 S. W. 358.

#### Art. 2836. Levy of tax.

Cited, *Oliver v. Smith* (Civ. App.) 187 S. W. 528.

**Provision directory.**—Laws naming the time for the levy of taxes are merely directory, and legal taxes can be levied whenever the necessity arises. *Cadena v. State* (Civ. App.) 185 S. W. 367.

### SCHOOLHOUSE BONDS

#### Art. 2837. Election for issuance of bonds.

**Validity of contract.**—A contract by the officers of an independent school district to pay for plans of a schoolhouse held unenforceable, where it was made before authorization and sale of bonds and without available funds out of which to make such payment. *Board of Trustees of Alpine Independent Dist. v. Jacob* (Civ. App.) 170 S. W. 795.

#### Art. 2838. Ballots.

**Validity of contract.**—See *Board of Trustees of Alpine Independent Dist. v. Jacob* (Civ. App.) 170 S. W. 795; note under art. 2837.

#### Art. 2839. Issuance and sale of bonds.

**Validity of contract.**—See *Board of Trustees of Alpine Independent Dist. v. Jacob* (Civ. App.) 170 S. W. 795; note under art. 2837.

Under Const. art. 7, § 3, and *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 2839, 2843, 2853, the trustees of an independent school district cannot, until bonds are sold, enter into a valid contract for the erection of a school building with the proceeds of the bonds. *Bone v. Black* (Civ. App.) 174 S. W. 971.

#### Art. 2841. Levy of bond tax.

**Levy on whole or constituent part of enlarged district.**—Under this article the trustees of an enlarged school district not authorized by taxpayers of that district to levy a tax on all the property to pay the bonds of an included district should levy on the property of the included district the tax theretofore authorized to make such payments. *Love v. Rockwall Independent School Dist.* (Civ. App.) 194 S. W. 659.

Where the property of a former school district included in an enlarged district was subject to tax to pay the bonds thereof, the amount levied against that property for the maintenance of schools should be reduced so that the total levy thereon would not exceed the constitutional limit of 50 cents on each \$100 of valuation fixed by Const. art. 7, and this article. *Id.*

The directors of a consolidated or enlarged school district when authorized by vote of the taxpayers can levy a tax on all the property of the district for the interest and sinking fund of bonds issued by an included district. *Id.*

#### Art. 2842. Tax must be levied until bonds are paid.

Cited, *Bone v. Black* (Civ. App.) 174 S. W. 971.

**Independent districts including territory in bonded district.**—In view of this article, articles 2850 and 2851 do not authorize incorporation of independent school districts except where territory of proposed district contains town or village of 200 inhabitants or over, and do not authorize incorporation of independent district including territory already embraced in bonded common school district, bonds of which are unpaid. *Ferguson v. Leigh* (Civ. App.) 193 S. W. 206.

#### Art. 2843. Expenditure of proceeds of bonds.

**Validity of contract.**—Under Const. art. 7, § 3, and *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 2839, 2843, 2853, the trustees of an independent school district cannot, until bonds are sold, enter into a valid contract for the erection of a school building with the proceeds of the bonds. *Bone v. Black* (Civ. App.) 174 S. W. 971.

## SCHOOL PROPERTY

**Art. 2844. Trustees to contract for building.**

See arts. 2904b-2904g, 6394f-6394j, post.

**Bond of contractor.**—A materialman held not entitled to sue on a bond, given by contractors for a school building to complete the building free from liens. *Garrett v. A. G. McAdams Lumber Co.* (Civ. App.) 163 S. W. 320.

Where a contractor for a school building gave a bond conditioned to keep the building free from mechanics' liens, and a materialman, who could never acquire a lien upon the property, sued the contractor and the district, the district is not entitled to attorney's fees for defending the suit. *Id.*

That the Thirty-Third Legislature (Vernon's Sayles' Civ. St. 1914, art. 6394f) enacted a law requiring any person contracting with a school district for the building to give a bond to pay for labor and material did not prove want of previous authority to require such a bond. *N. O. Nelson Co. v. Stephenson* (Civ. App.) 168 S. W. 61.

Rev. St. 1911, tit. 48, c. 15, authorizing the trustees of a school district to contract for the construction of school buildings carried with it authority to require bond for faithful compliance with the contract, and incidentally to protect the laborers and materialmen. *Id.*

A school building contractor's bond to the school district and all parties furnishing labor or materials, for the payment of all debts incurred, inured to the benefit of the laborers and materialmen, any of whom could sue thereon in his own name. *Id.*

**Liability of district for improper payments to contractor.**—School district which, after notice of materialman's claim, approved by building contractors, paid more than the amount thereof on junior claims or to the contractors, held liable to the materialman. *Rice Common School Dist. No. 2 v. Oil City Iron Works* (Civ. App.) 180 S. W. 1121.

**Reversion of school building to grantor of land.**—See *Allen v. Franks* (Civ. App.) 166 S. W. 384.

**Art. 2845. Lien may not be acquired.**

See Vernon's Sayles' Civ. St. 1914, art. 6394f et seq.

**Right to lien.**—A mechanic's lien cannot be enforced against a public school building. *Rice Common School Dist. No. 2 v. Oil City Iron Works* (Civ. App.) 180 S. W. 1121.

**Reversion of school building to grantor of land.**—See *Allen v. Frank* (Civ. App.) 166 S. W. 384.

**Art. 2846. Sale of school property.**

**Liability on covenant of warranty.**—A school district is not liable on covenants of warranty contained in a deed executed without authority by county officers conveying a school site which had been deeded to the district under a conditional limitation which had been abandoned for school purposes. *Stewart v. Blain* (Civ. App.) 159 S. W. 928.

The county judge and commissioners are not personally liable on the covenant in a deed executed by them conveying an abandoned schoolhouse site. *Id.*

A county is not liable on the covenants in a deed executed by the county judge and commissioners conveying an abandoned schoolhouse site in the absence of authority to bind the county by such covenants. *Id.*

**Art. 2847. Control of school property.**

**Removal of school house.**—Under arts. 2822, 2844, 2845, 2847, 2849, where school building was erected with contributions from citizens of the community on land conveyed on condition that it should revert to the grantors when the land ceased to be used for school purposes, held, that the building did not so revert, though the contributors and trustees intended it to remain permanently on the land, and it could be removed by the trustees. *Allen v. Franks* (Civ. App.) 166 S. W. 384.

**Art. 2849. Title to property.**

**Reversion of school house to grantor of land.**—See *Allen v. Franks* (Civ. App.) 166 S. W. 384; note under art. 2847.

## CHAPTER FIFTEEN A

## PUBLIC HIGH SCHOOLS IN COMMON SCHOOL DISTRICTS

Art.  
2849b. Classification of high schools.  
2849bb. Subjects of study in high schools.

Art.  
2849d-2849o. [Amended.]

**Article 2849b. Classification of high schools.**—In accordance with the provisions of this Act, the public high schools of the State shall, upon satisfactory evidence, be ranked by the State Department of Education as high schools of the first class, high schools of the second class and high schools of the third class. A high school of the first class shall be a high school which maintains at least four years or grades of work above the seventh grade or years, may include in its curriculum the first seven



grades or years of work, shall employ at least two teachers to teach high school subjects, who shall each hold a State first grade certificate or certificate of higher grade, and shall be maintained for not less than eight scholastic months during each school year. A high school of the second class shall be a high school which maintains at least three years or grades of work above the seventh grade or year, may include in its curriculum the first seven years or grades of work, shall employ at least two teachers to teach high school subjects, who shall each hold a State first grade certificate or certificate of higher grade, and shall be maintained for not less than eight scholastic months during each school year. A high school of the third class shall be a high school which maintains at least two years or grades of work above the seventh grade or year, may include in its curriculum the first seven years or grades of work, shall employ at least one teacher to teach high school subjects, who shall hold a State first grade certificate or certificate of higher grade, and shall be maintained for not less than seven scholastic months during each school year. Each class of high schools herein defined shall be entitled to receive a certificate of approval or classification from the State Department of Education. High schools which fail to come up to the standard herein prescribed as to teachers, number of grades or years of work and length of annual session, shall not be prohibited by this Act, but such high schools shall not be entitled to receive a certificate of approval, or classification from the State Department of Education. A grade or year of work as herein mentioned shall consist of not less than thirty-two weeks of five days each. [Acts 1911, p. 34, § 2; Act March 5, 1915, ch. 36, § 5.]

**Art. 2849bb. Subjects of study in high schools.**—Besides the subjects prescribed by law to be taught in the public schools of Texas, such additional subjects as agriculture, manual training, domestic economy or other vocational branches shall be included in the course of study in all high schools provided for herein which are located outside of incorporated towns and cities, and special attention shall be given to teaching said subjects. [Id., § 6.]

**Arts. 2849d–2849o.**

Amended by Act Mar. 5, 1915, set forth as arts. 2749a–2749l, ante.

Arts. 2849f, 2849g, 2849j, cited, *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County (Civ. App.)* 185 S. W. 589.

## CHAPTER SIXTEEN

### INDEPENDENT DISTRICTS

**Art.**  
2850. Application to county judge for elections.  
2851. Incorporation.  
2852. Board of trustees.  
2853. Powers of the board.  
2855. Districts validated.  
2856. General laws apply to all districts.  
2856b. Change or abolishment of district.

**Art.**  
**TAXES AND BONDS**  
2857. Local taxes; bonds.  
2858. Election to be ordered by trustees.  
2861. Collection of taxes.  
2862. Assessment and collection of taxes by county officer.

**Article 2850. Application to county judge for elections.**

**Inclusion of territory in bonded district.**—In view of art. 2842, articles 2850 and 2851 do not authorize incorporation of independent school districts except where territory of proposed district contains town or village of 200 inhabitants or over, and do not authorize incorporation of independent district including territory already embraced in bonded common school district, bonds of which are unpaid. *Ferguson v. Leigh (Civ. App.)* 193 S. W. 206.

**Validity of special act.**—As Acts 33d Leg. c. 35, § 7, creating the Clifton independent school district, does not conflict with any provision of the Constitution, it is not invalid, though its passage was procured by fraud, and it is unfair, nor is it in violation of Const. art. 3, § 56, prohibiting local or special laws creating offices in school districts. *Glass v. Pool*, 166 S. W. 375, 106 Tex. 266.

**Art. 2851. Incorporation.**

See Penal Code, art. 1513h, post.

**Powers of district and its officers.**—A board of education has only such powers as are conferred upon it and such implied powers as are necessary to execute the express powers. *Royse Independent School Dist. v. Reinhardt* (Civ. App.) 159 S. W. 1010.

An independent school district may, in analogy to a municipal corporation, permit school property not then necessary for school use to be used for private purposes so long as such use will not affect its use as school property. *Id.*

Where an independent school district, in consideration of the baseball club fencing the school property and maintaining the same, allowed part of its grounds not then needed for school purposes to be used as a ball field during vacation, such use was not unauthorized. *Id.*

**Valuation for assessment.**—Under arts. 2851–2853, 2862, held, that the trustees of such a district, when assessing and collecting their own taxes, may assess property at a higher rate than it is assessed for state and county purposes. *Cooper v. Avery* (Civ. App.) 168 S. W. 412, judgment affirmed *Avery v. Cooper* (Sup.) 180 S. W. 734.

**Reports by treasurers.**—Art. 2773, requiring treasurers of school funds to make reports, embraces all treasurers of school funds, including the treasurer of an independent school district organized under article 2851. *Hall v. State* (Cr. App.) 188 S. W. 1002.

Pen. Code 1911, art. 1580, does not embrace the treasurer of an independent school district authorized by this article, and his failure to report as required by art. 4517, is not punishable thereunder. *Id.*

**Inclusion of territory embraced in bonded district.**—See *Ferguson v. Leigh* (Civ. App.) 193 S. W. 206; note under art. 2850.

**Collateral attack on organization.**—Order of county commissioners' court declaring result of an election to determine whether school district should be incorporated was on collateral attack prima facie proof of fact that it was duly incorporated, in the absence of any contrary contention. *Clark v. State* (Civ. App.) 189 S. W. 84.

**Art. 2852. Board of trustees.**

**Valuation for assessment.**—See *Cooper v. Avery* (Civ. App.) 168 S. W. 412, judgment affirmed *Avery v. Cooper* (Sup.) 180 S. W. 734.

**Validity of special act.**—Act 1909 (Loc. & Sp. Acts 31st Leg. c. 84), as amended by Act March 26, 1913 (Loc. & Sp. Acts 33d Leg. c. 93) §§ 2, 3, fixing terms of trustees of independent school districts at more than two years held to violate Const. art. 16, § 30, and article 20a, added in 1912, fixing maximum term of offices at two years. *San Antonio Independent School Dist. v. State* (Civ. App.) 173 S. W. 525.

**Art. 2853. Powers of the board.**

Cited, *Avery v. Cooper* (Sup.) 180 S. W. 734.

**Power to require vaccination of pupils.**—The school board of an independent school district authorized by the act creating it to make rules for the protection of health may require vaccination to prevent the spread of smallpox, even though the danger from the disease was equally great in places under the control of the city where no such regulation was imposed. *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840.

**Power to contract before issuance of bonds.**—A contract by the officers of an independent school district to pay for plans of a schoolhouse held unenforceable, where it was made before authorization and sale of bonds and without available funds out of which to make such payment. *Rev. St. 1911, arts. 2837–2839, 2853. Board of Trustees of Alpine Independent Dist. v. Jacob* (Civ. App.) 170 S. W. 795.

Under Const. art. 7, § 3, and *Vernon's Sayles' Ann. Civ. St. 1914, arts. 2839, 2843, 2853*, the trustees of an independent school district cannot, until bonds are sold, enter into a valid contract for the erection of a school building with the proceeds of the bonds. *Bone v. Black* (Civ. App.) 174 S. W. 971.

**Liability on contract.**—School board was not bound by contracts of party secured by bonding company to complete school building for contractor for which bonding company had been surety, nor was party himself bound by school board's contract with bonding company; contracts, though made with reference to each other, being independent undertakings between different parties. *General Bonding & Casualty Ins. Co. v. McQuerry* (Civ. App.) 191 S. W. 858.

**Levy of tax as condition precedent to liability.**—Under arts. 2853, 2857, a petition against a school district to recover for the construction of school buildings failing to allege the levy of a tax by the trustees or the existence of a fund held insufficient. *Crowell Independent School Dist. v. First Nat. Bank* (Civ. App.) 163 S. W. 339.

**Valuation for assessment.**—See *Cooper v. Avery* (Civ. App.) 168 S. W. 412, judgment affirmed *Avery v. Cooper* (Sup.) 180 S. W. 734; note under art. 2851.

**Board of equalization.**—Under this article charging independent school districts with all the duties of city councils in respect to taxation, and article 945, providing that cities shall have a board of equalization, an independent school district not having appointed a board of equalization, could not adopt the finding of the county board. *Vance v. Miller* (Civ. App.) 170 S. W. 838, judgment reversed *Miller v. Vance* (Sup.) 180 S. W. 739.

Under arts. 945, 947, 965, 2853, 2862, an independent school district whose taxes are collected by county officials need not have any board of equalization. *Miller v. Vance* (Sup.) 180 S. W. 739, reversing judgment *Vance v. Miller* (Civ. App.) 170 S. W. 838.

**Acceptance of building.**—Acceptance of new school building with exceptions noted in architect's letter to building committee was not an unqualified acceptance of work of contractor. *Lyon-Gray Lumber Co. v. Wichita Falls Brick & Tile Co.* (Civ. App.) 194 S. W. 1167.

Taking possession of unfinished building with consent of builder and with understanding that it shall not operate as waiver of any right to insist on completion according to contract is not a waiver of any condition. *Id.*

**Liability of surety on building contractor's bond.**—Defendant surety for defaulting contractor for school building, employing plaintiff to complete work, held liable for the agreed price, though the work was not done within the time as extended by the school board, which was shorter than the time allowed by the contract with plaintiff. *General Bonding & Casualty Ins. Co. v. McQuerry* (Civ. App.) 191 S. W. 858.

**Actions.**—A school district, is a necessary party to a suit to enjoin the collection of taxes assessed in the district, since, under Rev. St. 1911, art. 2853, a school district is a municipal corporation, and under Rev. St. 1911, art. 1835, all suits against such corporations must be against it in its corporate name. *Vance v. Miller* (Civ. App.) 170 S. W. 838, judgment reversed *Miller v. Vance* (Sup.) 180 S. W. 739.

#### **Art. 2855. Districts validated.**

Cited, *Ferguson v. Leigh* (Civ. App.) 193 S. W. 206.

#### **Art. 2856. General laws apply to all districts.**

Cited, *Bone v. Black* (Civ. App.) 174 S. W. 971.

**Application.**—A school bond election held governed by special act March 16, 1909, and not affected by this article, adopted February 18, 1909. *Hall v. Trotter* (Civ. App.) 160 S. W. 978.

**Employment of attorney.**—See *Arrington v. Jones* (Civ. App.) 191 S. W. 361.

#### **Art. 2856b. Change or abolishment of district.**

Cited, *Ferguson v. Leigh* (Civ. App.) 193 S. W. 206.

### TAXES AND BONDS

#### **Art. 2857. Local taxes; bonds.**

Cited, *Board of Trustees of Alpine Independent Dist. v. Jacob* (Civ. App.) 170 S. W. 795; *Bone v. Black* (Civ. App.) 174 S. W. 971.

**Constitutionality.**—Under the constitutional provision authorizing additional taxes for the erection of free public schools, Rev. St. 1911, art. 2857, authorizing the imposition of such additional taxes for the purchase of sites and the issuance of bonds for that purpose, is valid. *Glass v. Pool*, 166 S. W. 375, 106 Tex. 266.

**Levy of tax as prerequisite to construction of building.**—Under arts. 2853, 2857, a petition against a school district to recover for the construction of school buildings failing to allege the levy of a tax by the trustees or the existence of a fund held insufficient. *Crowell Independent School Dist. v. First Nat. Bank* (Civ. App.) 163 S. W. 339.

**Purpose of tax.**—In view of this article a vote of the taxpayers of an enlarged school district authorizing the levy of a tax for the maintenance and support of the schools does not authorize a levy for interest and sinking fund on bonds issued by one of the included districts. *Love v. Rockwall Independent School Dist.* (Civ. App.) 194 S. W. 659.

**Construction of special act.**—Under act creating Benavides independent school district, approved March 22, 1915, effective June 19, 1915 (Loc. & Sp. Acts 34th Leg. c. 54), held, that trustees of the district were authorized to levy a maintenance tax for the year 1915. *Cadena v. State* (Civ. App.) 185 S. W. 367.

#### **Art. 2858. Election to be ordered by trustees.**

Cited, *Bone v. Black* (Civ. App.) 174 S. W. 971.

**Time for presentation of petition.**—Where a petition for an election to determine whether bonds should be issued by an enlarged school district was not presented to the county judge, whose duty it was to call the election, until after the new district had been created, it was immaterial that it was signed prior to that time. *Woods v. Eberling* (Civ. App.) 169 S. W. 932.

#### **Art. 2861. Collection of taxes.**

Cited, *Avery v. Cooper* (Sup.) 180 S. W. 734.

#### **Art. 2862. Assessment and collection of taxes by county officers.**

**Valuation.**—Acts 31st Leg. c. 12, which repealed the second proviso in Acts 29th Leg. c. 124, § 57, ante art. 2827, held to remove from independent school districts the inhibition against assessing property at a rate in excess of that fixed for state and county purposes. *Cooper v. Avery* (Civ. App.) 168 S. W. 412, judgment affirmed *Avery v. Cooper* (Sup.) 180 S. W. 734.

Under this article an independent school district, having its own assessor and collector of taxes, could assess property for school taxes at a valuation other than made by the county assessor for state and county purposes; article 2827 having no application. *Avery v. Cooper* (Sup.) 180 S. W. 734, affirming judgment *Cooper v. Avery* (Civ. App.) 168 S. W. 412.

**Equalization.**—Under arts. 945, 947, 965, 2853, 2862, an independent school district whose taxes are collected by county officials need not have any board of equalization. *Miller v. Vance* (Sup.) 180 S. W. 739, reversing judgment *Vance v. Miller* (Civ. App.) 170 S. W. 838.

## CHAPTER SEVENTEEN

## EXCLUSIVE CONTROL BY CITIES AND TOWNS—INDEPENDENT DISTRICTS

<p>Art. 2871. General laws shall govern.</p> <p>2872. Property vested in trustees.</p> <p style="text-align: center;">CITY SCHOOL TAXES</p> <p>2876. Election for levy of annual tax for maintenance and buildings; discontinuance of tax.</p> <p>2877. Levy of tax.</p>	<p>Art. 2878. Levy in city or town assuming exclusive control of schools.</p> <p>2879. Levy in city or town constituting independent school district.</p> <p>2880. Repeal.</p> <p>2883. Extension of city limits for school purposes.</p>
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**Article 2871. General laws shall govern.**

Cited, *Bone v. Black* (Civ. App.) 174 S. W. 971.

**Art. 2872. Property vested in trustees.**

**Powers of school officers.**—A regulation imposed by a school board under its general powers and without express authority must be reasonable. *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840.

Superintendent, principal, and board of trustees of public schools, stand, as to pupils, in loco parentis, and may exercise such powers of control, restraint, and correction as may be reasonably necessary to enable teachers to perform their duties and to effect general purposes of education. *Hailey v. Brooks* (Civ. App.) 191 S. W. 781.

Acts of principal, superintendent, and school trustees in inaugurating school cafeteria and supply house, and punishing pupils who purchased supplies of plaintiff, held a boycott, and beyond their authority. *Id.*

## CITY SCHOOL TAXES

**Art. 2876. Election for levy of annual tax for maintenance and buildings; discontinuance of tax.**—The city or town council or board of aldermen of any city or commission of any city, town or village, whether incorporated under any act of the Congress of the Republic or the Legislature of the State of Texas, or under any act of incorporation whatever, shall have power by ordinance to annually levy and collect such advalorem taxes for the support and maintenance of public free schools and for the erection and equipment of public free school buildings in the city or town where such city or town is a separate and independent school district; provided that no such tax shall be levied until an election shall have been held, at which none but property tax payers, as shown by the last assessment rolls, who are qualified voters of such independent school districts shall vote and a majority of those voting shall vote in favor thereof. The proposition submitted may be for such a rate of advalorem tax not exceeding such per cent as may be voted by a majority vote of all votes cast at any such election. One election and no more, shall be held thereafter in any one calendar year to ascertain whether a school tax shall be levied. If the proposition is carried the school tax shall be continued to be annually levied and collected for at least two years, and thereafter, unless it be discontinued at an election held to determine whether the tax shall be continued or discontinued, at the request of fifty property tax payers of such independent school district. When the tax is continued no election to discontinue it shall be held for two years; when the tax is discontinued no election to levy a tax shall be held during the same year. [Acts 1905, p. 263, § 141; Act March 30, 1917, ch. 169, § 1.]

**Explanatory.**—The act amends arts. 2877, 2878, 2879, and 2880, ch. 17, tit. 48, Rev. Civ. St. 1911, so as to read as set forth above and in the four following articles. The legislative scheme was to repeal art. 2876 as it appears in the Revised Civil Statutes, and to move up articles 2877, 2878, 2879, and 2880 so that they would bear, in their amended form, the numbers 2876, 2877, 2878, and 2879, leaving 2880 as the repealing article. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2877. Levy of tax.**—If the vote of the taxpayers is in favor of said tax, then it shall be the duty of the council or board of aldermen,

annually thereafter, to levy upon the taxable property in the limits of such district, in accordance with the usual assessment of taxes for municipal purposes, such additional tax as may be necessary for the support and maintenance of the public schools and for the erection and equipment of public school buildings for nine months in the year not to exceed the rate of tax voted. [Acts 1905, p. 263, § 142; Act March 30, 1917, ch. 169, § 1.]

See note under art. 2876.

**Art. 2878. Levy in city or town assuming exclusive control of schools.**—In a city or town that has assumed the exclusive control of the public free schools within its limits and has decided under the laws providing therefor, that a special tax shall be levied for the support and maintenance of such public free schools and the erection and equipment of public free school buildings, the mayor and council or board of aldermen of such city or town shall annually assess and levy such tax by ordinance duly passed and approved in the same manner as is required in the assessment and levy of taxes for general purposes in such city or town. In a city or town which has voted upon and directed the levy of a special tax the mayor or council or board of aldermen or commission of such city or town shall annually levy such rate of tax for public school purposes and for the erection and equipment of public school buildings not exceeding the rate of tax voted for the support and maintenance of the public free schools and for the erection and equipment of public school buildings for the term as required by law; but in a city or town that has voted upon and decided at an election held for that purpose that a specified rate of tax shall be assessed and levied in such city or town for the support and maintenance of its public free schools, and for the erection and equipment of public school buildings the mayor and council or board of aldermen or commission of such city or town shall have no discretion in fixing the rate at which such tax shall be levied, but shall assess and levy the same at the rate fixed in the proposition as submitted and adopted by the qualified voters of such city or town at the election held for that purpose. [Acts 1905, p. 263, § 143; Act March 30, 1917, ch. 169, § 1.]

See note under art. 2876.

**Art. 2879. Levy in city or town constituting independent school district.**—In a city or town that may now or hereafter constitute an independent school district, and where a special tax for school purposes has been voted by the people or provided by special charter, it shall be the duty of said board of trustees to determine what amount of said tax, within the limit voted by the people or fixed by special charter will be necessary for the maintenance and support of the school and for the erection and equipment of public school buildings for each current year; and it shall become the duty of the city council, board of alderman or city commission upon the requisition of the said board of trustees to annually levy and collect said tax, as other taxes are levied and collected; and said tax, when collected, shall be placed at the disposal of the said school board, by paying over monthly to the treasurer of said board the amount collected for the support and maintenance of the school and for the erection and equipment of public school buildings in such district, to be used for the maintenance and support of the public free schools and for the erection and equipment of public school buildings in such district. [Acts 1905, p. 263, § 138; Act March 30, 1917, ch. 169, § 1.]

See note under art. 2876.

**Art. 2880. Repeal.**—All of Article 2876, Chapter 17, Title 48 of the Revised Civil Statutes of the State of Texas, 1911, is hereby repealed. [Acts 1905, p. 308, § 168; Act March 30, 1917, ch. 169, § 1.]

See note under art. 2876.

**Art. 2883. Extension of city limits for school purposes.**

**Levy and collection of tax.**—Under Const. art. 7, § 3, independent school district annexed to existing common school district under this article, might collect 20-cent tax applicable to land in common school district before the annexation. *Davis v. Payne* (Civ. App.) 179 S. W. 60.

**CHAPTER EIGHTEEN****INDEPENDENT DISTRICT SCHOOL TRUSTEES**

<p><b>Art.</b> 2887. Board of school trustees shall order elections; election officers; compensation; election, how held; canvass.</p>	<p><b>Art.</b> 2889. Term of office of school trustees. 2892. Board shall adopt rules and regulations.</p>
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**Article 2887. Board of school trustees shall order election; election officers; compensation; election, how held; canvass.**—All elections shall be ordered by the board of trustees of each independent school district; and such order shall be made at least ten days before the date of election; and a notice of the order shall be posted at three different places in the district. The board of school trustees, at the time of ordering such election, shall appoint three persons to hold the election, and shall designate the places where the polls shall be open. And each of said members of such election board so appointed shall receive as their compensation the sum of one dollar each, to be paid out of the general fund of the county in the same manner as other claims are paid. All such elections shall be held in accordance with the State law governing elections; and returns of such elections shall be made to the board of school trustees in the same manner as election returns are made under such State law. The board of school trustees shall canvass such returns, declare the result of such election, and issue certificates of election to the persons shown by such returns to be elected. [Acts 1905, p. 263, § 164; Act March 30, 1915, ch. 132, § 1.]

See note under art. 2819.

**Art. 2889. Term of office of school trustees.**—The terms of office of the seven trustees chosen at the first election shall be divided into two classes, and the members shall draw for the different classes; the four members drawing the numbers one, two, three and four shall serve for one year or part thereof; that is, until the first of April thereafter, and until their successors are elected and qualified; and the three members drawing the numbers five, six and seven shall serve two years; that is, until the second of April thereafter, and until their successors are elected and qualified; and regularly thereafter on the first Saturday in April of each year, four trustees and three trustees, alternately, shall be elected for a term of two years, to succeed the trustees whose term shall at that time expire. [Acts 1905, p. 263, § 163; Act March 30, 1915, ch. 132, § 1.]

Cited, *San Antonio Independent School Dist. v. State ex rel. Dechman* (Civ. App.) 173 S. W. 525.

See note under art. 2819.

**Art. 2892. Board shall adopt rules and regulations.**

**Employment of attorney.**—Under arts. 2772, 2822, 2823, 2856, 2892, as to school districts and powers of school trustees, trustees of an independent school district incorporated by the Legislature could employ and pay from the special maintenance fund an attorney to sue to cancel a teacher's contract. *Arrington v. Jones* (Civ. App.) 191 S. W. 361.

## CHAPTER NINETEEN

## GENERAL PROVISIONS

## Art.

2896. School shall not be sectarian.  
 2899. Where children may attend school.  
 2900. Scholastic age.  
 2903a. History of Texas shall be taught.

## Art.

2903b. Same; number of hours per week; notice to local superintendents.  
 2903c. Acquisition of land for playgrounds, agricultural tracts, etc.

**Article 2896. School shall not be sectarian.**

Cited, *Adkins v. Heard* (Civ. App.) 163 S. W. 127.

**Art. 2899. Where children may attend school.**

Requiring vaccination.—A regulation requiring vaccination before children could attend school is not in violation of arts. 2899, 2900, declaring that all children of school age shall be entitled to school privileges. *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840.

**Art. 2900. Scholastic age.**

Requiring vaccination.—See *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840; note under art. 2899.

**Art. 2903a. History of Texas shall be taught.**—That on and after the third day of September, 1917, the history of Texas shall be taught in all public schools of this State, which history shall be taught in the history course of all public schools in this State, and in this course only. [Act March 28, 1917, ch. 112, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2903b. Same; number of hours per week; notice to local superintendents.**—The said history course shall be not less than two hours in any one week and as much more time as the State Superintendent of Public Instruction, in his discretion, thinks is necessary. The State Superintendent of Public Instruction shall, within ten days after this act goes into effect, notify the different county and city school superintendents as to how said history course shall be divided. [Id., § 2.]

Explanatory.—Sec. 3 imposes a criminal penalty for violation and is set forth post as art. 1513i. Penal Code.

**Art. 2903c. Acquisition of land for playgrounds; agricultural tracts, etc.**—That the County School Trustee shall have the power to purchase and lease real property for all the Common Schools Districts, and the Independent School District of their County having less than 150 scholastics, and the Trustees of all Independent School Districts, having 150 scholastics or more shall have power to purchase and lease real property for their District, for the purpose of supplying playgrounds, agricultural tracts and sites upon which to build school houses and such other buildings as are necessary for the schools of said Districts, and to acquire such real property and easements therein, by condemnation proceedings in the manner prescribed by the present law authorizing a condemnation of right of way of railroads. [Act March 29, 1917, ch. 125, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

## CHAPTER NINETEEN A

## PUBLIC SCHOOL BUILDINGS

## Art.

2904b. Windows not to face pupils.  
 2904n. Building permits.

## Art.

2904o. Payments before permit unauthorized.

**Article 2904b. Windows not to face pupils.**

Cited, *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

**Art. 2904n. Building permits.**

Effect of invalidity of contract.—Invalidity of a contract for the construction of a school building under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 2904n, 2904o, does not

defeat recovery by a materialman on the contractor's bond given as required by articles 6394f-6394j. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

There can be no recovery on express or implied contracts with reference to a school building constructed without the permit required by *Vernon's Sayles' Ann. Civ. St. 1914, arts. 2904n, 2904o. Id.*

Under *Vernon's Sayles' Ann. Civ. St. 1914, art. 2904o* compliance with the requirement of article 2904n cannot be presumed in a suit on a school building contract. *Id.*

A contract for the erection of a school building cannot be enforced, where it did not appear that the plans and specifications provided for the lighting, heating, and sanitation of the building, as required by this article. *Bone v. Black* (Civ. App.) 174 S. W. 971.

#### Art. 2904o. Payments before permit unauthorized.

Effect of invalidity of contract.—See *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746; notes under art. 2904n.

## CHAPTER NINETEEN B

### FREE TEXT BOOKS IN SCHOOL DISTRICTS

Art. 2904r. Election in common and independent districts.	Art. 2904u. Right to vote; returns of election.
2904s. Same; ballots.	2904v. Trustees to purchase books.
2904t. Same; notice; election officers.	2904w. Purchase of free text books otherwise not prohibited.

**Article 2904r. Election in common and independent districts.**—When ten per cent of the qualified property tax paying voters of any common or independent school district that has or may have at the time the petition hereinafter mentioned shall be presented, voted a special school tax for the purpose of supplementing the State school fund apportioned to said district in the support and maintenance of the public free schools in said district, shall petition the county school trustees, if a common school district, or the board of trustees if an independent school district, they shall order an election in the school district from which the petition came to determine whether or not a majority of the legally qualified property tax paying voters of that district desire that text books required by the pupils within the scholastic age attending public free school in said district shall be furnished to said pupils by the trustees of said district free of charge and be paid for out of said school tax that has theretofore been voted by said district. Said election shall be ordered, held and the returns counted and published in accordance with the laws of this State. [Act March 30, 1915, ch. 134, § 1.]

Took effect 90 days after March 20, 1915, date of adjournment.

**Art. 2904s. Same; ballots.**—Whenever it has been found lawful for any such board of school trustees to order an election on said subject of furnishing free text books as provided herein, said board of school trustees shall prepare proper ballots for use in said school district election and the said school district shall bear the expense of having such ballots printed. Each person who favors the furnishing of said free text books as herein provided shall have written or printed on his ballot "For the Free Text Books," and each person opposed to the furnishing of said free text books shall have written or printed on his ballot "Against the Free Text Books." [Id., § 2.]

**Art. 2904t. Same; notice; election officers.**—The said board of school trustees shall give notice of such election by placing notices of same in three different public places in said district at least twenty days before said election, which notices shall state the time, place or places of the holding and purpose of the election, and the said board of school trustees shall appoint the presiding officer or officers to hold said election; and said presiding officer or officers shall appoint the necessary judges and clerks to assist in holding same. [Id., § 3.]

**Art. 2904u. Right to vote; returns of election.**—All persons who are legally qualified voters of this State and of the county of their residence and who are resident property tax payers in said district shall be



entitled to vote in said school district election, and if at such election a majority of those voting shall vote for the furnishing of such free text books it shall be declared by the said board of school trustees to have carried in said district, and shall be entered upon the records of said trustees to have been carried, and in all cases the returning officer shall make a full and complete return, as in other elections, to said trustees, and within five days after said election is held said returns shall be opened and counted at a meeting of said trustees and the result declared. [Id., § 4.]

**Art. 2904v. Trustees to purchase books.**—As soon as it is practicable after said school trustees shall have declared said proposition to have carried, as set out in Section 4 of this Act, it shall be the duty of the trustees of said district to purchase the required text books for the said pupils of said district and pay for same out of said local tax fund of said district by warrants drawn in the same manner as is now provided by law for paying claims out of said funds, and the said trustees shall continue to furnish said books, as needed, to said pupils in the same manner. [Id., § 5.]

**Art. 2904w. Purchase of free text books otherwise not prohibited.**—Nothing in this Act shall be construed to prevent school trustees of school districts from furnishing free text books to pupils in their own discretion without an election, as herein provided, under the power given in Article 2772, Chapter 12, Title 48, of the Revised Civil Statutes of Texas, 1911. [Id., § 6.]

## CHAPTER TWENTY

### THE TEXAS STATE TEXTBOOK COMMISSION

Art.		Art.	
2909a.	Name of commission; how constituted; appointment; eligibility; vacancy; meetings; appearance of representatives of publishers before commission.		and statement; filing copies of agreements with other publishers.
2909b.	Members of commission to make affidavit of disinterest.	2909gg.	Contract to stipulate against liability of state.
2909bb.	Uniform system of text books; branches covered; character of books; dead languages; applicable to all public schools in state.	2909h.	Execution of contract; duplicate; record.
2909c.	Supplementary books; when to be used.	2909hh.	Disposition of deposits made by bidders.
2909cc.	Advertisement for bids; requisites of bids; deposit; forfeiture.	2909i.	Proclamation as to letting of contract; custody of standards adopted.
2909d.	Sealing and opening of bids; affidavit as to payment of taxes; affidavit of bidder as to disinterest of members of commission.	2909ii.	Circular letter to local school officers.
2909dd.	Meeting for consideration of bids; investigations; adoption of books; postponement of selection.	2909j.	Contractor to maintain stock of books within state at convenient distributing points; agencies; mode of distribution; failure to furnish books; penalty; unorganized counties.
2909e.	Stipulations of contract as to exchange of books.	2909jj.	Price to be marked on books.
2909ee.	Stipulations in contract as to changes, amendments and additions.	2909k.	Use of books compulsory; exception; restriction as to authorship.
2909f.	Bond of contractor; duties of Attorney General; deposit and performance of contract; suits on bond; new bond.	2909kk–2909mm.	[Superseded.]
2909ff.	Prices to be paid for books; discrimination; liquidated damages; recovery at suit of Attorney General.	2909n.	Cancellation of contract; suit on bond of contractor.
2909g.	Disqualification of contractor violating anti-trust law; affidavit	2909nn.	Designation of secretary of state to receive service of process.
		2909o.	Compensation of teachers acting as members of commission; appropriation; employment of stenographer.
		2909oo.	Effect of adoption of constitutional amendment.
		2909ooo.	Books to be manufactured in Texas; price.
		2909oooo.	Same; permit to manufacture outside of state where cost is substantially lower.

**Article 2909a. Name of commission; how constituted; appointment; eligibility; vacancy; meetings; appearance of representatives of publishers before commission.**—That a permanent Textbook Commission for the State of Texas is hereby authorized and styled "The Texas State Textbook Commission." The Commission shall be constituted as follows: The State Superintendent of Public Instruction, The President of the College of Industrial Arts and the President of the South West Texas State Normal, The President of the University of Texas, The President of the A. and M. College, acting together as a committee shall at a date not later than the 1st day of August 1918, and biennially thereafter not later than the 1st day of August, submit to the Governor of this State the names of 15 teachers, five of which shall be women, of recognized scholarship and professional standing who have been actively and continuously engaged in teaching or supervising in the public schools of this State for the past five years and who have primary permanent or permanent certificates, said 15 teachers shall represent as nearly as possible every phase of the public school work, and it shall be the duty of the Governor to select seven therefrom who shall with the Governor and the Superintendent of Public Instruction constitute the text book commission of this State: provided, that at least two of those who are selected to serve on the Board shall be women; and provided further that one member of said Board shall have had at least three years' experience in teaching in the schools of Texas below the High Schools within the past five years. The term of office or the appointive members shall be for a period of not more than two years and shall be concurrent with the term of office of the official making the appointment. No person who has acted as a text-book agent for any author or publishing house, or who has been an author or associate author of any book published by any house, or who has directly or indirectly been concerned in the authorship of any text book or in any publishing house shall be eligible to appointment on the Textbook Commission, any vacancy occurring on said Board from any cause shall be filled by appointment by the Governor, from the list of teachers submitted under the provisions of this Act. The Commission shall meet at such times and places as may be designated by the chairman, and it shall adopt such rules and regulations for the transaction of its business as it may deem proper, not contrary to the provisions of this Act; provided, that no legal representative or temporary employé or other special agent employed by any author or publisher shall be allowed to present the merits of a book to the members of the Commission, individually or collectively, except as hereafter defined, and any contract entered into by said Commission when so represented shall be void; but the Commission may allow the authors of books or publishers or any regular or permanent employé to appear before the Commission and represent the merits of books when said Commission is in session, and not otherwise, and under such restrictions and regulations as are provided by the State Textbook Commission and are in accord with the provisions of this Act. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 1; Act June 5, 1917, 1st C. S., ch. 44, § 1.]

Took effect 90 days after May 17, 1917, date of adjournment.

**Art. 2909b. Members of Commission to make affidavit of disinterest.**—Each member of the Commission, before entering upon his duties as a member of the Commission, shall make out and file with the Secretary of State an affidavit that he is not and has not been directly or indirectly interested in, or connected with, or employed by, any publishing house, person, firm or corporation submitting any books for adoption, or in any books offered for adoption, or in any books adopted, nor is he connected in business with any person or agent representing such house, person, firm or corporation to whom any contract may be awarded by said Commission during the term and duration of said contract, and that

he is not connected in any business with any person or agent representing such house, firm or corporation, and that he will not become so interested and will not accept any position as agent or representative of any person, firm or corporation who may submit any books for adoption or two whom any contract may be awarded by said Board during the term and duration of said contract. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 3; Act June 5, 1917, 1st C. S., ch. 44, § 2.]

**Governor as chairman of Commission; secretary; meetings; minutes of proceedings; public inspection.**—The Governor shall be chairman of the Commission, and the State Superintendent shall be its secretary, who shall keep a complete record of all proceedings of the Commission. The Commission shall meet at such times and places as may be designated by the chairman for the purpose of considering and extending contracts, the making of new adoptions, and the keeping and operation of a complete system of uniform textbooks for the public free schools of this State in accordance with the provisions of this act. The Commission shall keep a minute book for its proceedings and on every action of the Commission an “aye” and “no” vote of the members thereof shall be required, and such minute book shall be kept in the office of the Superintendent of Public Instruction, and shall be open to public inspection, and no adopted text at any time shall be superseded or substituted except by the affirmative vote of two thirds of the members of the Commission present and voting. [Act June 5, 1917, 1st C. S., ch. 44, § 3.]

**Time of meeting; continuance of present contracts; consideration of advisability of change; terms of new contract; investigation of publications; frequency of changes.**—It shall be the duty of the Commission to meet not later than September 1, 1918, and as often thereafter as may be necessary, for the purposes of considering the advisability of continuing or discontinuing at the expiration of all current contracts any or all of the State adopted textbooks in use in the public schools of Texas, and of making such adoptions as are provided for in Section 5 of this Act. Before making any change in the adopted series, however, the Commission shall, upon thorough investigation, satisfy itself that a change is desirable in the interests of the children in the schools, and if in the judgment of the Commission, no text on any subject or subjects is offered that is better suited to the requirements of the schools than the present adopted text or texts, then it shall be lawful for the Commission to renew any contract for such period of time as may be deemed advisable, not to exceed a period of six years; provided no book or books in the present list of State adopted Textbooks shall be changed if the contractor furnishing same will when said Commission meets agree to enter into contract and bond to continue to furnish such book or books at the price and of the quality and upon the conditions specified in the current contract for a period of time not less than one year and not more than six years, as may be determined by the Commission. If no text or texts on any prescribed subject or subjects are submitted by any particular publisher or publishers that meet the requirements of the schools, as may be determined by the Commission, then it shall be the duty of the chairman of the Commission to instruct the secretary of the Commission to investigate the book markets for the purpose of securing bids with a view to providing at the most reasonable price or prices possible the best available texts, on any and all subjects that are to be adopted by the Commission for the schools of Texas. Provided, that it shall not be lawful for the Textbook Commission hereby created to change the books in more than one subject or text, in any one year; and provided further, that persons holding present contracts shall continue to furnish said books of as good quality and as low price, as at present, and upon the same conditions as contained in existing contracts. [Act June 5, 1917, 1st C. S., ch. 44, § 4.]

**Art. 2909bb. Uniform system of text books; branches covered; character of books; dead languages; applicable to all public schools in state.**—The Textbook Commission authorized by this Act shall have authority to select and adopt a uniform system of textbooks to be used in the public free schools of Texas, and the books so selected and adopted shall be printed in the English language and shall include and be limited to textbooks on the following subjects; Spelling, a graded series of reading books, a course in language lessons, English grammar, English composition, oral English, history of English Literature, history of American literature, geography, arithmetic, mental arithmetic, physiology, and hygiene, civil government, algebra, physical geography, history of the United States (in which the construction placed on the Federal Constitution by the fathers of the Confederacy shall be fairly represented), history of Texas, agriculture, a graded system of writing and of drawing books, plane geometry, solid geometry, physics, chemistry, general history, and Latin; provided that the series of readers adopted by the Commission shall have a full page cut of the manual alphabet as used by the Texas School for the Deaf; provided that none of said textbooks shall contain anything of a partisan or sectarian character, and that nothing in this Act shall be construed to prevent the teaching of German, Bohemian, Spanish, French, Latin or Greek in any of the public schools as a branch of study, but the teaching of one or more of these languages shall not interfere with the use of textbooks herein prescribed; and the study of a language known as a dead language, such as Latin or Greek, shall never be made compulsory as a requirement for the completion of any regular course of study in use in any public school in this State without providing an equivalent course for graduation equal in all other respects to such a course, containing such dead language or languages, which shall not include the same; provided, however, that nothing here in shall be construed to prevent the use of supplementary books as herein provided. The Commission as herein provided for shall adopt text books in accordance with provisions of this Act for every public free school in this State, and no public free school in this State shall use any text book unless same has been previously adopted or approved by this Commission; and the Commission shall prescribe rules under which all text books adopted or approved shall be introduced or used by or in the public free schools of the State. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 4; Act June 5, 1917, 1st C. S., ch. 44, § 5.]

**Art. 2909c. Supplementary books; when to be used.**—The Textbook Commission shall have authority to adopt a series of supplementary readers for the elementary grades and such other supplementary books as it may deem advisable for use in the public free schools of the State. Each bidder presenting such book or books shall state at what price it or they are offered, provided, however, that no supplementary books shall be purchased and used to the exclusion of the books prescribed under the provisions of Section 5 [Art. 2909bb] of this Act, but full use must be made in good faith of the books selected by said Commission under Section 5 before any of the supplementary books provided for in this Section shall be required to be purchased and used; and no other supplementary readers shall be required to be purchased and used in good faith. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 5; Act June 5, 1917, 1st C. S., ch. 44, § 6.]

**Changes and additions to list of books adopted; reservation in contract; exchange terms.**—The textbook commission may at any time require such changes, amendments or additions to the book or books adopted as in their judgment will be for the best interest of the public schools of this State; and contracts for books under the provisions of this Act shall be made upon the distinct condition that the commission provided

for in this Act may, during the time for which books are adopted under this Act, upon giving one year's previous notice to the publishers thereof, order such changes, amendments and additions to the book or books so adopted as such textbook commission may determine; provided, also that if in the judgment of the commission such changes or revisions make it impractical for the revised books to be used in the same class with the old books, the publishers will be required to give the same exchange terms as were given when the books were first adopted, and such exchange period shall extend two years from the time the revised books are first put into use in the schools; provided, that nothing in this Section shall be construed so as to give said commission power or authority to abandon any book or books originally contracted for. [Act June 5, 1917, 1st C. S., ch. 44, § 7.]

**Art. 2909cc. Advertisement for bids; requisites of bids; deposit; forfeiture.**—When books are to be selected and adopted under the provisions of this Act the chairman of the commission shall for thirty days by notices in the public press and by written notices mailed to all persons, firms or corporations in whose behalf such notices may be requested, in which notices the time and place of such selection shall be set out and thus advertised that sealed bids will be received at the time and place fixed in said notice and not later than September 1, 1918. Each bid shall state specifically at what price each book will be furnished, and shall be accompanied by specimen copies of each book offered, and it shall be required that each bidder deposit with the treasurer of the State of Texas such sum of money as the commission may require, to be not less than five hundred dollars, nor more than twenty-five hundred dollars, according to the value of the books each bidder may propose to supply. Such deposits shall be forfeited to the State absolutely if such bidder so depositing shall fail to make and execute such contract and bond as herein required within such times as the commission may require, which time shall be specified in the notice advertised. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 6; Act June 5, 1917, 1st C. S., ch. 44, § 8.]

**Art. 2909d. Sealing and opening of bids; affidavit as to payment of taxes; affidavit of bidder as to disinterest of members of Commission.**—All bids submitted under Section 8 [Art. 2909cc] of this Act shall be sealed and deposited with the chairman of the commission to be delivered by him in the commission in session and for the purpose of considering the same, and shall be opened in the presence of the commission; provided that the commission shall not consider a bid of any publisher of school books who has failed to pay the tax due and payable the State of Texas under Chapter 148 of the Acts of the Twenty-ninth Legislature, and who has failed to make the affidavit required by this Act. Each individual, firm or corporation submitting bids to the commission for its consideration, or presenting books for adoption under the provisions of this Act, shall file with the Secretary of State an affidavit giving the names of all people employed to aid in any way whatsoever in securing the contract, and that no member of the commission is in any manner interested, directly or indirectly, in such individual, firm or corporation. If the fact should be disclosed that any member of the commission is so interested, it shall work a disqualification of such member of the commission, and he shall not be permitted to serve on the commission; or if it should further be disclosed that any member of the commission is or has been interested in any book or series of books as the author or associate author, or in any way pecuniarily interested in any book or series of books published by any house bidding for this contract, or offered for use in the public schools of this State, or that any member of the commission is interested in any such book or series of books in any manner, such fact shall likewise work as a disqualification of such member, and

he shall not be permitted to serve upon the commission. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 7; Act June 5, 1917, 1st C. S., ch. 44, § 9.]

**Art. 2909dd. Meeting for consideration of bids; investigations; adoption of books; postponement of selection.**—It shall be the duty of the commission to meet at the time and place mentioned in the notice and advertisement, and it shall then and there open and examine the sealed proposals received; and it shall be the duty of the commission to make a full and complete investigation of all the books and bids accompanying the same. The textbooks shall be selected and adopted after a careful examination and consideration of all books presented and the books selected and adopted shall be those which in the opinion of the commission are most acceptable for use in the schools, quality, mechanical construction, paper, print, price, authorship, literary merit and other relevant matters being given such weight in making its decision as the commission may deem advisable. The commission shall proceed without delay to adopt for use in the public schools of this State textbooks on all the branches hereinbefore mentioned; provided, that if the bid submitted to said commission should not be satisfactory to said commission, they may postpone the selection of such books or a part thereof to such time as they may select, and after the same is readvertised new bids may be received and acted on by such commission as provided for in this act; provided, that no textbook shall be adopted until it has been read and carefully examined by at least a majority of the commission. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 8; Act June 5, 1917, 1st C. S., ch. 44, § 10.]

**Art. 2909e. Stipulations of contract as to exchange of books.**—The commission shall stipulate in the contract where a change shall be made from the books in use that the contractor or contractors shall take in exchange the respective books adopted by the commission then in use in part payment for the new books; and all bidders under this Act shall specify what allowance they will make for the said respective books adopted by the State and then in the hands of the patrons of the public schools when offered in exchange for the new books adopted under this Act; provided, that said allowances and condition for the exchange of the old books shall be enforced only during the two scholastic years following a change in books, and no book shall be taken in exchange which was not in use in the public schools during the scholastic year next preceding the change, or which was not so purchased by book dealers for the session next preceding such exchange; and provided that the commission shall prescribe and promulgate the conditions of exchange, and upon failure to comply with such conditions by any contractor, suit shall be instituted against such contractor in accordance with Section 28 of this Act, and that said conditions of exchange shall be made a part of each contract authorized under this Act. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 9; Act June 5, 1917, 1st C. S., ch. 44, § 11.]

**Art. 2909ee. Stipulations in contract as to changes, amendments and additions.**—Every contract entered into with a publisher for the adoption of any book or books shall contain a provision that the commission herein provided for may, during the life of the contract, upon giving one year's previous notice to the publishers of such book or books, order such changes, amendments and additions to the book or books so selected and adopted as in the discretion of said commission shall keep them up to date and abreast of the times; provided that such revisions shall not be made oftener than once in two years. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 10; Act June 5, 1917, 1st C. S., ch. 44, § 12.]

**Art. 2909f. Bond of contractor; duties of Attorney General; deposit and performance of contract; suits on bond; new bond.**—The bidder to whom any contract may have been awarded shall make and execute a good and sufficient bond payable to the State of Texas in the sum of not less than twenty thousand dollars for each book adopted under the provisions of this Act; provided further that the commission is hereby given authority to require bond in such further and additional sum as it may deem advisable, said bond to be approved by the commission, such bond to be conditioned that the contractor shall faithfully perform all the conditions of the contract. The contract and bond shall be prepared by the Attorney General and shall be payable in Travis County, Texas, and be deposited in the office of the Secretary of State. The bond shall not be exhausted by a single recovery thereon, but may be sued upon from time to time until the full amount thereof is recovered, and the Texas State Text Book Commission may at any time upon twenty days' notice require a new bond to be given, and in the event the contractor shall fail to furnish such new bond the contract of such contractor may at the option of the Texas State Text Book Commission be forfeited. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 11; Act June 5, 1917, 1st C. S., ch. 44, § 13.]

**Art. 2909ff. Prices to be paid for books; discrimination; liquidated damages; recovery at suit of Attorney General.**—The commission shall not in any case contract with the publisher for any book or books to be used in the public schools of this State at a price in excess of the lowest price at which said publisher or publishers furnish or have offered to furnish and distribute the same book or books under contract with any other State, county or school district in the United States, and all contracts with publishers for the furnishing of books hereunder shall further stipulate and bind such publishers that they will not hereafter during the life of the respective contracts furnish or offer to furnish and distribute the same book or books under contract with any other state, county or school district in the United States at a lower price than that at which said publishers agree to furnish and distribute the same books under the contracts executed pursuant to this act, unless such publishers respectively shall immediately give such lower price to the beneficiaries of the contracts executed hereunder, provided, that in the event any such contract is made it shall be the duty of the Attorney General to institute suit upon the bond hereinabove provided for, for a recovery on behalf of the State of the liquidated damages due under and as provided for in Section 28 of this Act, and proof of a violation of this provision in any particular shall be prima facie evidence of liability in any such suit brought hereunder, and in case that any contractor who has a contract to furnish a book or books for the State under the provisions of this Act shall at any time during the period of this adoption contract with any other State, county or school district in the United States to furnish and distribute the same book or books at a lower price than fixed in accordance with the provisions of this Act, under similar conditions of sale and distribution as may be decided by the Texas State Text Book Commission such lower price shall immediately be given to the State of Texas, and for the breach of any of the conditions and stipulations contained herein or in the respective contracts, the contract may be forfeited and the contractors shall be liable to the State of Texas in liquidated damages in the full amount of the bond; and it shall be the duty of the Attorney General to bring suit on the bond of such contractors for such liquidated damages as provided for in Section 28 [Art. 2909n] hereof. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 12; Act June 5, 1917, 1st C. S., ch. 44, § 14.]

**Art. 2909g. Disqualification of contractor violating anti-trust law; affidavit and statement; filing copies of agreements with other publish-**

ers.—No book or books shall be purchased from any person, firm or corporation who is a member of or connected with any trust; and in the event it be established that this provision has been violated, such violation shall be held to be fraud and collusion as contemplated under Section 28 of this Act, and the Attorney General shall bring suit upon the bond of such person, firm, or corporation and upon proof of such violation shall recover the liquidated damages as provided for in said Section 28 hereof, as defined by the laws of this State, and a sworn affidavit that said person or corporation is not connected either directly or indirectly with a trust shall be required, and said affidavit shall be filed with said commission. Before proceeding to adopt books as provided under the provisions of this Act, the commission shall require all persons, firms, and corporations bidding for a contract to file with the commission a sworn statement on or before the date selected by the commission for receiving sealed bids, stating whether said person, firm, or corporation is interested, or whether said person, firm or any member thereof or any individual stockholder of such corporation is interested or acting as a director, trustee or stockholder, either directly or indirectly or through a third party, in any manner whatsoever, in any other publishing house, and this statement shall be sworn to by such person, a member of such firm or the president, secretary, and each one of the directors of said corporation. All firms or persons bidding for a contract for supplying books shall present a sworn statement signed by all its members showing the names of all members of said firm, and whether any other person, firm or corporation has any financial interest in said firm, and also whether any individual member or members of said firm have any financial interest in any other publishing firm or corporation of publishers; provided further, that the commission shall require all corporations, or person, or firms to file with the governor attested copies of all written agreements entered into and existing between them and others engaged in the publishing business, and if in the opinion of the commission such written agreements or other facts adduced are violations of the anti-trust law of the State of Texas, or opposed to public policy, the bids of such houses shall not be considered by the commission. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 13; Act June 5, 1917, 1st C. S., ch. 44, § 15.]

**Art. 2909gg. Contract to stipulate against liability of state.**—It shall be a part of the terms and conditions of every contract made in pursuance of this Act that the State of Texas shall not be liable to any contractor thereunder for any sum whatsoever, but all such contractors shall receive compensation solely and exclusively from the proceeds of the sale of school books as provided in this Act. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 14; Act June 5, 1917, 1st C. S., ch. 44, § 16.]

**Art. 2909h. Execution of contract; duplicate; record.**—Each contract shall be duly signed by the publishing house or its authorized officers and agents; and if it is found to be in accordance with the award and all the provisions of this Act, and if the bond herein required is presented and duly approved the commission shall approve said contract and order it to be signed on behalf of the State by the Governor in his capacity as chairman. All contracts shall be made in duplicate, one copy to remain in custody of the Secretary of State and be copied in full in the minutes of the meeting of the commission in a well bound book, and the other copy to be delivered to the company or its agent. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 15; Act June 5, 1917, 1st C. S., ch. 44, § 17.]

**Art. 2909hh. Disposition of deposits made by bidders.**—When any person has been awarded a contract and he has filed his bond and contract with the commission and the same has been approved, the commission shall make an order on the Treasurer of the State reciting such fact,



and thereupon the Treasurer shall return the deposit of such bidder to him; but if any successful bidder shall fail to make and execute the contract and bond as hereinbefore provided, the Treasurer, shall place the deposit of such bidder in the State Treasury to the credit of the available school fund, and the commission shall readvertise for other bids to supply such books which said bidder may have failed to supply. All unsuccessful bidders shall have their deposit returned to them by the State Treasurer as soon as the commission has decided not to accept their bids. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 16; Act June 5, 1917, 1st C. S., ch. 44, § 18.]

**Art. 2909i. Proclamation as to letting of contract; custody of standards adopted.**—As soon as the State shall have entered into the contract for the furnishing of books for use of the public schools of this State under the provisions of this Act, it shall be the duty of the commission to issue its proclamation of such facts to the people of the State; and the State superintendent of public instruction shall carefully label and file away the copies of the books adopted as furnished for examination to the board; and such copies of such book shall be securely kept and the standard of quality and mechanical excellence of the book or books so furnished under this Act shall be maintained in said books so furnished under contract authorized by this Act during the continuance of the contract. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 17; Act June 5, 1917, 1st C. S., ch. 44, § 19.]

**Art. 2909ii. Circular letter to local school officers.**—As soon as practical after the adoption of the textbooks provided for in this Act, the superintendent of public instruction shall address a circular letter to the county superintendent and to the president of the school boards in independent school districts, which circular letter shall contain a list of all the books adopted with their respective prices, together with such other information as he may deem advisable. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 18; Act June 5, 1917, 1st C. S., ch. 44, § 20.]

**Art. 2909j. Contractor to maintain stock of books within state at convenient distributing points; agencies; mode of distribution; failure to furnish books; penalty; unorganized counties.**—All parties with whom the contract have been made shall establish and maintain in some city in the State a depository where a stock of their goods to supply all immediate demands shall be kept; all contractors not maintaining their own individual or separate State agencies or depositories shall maintain a joint agency or depository to be located at some suitable and convenient distributing point, at which general depository each contractor joining in said agency shall keep on hand a sufficient stock of books to supply sub-depositories, and every contractor shall establish and maintain in every county in the State having an enrollment of five hundred pupils or more in the public schools as shown in the last preceding report of the county superintendent, on file in the office of the State Superintendent of Public Instruction, one or more agencies, one of which shall be at the county seat. At each county seat, as above provided, and in every city in the State containing five hundred inhabitants or over shall be maintained an agency of each contractor carrying a sufficient stock of all books contracted for to supply all immediate demands; provided, that in all counties not entitled to a depository under the conditions as provided for in this Act contractors shall supply such adopted books under such rules and regulations as may be approved by the Texas State Text Book Commission. Any person, dealer or school board in any county in the State may order from the central agency, and the books so ordered shall be furnished at the same rate and discount as are granted to agents at the county seat; provided that the price of books so ordered shall be paid in advance. Upon the failure of any contractor to furnish the books as pro-

vided in the contract, and in this Act, the county judge in the county wherein such books have not been furnished shall report the fact to the Attorney General, and he shall bring suit on account of such failure in the name of the State of Texas in the district court of Travis County, and shall recover on the bond given by such contractor for the full value of the books not furnished as required, and in addition thereto the sum of one hundred dollars, and each day of failure to furnish the books shall constitute a separate offense, and the amounts so recovered shall be placed to the credit of the available school fund of the State. Any unorganized county shall be furnished from the same agency as the county to which said unorganized county is attached for judicial purposes in the same manner as such organized county. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 19; Act June 5, 1917, 1st C. S., ch. 44, § 21.]

**Art. 2909jj. Price to be marked on books.**—The contract price of each book shall be plainly printed on the back of each book, together with the following notice "The price marked hereon is fixed by the State, and any deviation therefrom should be reported to the State Superintendent of Public Instruction." First two years of the contract for new books the exchange price of each book shall be printed thereon, also. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 20; Act June 5, 1917, 1st C. S., ch. 44, § 22.]

**Art. 2909k. Use of books compulsory; exception; restriction as to authorship.**—The books adopted by the Commission under the provisions of this Act shall be introduced and used as textbooks to the exclusion of all others in public free schools of this State for such period of years as may be determined by the commission, not to exceed six years in any case; provided nothing in this Act shall be construed to prevent or prohibit the patrons of the public schools throughout the State from procuring books in the usual way in the event that no contracts are made. Provided that said Commission shall not contract for any book of which any member of the nominating committee, or any member of said Commission is, or may be author. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 21; Act June 5, 1917, 1st C. S., ch. 44, § 23.]

**Art. 2909kk.**

Superseded by Act June 5, 1917, 1st C. S., c. 44.

**Arts. 2909l–2909mm.**

Superseded by Act June 5, 1917, 1st C. S., ch. 44, §§ 24–27, set forth post as arts. 1513a–1513d, Penal Code.

**Art. 2909n. Cancellation of contract; suit on bond of contractor.**—The State may at its election cancel any contract entered into by virtue of the provisions of this Act for fraud, or collusion, or material breach of contract upon the part of either party of the contract, or any member of the commission, or any person, firm or corporation or their agents making said bond or contract; and for the cancellation of any such contract the attorney general is hereby authorized to bring suit in the proper court of Travis County, and in case of the cancellation of any contract as provided for, the damages are fixed at not less than the amount of said bond, to be recovered as liquidated damages in the same suit cancelling said contract; and on account of the difficulty of determining the damages, that might accrue by reason of such fraud collusion or material breach, and cancellation of such contract, the full amount of the bond given by the contractor shall be considered as liquidated damages to be recovered out of said bond by the State at the suit of the attorney general, and every contract that shall contain a clause to this effect. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 26; Act June 5, 1917, 1st C. S., ch. 44, § 28.]

**Art. 2909nn. Designation of Secretary of State to receive service of process.**—Any person, firm or corporation with whom a contract has

been entered into under the provisions of this Act shall designate the secretary of state of Texas as its or their agent, upon whom citation and all other writs and processes may be served in the event any suit shall be brought against such person, firm or corporation. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 27; Act June 5, 1917, 1st C. S., ch. 44, § 29.]

**Art. 2909o. Compensation of teachers acting as members of Commission; appropriation; employment of stenographer.**—The teachers selected upon said commission under the provisions of this Act shall receive as compensation for their services the sum of five dollars per day each while on active duty and actual traveling expenses in going to and from the place of meeting, and in attending to the business of the commission, to be paid upon warrants drawn by the comptroller under the direction and approval of the chairman of the commission; and the sum of four thousand dollars for the fiscal year ending August 31, 1918, and one thousand dollars for each year thereafter, or so much thereof as may be necessary, is hereby appropriated out of the general revenue of this State, not otherwise appropriated, for the purpose of paying the same and cost and expense of putting into effect the provisions of this Act; provided, that the superintendent of public instruction be and is hereby fully authorized to employ one stenographer to assist in the clerical work of the State Text-book Commission, the pay of said stenographer to be paid out of the appropriation herein made. [Acts 1907, 1 S. S., p. 448; Acts 1911, S. S., p. 88, § 28; Act June 5, 1917, 1st C. S., ch. 44, § 30.]

**Art. 2909oo. Effect of adoption of constitutional amendment.**—In the event the proposed amendment to Article 7 of the Constitution of Texas, to be voted on in November 1918, is adopted and thereafter put into actual operation and effect before the expiration of any textbook contracts awarded hereunder, or if for any other reason before the expiration of any text book contracts awarded hereunder, it is decided to furnish free text books by the State of Texas for use in the Public Schools the books covered by such contracts shall be continued in use until the expiration of such contracts at the prices contracted for and under all the other terms and conditions of this Act, and in submitting any bid or bids under the terms of this Act every bidder shall agree that the books embraced in said bid shall be sold and delivered to the State of Texas at the prices offered in said bid and that the State shall receive the same discount from such prices that the Central Depository is allowing any subdepository in the State of Texas at the time that the State takes over the furnishing of free books for use in the Public Schools. [Act June 5, 1917, 1st C. S., ch. 44, § 31.]

**Art. 2909ooo. Books to be manufactured in Texas; price.**—That on and after this Act shall become effective, all text books which shall be hereafter adopted or contracted for by the Text Book Board of the State of Texas, for use in the public schools of Texas, under the provisions of Chapter 11, of the General Laws of the Thirty-second Legislature, passed at the First Called Session thereof, and approved August 31, 1911, be and the same are hereby required to be printed, bound, completed and finished within the State of Texas; and, provided further, that all typesetting and other mechanical labor connected with the printing of said books or revision or new edition thereof shall be performed within the State of Texas; provided, that no text book shall be adopted or contracted for by said board at a higher price than a similar book of equal or better quality would cost if manufactured elsewhere. [Act March 23, 1915, ch. 112, § 1 (§ 30).]

**Explanatory.**—It would seem that this act is superseded by Act June 5, 1917, ch. 44, ante, arts. 2909a-2909oo.

The act in its title and enacting part purports to amend ch. 11, Acts 32nd Leg., 1st Called Sess., by adding thereto sections 30, 31, and 32. The enacting part, however, adds sections 30 and 30a only reading as set forth in articles 2909ooo and 2909oooo.

The title declares the subject of the proposed legislation to be "in substance that if this act becomes effective all text-books hereafter adopted or contracted for by the state text-book board for use in the public schools shall be printed, bound, completed, and finished within the state of Texas, and that all typesetting and other mechanical labor connected with the printing of said books or revision or new edition thereof shall be performed within the state of Texas; providing further that any person, firm, or corporation who at the time this act shall become effective shall be publishing or furnishing any text-books for use in the public schools by virtue of any such contract shall have said contract extended for a period of two years from the date of expiration thereof; provided such persons, firms, or corporations shall file with the secretary of state, state of Texas, on or before July 31, 1915, a supplementary agreement to be attached to such contract providing that on and after January 1, 1916, such publisher will print, bind, complete, and finish within the state of Texas all text-books furnished for use under the provisions of such contract; providing also certain duties of the governor with reference to the extension of such contract and regulating the execution of bonds relative thereto and the giving of new bonds under certain conditions." The act took effect 90 days after March 20, 1915, the date of adjournment.

**Art. 29090000.** Same; permit to manufacture outside of state where cost is substantially lower.—Provided, that the Governor and Text Book Board shall be authorized to permit publishers of adopted, or presented for adoption, books to contract for the printing, binding and completion of such books outside of the State when said publishers present satisfactory proof to said board that they can contract for editions of equal size and quality at a substantially lower price outside of the State, and contractors within the State will not substantially meet said competitive prices. [Id. (§ 30a).]

See note under art. 2909000.

## CHAPTER TWENTY-TWO

### FREE KINDERGARTENS

<p><b>Art.</b> 2909½.</p>	<p>Establishment; petition; school census and apportionment of school funds not affected; ex-</p>	<p><b>Art.</b> 2909½a. 2909½b.</p>	<p>pense, how paid; part of school system. Employment of teachers. Repeal; partial invalidity.</p>
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**Article 2909½.** Establishment; petition; school census and apportionment of school funds not affected; expense, how paid; part of school system.—The trustees of any school district in the State of Texas, upon the petition of the parents or guardians of twenty-five or more children under the scholastic age down to and including five years, residing within said district, shall establish and maintain a kindergarten as a part of the public free schools of said district, for the training of children under the scholastic age down to and including five years, residing in said district, and shall establish such courses of training, study and discipline, and such rules and regulations governing such kindergartens as said trustees shall deem best. Provided that any such petition for the establishment and maintenance of a free kindergarten shall be presented to the trustees of said district between the First day of June and the First Day of August in any year. Provided further, that nothing in this Act shall be construed to change the law relating to the taking of the scholastic census, or the apportionment of State and County school funds among the several Counties and districts in this State. Provided, further, that the cost of establishing and maintaining such kindergartens shall be paid from the special school tax of said districts. Said kindergartens shall be a part of the public school system and shall be governed, as far as practicable in the same manner and by the same officers as is now, or may hereafter be, provided by law for the government of the other public schools of the State. [Act March 29, 1917, ch. 122, § 1.]

**Explanatory.**—The title of the act purports "to amend article 2811, chapter 14, title 48, Revised Statutes of Texas 1911, empowering the trustees of any school district, upon petition of parents or guardians, to require said trustees to establish and maintain free kindergarten, for the training of children under the scholastic age down to and including five years, and to provide for trained kindergarten teachers." In view of the provisions of section 2 of the act, post, art. 2909½a, it seems obvious that an "amend-

ment" of art. 2811, in the strict sense of that term was not intended, and the enacting part of the statute does not so declare. The act is broader in its terms than the heading of the chapter in which article 2811 appears. The act took effect 90 days after March 21, 1917, date of adjournment.

**Art. 2909<sup>1</sup>/<sub>2</sub>a. Employment of teachers.**—The trustees shall be empowered to employ to teach such kindergartens only those who hold State Kindergarten Certificates, provided for in Section No. 121, of Chapter 96, of the Acts of the Thirty-second Legislature of the State of Texas [Art. 2811]. [Id., § 2.]

**Art. 2909<sup>1</sup>/<sub>2</sub>b. Repeal; partial invalidity.**—All laws and parts of laws in conflict with this Act are hereby repealed, and in case it is held by the courts that any part of this Act is unconstitutional, such decision shall not impair the other parts and provisions of this Act. [Id., § 3.]

## CHAPTER TWENTY-THREE

### VOCATIONAL EDUCATION

**Art.**  
2909<sup>3</sup>/<sub>4</sub>. Acceptance of act of Congress relating to vocational education.  
2909<sup>3</sup>/<sub>4</sub>a. Custody of funds.  
2909<sup>3</sup>/<sub>4</sub>b. Administration of fund by state board of education.  
2909<sup>3</sup>/<sub>4</sub>c. Appropriation.

**Art.**  
2909<sup>3</sup>/<sub>4</sub>d. State appropriation to be compensated by school appropriation.  
2909<sup>3</sup>/<sub>4</sub>e. Plans for expenditure of fund to be approved by Federal board for vocation; applications for aid.

**Article 2909<sup>3</sup>/<sub>4</sub>. Acceptance of Act of Congress relating to vocational education.**—That the State of Texas, hereby accepts the provisions of the Act of Congress, approved February 23, 1917, entitled; "An Act to provide for the promotion of vocational education; to provide for the promotion of vocational education; to provide for cooperation with the States in the promotion of such education in agriculture and the trades and industries; to provide for cooperation with the States in preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure." The good faith of the State is hereby pledged to make available through appropriations for the several purposes of said Act funds sufficient at least to equal the sums allotted, from time to time, to this State for the appropriations made by said Act and to meet all conditions necessary to entitle the State to the benefits of said Act. [Act June 5, 1917, 1st C. S., ch. 45, § 1.]

**Art. 2909<sup>3</sup>/<sub>4</sub>a. Custody of funds.**—The State Treasurer is hereby designated custodian of all funds allotted to this State from the appropriations made by said Act, and he shall receive and provide for the proper custody and disbursement of the same in accordance with this Act. [Id., § 2.]

**Art. 2909<sup>3</sup>/<sub>4</sub>b. Administration of fund by State Board of Education.**—That the State Board of Education is hereby designated and authorized, and is hereby given all necessary power, to cooperate, as provided in and required by the aforesaid Act of Congress with the Federal Board of Vocational Education in the administration of the provisions of said Act; and to do all things necessary to entitle the State to receive the benefits thereof. [Id., § 3.]

**Art. 2909<sup>3</sup>/<sub>4</sub>c. Appropriation.**—That there is hereby appropriated out of the money in the State Treasury not otherwise appropriated, for the scholastic year 1917-18, \$29,950.00, or so much thereof as may be necessary, to be used for salaries of teachers, supervisors, or directors of agricultural education in the public schools; \$11,000.00, or so much thereof as may be necessary, for salaries of teachers, supervisors, or directors of trade, home economics and industrial subjects in the public schools;

and \$21,200.00, or so much thereof as may be necessary, for training of teachers of vocational subjects in the public high schools and colleges of the State, to be conditioned upon receiving a like sum from the Federal Board for Vocational Education to be used for similar purposes; and for the scholastic year 1918-19 \$44,925.00, or so much thereof as may be necessary, for salaries of teachers, supervisors, or directors of agricultural education in the public schools; \$16,500.00, or so much thereof as may be necessary for paying salaries of teachers, supervisors or directors or trade, home economics and industrial subjects in the public schools; \$29,680.00, or so much thereof as may be necessary, for training of teachers of vocational subjects in the public high schools and colleges of the State, to be conditioned upon receiving a like sum from the Federal Board for Vocational Education to be used for similar purposes. [Id., § 4.]

**Art. 2909<sup>3</sup>/<sub>4</sub>d. State appropriation to be compensated by school appropriation.**—It is hereby expressly provided that all appropriations by local school boards for the purposes of this Act, and all appropriations by the State in its educational budgets that come within the provisions of this Act shall be allowed to compensate for the appropriations herein provided; and that the appropriations in this Act are simply a guarantee of good faith on the part of the State in the administration of the Federal Vocational Education Act; and are to be actually distributed in whole or in part by the State Board of Education only in case of necessity to preserve the good name of the State. [Id., § 5.]

**Art. 2909<sup>3</sup>/<sub>4</sub>e. Plans for expenditure of fund to be approved by Federal Board for Vocation; applications for aid.**—That in order to secure the benefits of the appropriation for the purposes specified in this Act, plans shall be submitted to the State Board of Education showing the kinds of vocation for which it is proposed that the appropriations shall be used; the kinds of schools and equipment; courses of study; methods of instruction; qualifications of teachers; and in the case of agricultural subjects, the qualifications of supervisors or directors; plans for the training of teachers; and in the case of agricultural subjects, plans for the supervision of agricultural education, as provided in the Federal Act. Such plans shall be prepared under the supervision of the State Superintendent of Public Instruction upon the form prescribed by the State Board of Education, and approved by the Federal Board for Vocation, and approved by the Federal Board for Vocational Education. It shall be the duty of the State Superintendent as secretary of the State Board of Education, to make a thorough investigation of such application submitted for aid under this Act, and the State Board of Education shall require his certificate that each school applying for aid under this Act meets substantially the requirements of the law before aid in any amount is granted. [Id., § 6.]

## TITLE 49

## ELECTIONS

Chap.		Chap.	
1. Time and place of holding elections.		8. Contesting elections.	
2. Officers of election.		10. Nominations—By primary elections and otherwise.	
3. Ordering elections, etc.		10a. Election of United States Senators by direct vote.	
4. Suffrage.		11. National conventions—State conventions to select delegates to.	
5. Official ballot.			
7. Manner of conducting elections, and making returns thereof.			

## CHAPTER ONE

## TIME AND PLACE OF HOLDING ELECTIONS

Art.		Art.	
2910. Elections, general, time for holding.		2916. Voters shall vote in precinct where they reside.	
2913. Precinct election, formed how and when; publication.		2919a. Use of public buildings for holding elections.	

**Article 2910. Elections, general, time for holding.**

Cited, *Waples v. Gilmore* (Civ. App.) 189 S. W. 122.

**Art. 2913. Precincts, election, formed how and when, publication.**

**Voting precincts how established.**—The voting precincts of a new county should be so established as to embrace only territory situated in one commissioner's precinct and one justice's precinct in order that the vote for precinct officers may be determined. *Dubose v. Woods* (Civ. App.) 162 S. W. 3.

**Convenience of voters to be considered.**—Under the act creating Dunn county (Acts 33d Leg. [1st Called Sess.] c. 35), the division of such county into commissioner's, justice's, and voting precincts held so manifestly wrong, in view of the comparative size and comparative number of voters and the inconvenience to residents of two of the three largest towns in reaching the polling place and justice's court, as to require the holding of an election in such precincts to be enjoined. *Dubose v. Woods* (Civ. App.) 162 S. W. 3.

A division of a county into election districts when not for the convenience of voters, but to give the county commissioners continued control of county politics, will not be upheld. *Williams v. Woods* (Civ. App.) 162 S. W. 1031.

**Art. 2916. [1732] [1689] Voters shall vote in precinct where they reside.**

**Evidence supporting rejection of ballots.**—Where votes of two Mexicans were questioned, testimony that the precinct in which they lived was sparsely settled, that no other Mexicans lived there and that such persons had not resided there for sufficient time to vote, is admissible and will support a finding rejecting their ballots. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

**Art. 2919a. Use of public buildings for holding elections.**—In all cases where it is practicable so to do, all elections shall be held in some school house, fire station or other public building within the limits of the election precinct in which such election is being held, and no charge shall be made for the use of such building, except that any additional expense actually incurred by the authorities in charge of such building on account of the holding of the election therein shall be repaid to them by the party who would be liable for the expenses of holding the election under the existing law, and provided that if there be no building available for the purpose of holding such election in the election precinct in which the election is being held, then such election may be held in some other building. [Act March 30, 1917, ch. 149, § 2.]

**Explanatory.**—The act amends ch. 1, tit. 49, Rev. Civ. St. by adding thereto art. 2919a. Took effect 90 days after March 21, 1917, date of adjournment.

## CHAPTER TWO

### OFFICERS OF ELECTION

Art. 2922. Disqualifications for being judges, etc., or members of executive committees.	Art. 2928d. Certain offenses of officers and supervisors.
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**Article 2922. Disqualifications for being judges, etc., or members of executive committees of parties.**

Cited, *Gilmore v. Waples* (Sup.) 188 S. W. 1037 (in dissenting opinion).

**Art. 2928d. Certain offenses of officers and supervisors.**

**Evidence as to intimidation.**—Evidence in election contest held to show that a voter was deterred from voting by talk as to his having trouble if he voted and an opinion of the county attorney as to voting rights. *Abshier v. Aiken* (Civ. App.) 191 S. W. 766.

Evidence in election contest held to show that a certain voter was neither influenced by intimidation nor an adverse opinion by the county attorney on his voting rights. *Id.*

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## CHAPTER THREE

### ORDERING ELECTIONS, ETC.

**Article 2936. [1805] [1754] In case of a tie another election shall be held.**

**Prevention of vote which would have resulted in tie.**—Where a voter was restrained from voting by threatening talk and an adverse opinion by the county attorney, and his vote would have tied the result as between two candidates, the vote as between these candidates should be determined a tie. *Abshier v. Aiken* (Civ. App.) 191 S. W. 766.

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## CHAPTER FOUR

### SUFFRAGE

Art. 2938. Qualifications for voting—who not qualified.	Art. 2945a. Tax receipt not to be delivered to agent.
2939. Qualifications for voting; voting by absentees.	2949. Poll tax receipt shall show what.
2942. Poll tax collected from whom; when paid; receipt.	2950. Poll tax receipt, form of.
2944. Mode of paying poll tax.	2952. Poll tax receipt, etc., in case of removal to another county or precinct, proviso.

**Article 2938. Qualifications for voting; who not qualified.**

**Conviction of felony.**—Where a voter had been convicted of felony and his sentence suspended under Acts 32d Leg. c. 44 [art. 865b, *Vernon's Code Cr. Proc.* 1916], which was held unconstitutional, the suspension was void, and the voter was not qualified, not having been pardoned. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

**Art. 2939. [1731] Qualifications for voting; voting by absentees.**—Every male person subject to none of the foregoing disqualifications who shall have attained the age of twenty one years, and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; and every male person of foreign birth, subject to none of the foregoing disqualifications, who has, not less than six months before an election in which he offers to vote, declared his intention to become a citizen of the United States, in accordance with the Federal Naturalization laws, and shall have resided in the state one year next preceding such election and the last six months in the county in which he offers to vote, shall also be deemed a qualified voter; and all electors shall vote in the voting precinct of their residence; provided that the electors living in an unor-



ganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; and provided further, that any voter who is subject to pay his poll tax under the laws of the state of Texas or ordinances of any city or town in this state, shall have paid said tax before he offers to vote at any election in this state, and holds a receipt showing the payment of his poll tax before the first day of February next preceding such election; and, if he is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he must procure a certificate showing his exemption, as required by this or, if such voter shall have lost or misplaced his tax receipt, he shall be entitled to vote, upon making affidavit before any officer authorized to administer oaths that such tax was actually paid by him before said first day of February next preceding such election at which he offers to vote, and that said receipt had been lost. Such affidavit shall be made in writing and left with the judge of the election. Provided, that in any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then, in addition to the foregoing qualifications, the voter must have resided in such subdivision of the county for six months next preceding such election.

Any qualified elector as defined by the statutes of this state, who expects to be absent from the county of his residence, and at any other place in this State, on the day of his election may vote subject to the following conditions, to-wit:

At some time not more than ten days nor less than three days prior to the date of such election such elector shall make his personal appearance before the county clerk of the county of his residence, and if personally unknown to such clerk, shall be identified by at least two reputable citizens of such county, and shall deliver to such clerk his poll tax receipt or exemption certificate, entitling him to vote at such election, and said clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election, which shall then and there be marked by said elector apart and without the assistance or suggestions of any other person, in such manner as said elector shall desire, same to be voted, which ballot shall be folded and placed in a sealed envelope and delivered to said clerk who shall keep same so sealed, and who shall also keep said poll tax receipt or certificate open to the inspection of any person who may wish to examine or see same until the second day prior to said election, and said clerk shall on said second day place the said poll tax receipt or certificate together with the said sealed envelope containing said marked ballot in another envelope which shall be by said clerk then mailed to the presiding judge of the voting precinct in which said elector lives. The postage for the entire correspondence herein made necessary to be provided by said elector. In the presence of the election officers provided by law, and on the day of such election and between the hours of two and three o'clock the said presiding judge of same in the precinct of the residence of said elector shall open the envelope containing said poll tax receipts and marked ballots and publicly announce that the ballot of such named elector is proposed to be cast, at which time any person who desired to challenge said vote and the right of same to be cast, shall be heard to present such challenge, and if there be no challenge of same, said vote shall be cast and counted according to the law; but if there be any challenge of such vote legal cause same shall be heard and decided according to the law provided in the case of challenge; and in case no challenge is made, such poll tax receipt, after same is marked, "Voted" as provided by law, shall be mailed back to the said county clerk. But in case of challenge, if challenged, such poll tax receipt together with affidavits relating thereto shall be mailed by said judge of election to the county clerk of such county who shall keep same

for thirty days and if no demand be made for the production of same before any body or person in authority within said time, said county clerk shall deliver such receipt to the owners thereof. When voted the judge of election shall mark opposite the name of such absentee voter the word "Absentee" \* \* \* ; provided this Act shall apply to any and all primary elections only. [Acts 1905, 1 S. S., p. 520, § 2; Act May 26, 1917, 1st C. S., ch. 40, § 1.]

**Explanatory.**—The act amends art. 2939, ch. 4, tit. 49, Rev. Civ. St. 1911. Took effect 90 days after May 17, 1917, date of adjournment. The omitted part, as shown by asterisks, creates an offense, and is set forth post as art. 221a, Penal Code.

**Payment of poll tax.**—Where an elector on the 1st day of January, 1912, was subject to payment of a poll tax and failed to pay the same, his vote at an election October 18, 1913, is properly rejected. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

**Residence.**—That a voter voted at a school election in another state and paid poll taxes there, held not to preclude him from voting in the county of his residence. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

Where one whose ballot was rejected owned a farm in county and intended to return there whenever he could find some one who would live with and care for him, ownership of the farm did not constitute a residence, as he actually was in another county. *Id.*

Where a voter waiting to get a house in Texas removed to adjacent New Mexico town, his temporary residence, etc., will not, it appearing that he returned, deprive him of his right to vote in Texas. *Id.*

That a voter temporarily removed from the county but intended to return and resume business, does not, where he retained his home in the county, work a loss of residence, depriving him of the right to vote. *Id.*

That one owned a farm in the county and resided there, temporarily removed during season of drought, but returned, does not deprive him of his residence in the county and he may vote therein. *Id.*

That a resident of a county, in discharge of his duties with a railroad company, temporarily removed, held not to deprive him of his residence in the county and of his right to vote where he retained his family home. *Id.*

That a voter, who had resided in the county and state for a sufficient length of time, intended ultimately to return to a distant state, does not deprive him from acquiring a legal residence and the right to vote. *Id.*

A voter who managed a business in Texas but took his meals in a town across the state line in New Mexico, held resident of Texas where he slept and kept his effects in that state. *Id.*

That a man's wife and children resided on their homestead fixed his residence there, although he may have taken but one meal a day and spent the rest of his time on another farm. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

As residence is largely a matter of intention, and absence will not alone destroy a residence once fixed, that a voter had been abroad and out of state a great deal, nothing being shown with regard to his intention, will not destroy his right to vote. *Id.*

**Repetition of vote after removal of disqualification.**—A voter should not be allowed to repeat his vote because he violated law in casting first one. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

**Evidence.**—In an election contest where a voter's ballot was questioned, evidence held sufficient to sustain a finding that he had acquired residence in the county. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

In an election contest, evidence held sufficient to sustain a finding that a challenged voter had a residence in the county and was entitled to vote. *Id.*

In an election contest, evidence held sufficient to warrant the rejection of a voter's ballot on the ground that he resided in another state. *Id.*

Evidence in election contest held not to show conclusively that a voter did not live and pay his poll tax in the county in which he voted. *Abshier v. Aiken* (Civ. App.) 191 S. W. 766.

#### **Art. 2942. Poll tax collected from whom; when paid; receipt.**

**Duty of collector to receive and receipt for poll tax.**—Under arts. 2942, 2944, 2949, where a poll tax is tendered in proper time, the collector has no discretion but to receive it and receipt therefor, though he may be in doubt as to the right of the payer to vote, and if for any reason the receipt is not issued prior to February 1st, it is the collector's duty to issue it thereafter; notwithstanding Pen. Code 1911, art. 224. *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

Where poll taxes are tendered to the collector before the time for payment has expired, performance of the collector's duty to issue a tax receipt may be compelled by mandamus. *Id.*

#### **Art. 2944. Mode of paying poll tax.**

**Duty of collector to issue receipt.**—See *Parker v. Busby* (Civ. App.) 170 S. W. 1042; note under art. 2942.

#### **Art. 2945a. Tax receipt not to be delivered to agent, etc.**

Cited, *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

#### **Art. 2949. Poll tax receipt shall show what.**

Cited, *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

**Duty of collector to issue receipt.**—See *Parker v. Busby* (Civ. App.) 170 S. W. 1042; note under art. 2942.

**Art. 2950. Poll tax receipt, form of.**Cited, *Parker v. Busby* (Civ. App.) 170 S. W. 1042.**Art. 2952. Poll tax receipt in case of removal to another county or precinct; proviso.**

**Mandatory and directory requirements.**—Under this article an "affidavit" being an oath reduced to writing, requirement of affidavit is mandatory, while that in regard to oath is directory, so that votes of electors who had paid poll taxes and removed to another precinct, but made neither affidavit nor oath held not illegal, where receipts were not lost, and oath was not required by election officers. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

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**CHAPTER FIVE**
**OFFICIAL BALLOT**

Art. 2966. No candidate on ballot, except, etc.	Art. 2968. Vacancy; where nominee declines or dies, etc., substitution on ballot.
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**Article 2966. No candidate on ballot, except, etc.**Cited, *Gilmore v. Waples* (Sup.) 188 S. W. 1037; *Waples v. Gilmore* (Sup.) 189 S. W. 122.**Art. 2968. Vacancy, where nominee declines or dies, etc., substitution on ballot, etc.**Cited, *Waples v. Gilmore*, 189 S. W. 122.

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**CHAPTER SEVEN**
**MANNER OF CONDUCTING ELECTIONS AND MAKING RETURNS THEREOF**

Art. 2995. Judges may administer oaths; powers of presiding judge.	Art. 3028. Ballots, etc., shall be burned, when.
3005. Ballots, delivery by voter, deposit, etc.	3030. County commissioners shall open returns, when.
3012. Ballots which shall not be counted.	3031. Returns shall not be estimated, unless, etc.
3024. Return of elections, how and to whom made.	3032. Certificates of election to county and precinct officers.
3027. Ballots, etc., to be placed in a box and delivered to county clerk.	3044a. Uniform date for qualification of all county and precinct officers.

**Article 2995. Judges may administer oaths; powers of presiding judge.**

**Right of election judge to carry arms.**—Under Const. art. 5, §§ 12, 15, making judges conservators of the peace, and this article, giving the presiding officer of elections the powers of the district judge to preserve order and keep the peace, held, that an election judge may lawfully carry a pistol. *Hooks v. State*, 71 Cr. R. 269, 158 S. W. 808.

**Art. 3005. Ballot; delivery by voter; deposit, etc.**Cited, *Cain v. Garvey* (Civ. App.) 187 S. W. 1111.**Art. 3012. [1741] [1697] Ballots which shall not be counted.**Cited, *Cain v. Garvey* (Civ. App.) 187 S. W. 1111.**Art. 3024. [1743] [1698] Return of elections, how and to whom made.**

**Irregularities not invalidating election.**—Where the only returns of a school election were placed in paper boxes tied with cotton strings, which contained the ballots and list or tally sheet, held that the failure to comply with arts. 2829, 3024, 3027, and 3031, did not invalidate the election. *Mecaskey v. Ratliff* (Civ. App.) 159 S. W. 115.

**Art. 3027. [1747] [1702] Ballots, etc., to be placed in a box and delivered to county clerk.**

**Clerk to safely keep ballots.**—Under arts. 3027 and 3028, the contestants may presume that the clerk will preserve the ballots and need not take steps for preservation of the ballots. *Doss v. Chambers* (Civ. App.) 188 S. W. 260.

**Effect of destruction of ballots.**—Under arts. 3027, 3028, where election contest is brought, although no notice is served on the clerk to preserve ballots, destruction of

ballots by a janitor after bringing the contest and more than a year after the election is illegal. *Doss v. Chambers* (Civ. App.) 188 S. W. 260.

**Irregularities not invalidating election.**—See *Mecaskey v. Ratliff* (Civ. App.) 159 S. W. 115; note under art. 3024.

**Art. 3028. [1748] [1703] Ballots, etc., shall be burned, when.**

**Duty of clerk to preserve ballots.**—See *Doss v. Chambers* (Civ. App.) 188 S. W. 260; note under art. 3027.

**Effect of destruction of ballots.**—Where ballots are illegally destroyed the returns of the election officials tabulated and declared by the commissioners' court are not an official adjudication as to the true result of the election in contest for illegal voting. *Doss v. Chambers* (Civ. App.) 188 S. W. 260.

**Art. 3030. [1753] [1705] County commissioners shall open returns, when.**

**Vacancy in office on failure to elect successor.**—Under Const. art. 5, § 18, article 16, § 17, and Rev. St. 1911, arts. 2236, 2240, 3030, 3032, county commissioner's term expired when result of election was required to be declared, and if no commissioner was elected there was a vacancy, and defendant's subsequent qualification was not premature. *Tom v. Klepper* (Civ. App.) 172 S. W. 721.

**Art. 3031. [1754] [1706] Returns shall not be estimated, unless, etc.**

**Irregularities not invalidating election.**—Where the only returns of a school election were placed in paper boxes tied with cotton strings, which contained the ballots and list or tally sheet, held that the failure to comply with Rev. Civ. St. 1911, arts. 2829, 3024, 3027, and 3031, did not invalidate the election. *Mecaskey v. Ratliff* (Civ. App.) 159 S. W. 115.

**Art. 3032. [1755] [1707] Certificates of election to county and precinct officers.**

**Vacancy on failure to elect successor.**—Under Const. art. 5, § 18, article 16, § 17, and Rev. St. 1911, arts. 2236, 2240, 3030, 3032, county commissioner's term expired when result of election was required to be declared, and if no commissioner was elected there was a vacancy, and defendant's subsequent qualification was not premature. *Tom v. Klepper* (Civ. App.) 172 S. W. 721.

**Art. 3044a. Uniform date for qualification of all county and precinct officers.**—That after each general election in this State, those who are elected to the various county and precinct offices in the State shall qualify, by taking the oath of office and giving bond and assuming the duties of their respective offices, as prescribed by law, on the first day of December following such general election, or as soon thereafter as possible. And all those officers holding office at the time of such general election, shall surrender their offices to their successors accordingly on such date, or as soon after said date as their said successors shall have qualified and be ready to assume the duties thereof. All laws and parts of laws that may be in conflict herewith are hereby repealed. [Act March 30, 1917, ch. 143, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

## CHAPTER EIGHT

### CONTESTING ELECTIONS

Art.	Art.
3050. Other contested elections than for officers.	3063. Election to be declared void, when.
3051. Notice of contest.	3067. Costs, how taxed.
3056. Rules of evidence and procedure on trial.	3071. Who may take depositions.
3062. Fraudulent votes not to be counted.	3077. Other contested elections.
	3078. Parties defendant under preceding article.

**Article 3050. [1797] Other contested elections than for officers.**

**Grounds of contest.**—An election cannot be contested on the ground that the law authorizing it was void; but only for matters that would impeach the fairness of the result. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

**Jurisdiction of district court.**—Under Const. art. 5, § 8, and Rev. St. 1911, art. 3050, district court of county had jurisdiction of contest of election for establishment of drainage district, despite Acts 32d Leg. c. 118, § 3, art. 2569, ante. *McFarlane v. Westley* (Civ. App.) 186 S. W. 261.

Under Const. art. 5, § 8, Legislature cannot confer jurisdiction to determine election contest upon any court or tribunal other than district court. *Id.*

**Art. 3051. [1798] Notice of contest.**

**Application.**—The giving of notice of contest required by this article, held under articles 3077, 3078, necessary for contest of an election for acceptance of a city charter. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

**Sufficiency of notice.**—Service of a copy of the petition in a contest of an election for the issuance of school district bonds with a written notice of contest within the time required by statute, though the petition was filed before the notice was served, held a compliance with this article. *Dunne v. Sayers* (Civ. App.) 173 S. W. 503.

**Art. 3056. [1803] Rules of evidence and procedure on trial.**

**Procedure in general.**—A contest of election is not a civil suit, and so cannot be tried by methods prescribed therefor, but must proceed according to statutory provisions authorizing it. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

In an action to contest an election, a petition held sufficiently definite in naming the precincts in which the class of voters was excluded and officers who announced that class would be excluded. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

Remedy given by statute relative to election contests for irregularities, such as illegal throwing out of votes or denying to qualified voters right to vote, is exclusive. *Robertson v. Haynes* (Civ. App.) 190 S. W. 735.

**Evidence.**—Where ballots are illegally destroyed the contestants may question illegal voters as to how they voted, under this article. *Doss v. Chambers* (Civ. App.) 188 S. W. 260.

Evidence in election contest held to show that a voter was deterred from voting by talk as to his having trouble if he voted and an opinion of the county attorney as to voting rights. *Abshier v. Aiken* (Civ. App.) 191 S. W. 766.

Evidence in election contest held to show that a certain voter was neither influenced by intimidation nor an adverse opinion by the county attorney on his voting rights. *Id.*

**Issues and proof.**—In an action to contest an election, an allegation in petition held sufficient to form a basis of proof that members of a class were prevented from voting without naming the voters of the class. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

**Art. 3062. [1804e] Fraudulent votes not to be counted.**

**Result how determined.**—Under Const. art. 16, § 20, and Rev. St. 1911, arts. 3062, 5720, 5723, held that result of an election on question of prohibition is determined by a majority of qualified voters voting. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

**Rejection of ballots.**—Where from practical considerations a voter had changed his mind as to his vote on the question of change of the county seat, his vote will not be rejected because of subsequent attempts to coerce him to vote as he did. *Aldridge v. Hamlin* (Civ. App.) 184 S. W. 602.

**Art. 3063. [1804f] Election to be declared void, when.**

**Acts invalidating election.**—As Const. art. 6, § 2, designated a special class, if a proclamation by election officers that no man not born in United States, unless he had final naturalization papers, would be permitted to vote in an election to prohibit sale of intoxicating liquors in a county was made known, and a sufficient number to overcome majority was prevented from voting, although they did not present themselves at polls, the election was void. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

**Distinction between quo warranto and statutory contest.**—In quo warranto by the state under Rev. Civ. St. 1911, arts. 6398-6404, the only judgment permitted is of ouster from office and the installation of the relator, while the contest of the election under articles 3046-3078 may result in the contestant obtaining a certificate of his election or in a declaration of the illegality of the election and the ordering of another. *Cole v. State* (Civ. App.) 163 S. W. 353.

**Art. 3067. [1804] Costs, how taxed.**

**Liability of successful contestant.**—In view of this article, where contestant secures a judgment on appeal, although the costs cannot be collected against the contestees, the contestant can be taxed only with the costs incurred by him. *Doss v. Chambers* (Civ. App.) 188 S. W. 296.

**Art. 3071. [1804n] Who may take such depositions.**

Cited, *Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Zapp* (Civ. App.) 160 S. W. 139.

**Art. 3077. [1804t] Other contested elections.**

Cited, *Tharp v. Blake* (Civ. App.) 171 S. W. 549.

**Proper remedy.**—If an election for acceptance of city charter is void for preliminary questions not being submitted by the council to the voters, a contest is not necessary; but injunction or quo warranto is a proper remedy. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

**Who may contest election.**—Under this article, and Acts 32d Leg. c. 118, § 24a, ante art. 2597a, resident of county can bring suit in district court to contest election on formation of drainage district. *McFarlane v. Westley* (Civ. App.) 186 S. W. 261.

**Notice of contest.**—The giving of notice of contest required by art. 3051, held under articles 3077, 3078, necessary for contest of an election for acceptance of a city charter. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

**Art. 3078. [1804u] Parties defendant under preceding article.**

**Notice of contest.**—The giving of notice of contest required by art. 3051 held under articles 3077, 3078, necessary for contest of an election for acceptance of a city charter. *Bassel v. Shanklin* (Civ. App.) 183 S. W. 105.

Under arts. 3151, 3078, requiring notice of election contests and service thereof on

the county attorney, such notice and service are jurisdictional and may not be waived by the county attorney. *Moore v. Commissioners' Court of Titus County* (Civ. App.) 192 S. W. 805.

**Employment of attorney.**—Under art. 1042 et seq., and this article, an incorporated town had no authority to employ an attorney to contest an election by which it was voted to abolish the corporation or to bind the town for the fees for such services. *Tharp v. Blake* (Civ. App.) 171 S. W. 549.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Political question.**—Canvassing returns and declaring result of election involve political question not cognizable by court of equity. *Fuller v. McHaney* (Civ. App.) 192 S. W. 1159.

## CHAPTER TEN

### NOMINATIONS—BY PRIMARY ELECTIONS AND OTHERWISE

Art.		Art.	
1.	<b>NOMINATIONS BY PARTIES OF ONE HUNDRED THOUSAND VOTES AND OVER</b>	3137.	Place for state convention, fixed how.
3084.	Candidates of parties of 100,000 votes and over to be nominated by primary election.	3143.	Mandamus to compel performance of duties.
3090.	Judges of primary election, powers and duties.	3151.	Certificate and printing name on ballot, on decision by committee, unless appeal.
3093.	Qualifications for voting; poll tax in cities of 10,000 and over; additional qualifications, etc.	3154.	Review of certificates of nomination, by district court; procedure.
3094.	Expenses of primary election, how met.	3156.	Judgment of court final in what cases.
3104.	No candidate placed on ballot who has not paid pro rata expenses.	3158.	Appeal to court of civil appeals in what cases; advanced.
3136.	District conventions; notice; report by executive committee; canvass of votes at primary; certification; single candidate; duty of county clerk.		
		6.	<b>MISCELLANEOUS PROVISIONS</b>
		3172.	Nomination declined, how; vacancy how filled, etc.; posters used when, etc.
		3173.	No executive committee to nominate, except.

#### 1. NOMINATIONS BY PARTIES OF ONE HUNDRED THOUSAND VOTES AND OVER

**Article 3084. Candidates of parties of 100,000 votes and over to be nominated by primary election.**

**Jurisdiction of Court of Civil Appeals.**—Under arts. 3154, 3156, 3158, in proceeding to contest nomination for congressman at large, no appeal lies to the Court of Civil Appeals; that office not being a state office, especially in view of this article. *Lane v. McLemore* (Civ. App.) 169 S. W. 1073.

**Art. 3090. Judges of primary election, powers and duties.**

**Right of election judge to carry arms.**—Under Const. art. 5, §§ 12, 15, making judges conservators of the peace, and this article, giving the presiding officer of elections the powers of the district judge to preserve order and keep the peace, held, that an election judge may lawfully carry a pistol. *Hooks v. State*, 71 Cr. R. 269, 158 S. W. 808.

**Art. 3093. Qualifications for voting; poll tax in cities of 10,000 and over; additional qualifications, etc.**

Cited, *Hancock v. Wilson* (Civ. App.) 173 S. W. 1171.

**Art. 3094. Expenses of primary election, how met.**

Cited, *Hancock v. Wilson* (Civ. App.) 173 S. W. 1171.

**Art. 3104. No candidate placed on ballot who has not paid pro rata expenses.**

Cited, *Waples v. Marrast* (Sup.) 184 S. W. 180.

**Art. 3136. District conventions; notice; report by executive committee; canvass of votes at primary; certification; single candidate; duty of county clerk.**—On the fourth Saturday in August succeeding each general primary, there shall be held in each district within the State in which any candidate or candidates for any district office are to be elected at the succeeding general election, a district convention, which shall be composed of delegates from the county or counties composing such dis-

trict, selected in the manner herein provided; notice of the time and place of holding such convention shall be given by the executive committee of such district at least ten days prior to such meeting. Before such convention assembles, the executive committee of such district shall meet and elect a chairman of such committee, shall prepare a list of the delegates from the various counties composing such district which have been certified to the district committee by the chairman of the various county committees, shall tabulate the vote cast in the various counties for each candidate for district office, which has been certified to such committee as provided in this chapter and shall also prepare a statement, showing the number of convention votes which each county in such district is entitled to cast in said convention upon the basis set forth in Article 3142, and shall present such list of delegates, tabulated vote and convention vote to the convention when it assembles. The district convention shall then canvass the returns of the votes cast in all of the counties of the district for each candidate as presented to them by the district committee, and shall declare the person found to have received the largest number of votes at the primary in the district for such office the nominee of the party for such office; and the chairman and the secretary of the convention shall forthwith certify such nomination to the Secretary of State, who shall certify all district nominations to the various county clerks. But, in the event there is only one name on the ballot for a district office without an opponent, the district chairman shall, as soon as practicable after the primary election, certify that the person on the ballot is the nominee of the party and that there shall be no convention held for the purpose of declaring the result; provided further that it shall be the duty of the county clerk of each county of this state to certify to the Secretary of State on or before the fourth Saturday in August succeeding any general primary the total vote cast in his county for each and every district officer, and in the event no district convention be held as herein provided for, the Secretary of State shall ascertain from the returns so certified who has received the largest vote for such office, and shall certify such fact to each county clerk in such district not later than October 1st of such year. [Acts 1905, S. S., p. 547; Acts 1907, p. 329; Act Feb. 18, 1915, ch. 16, § 1.]

**Explanatory.**—The act amends art. 3136, ch. 10, tit. 49, Rev. Civ. St. 1911. Took effect 90 days after March 20, 1915, date of adjournment.

**Art. 3137. Place for state convention, fixed how.**

Cited, *Gilmore v. Waples* (Sup.) 188 S. W. 1037 (in dissenting opinion).

**Art. 3143. Mandamus to compel performance of duties.**

Cited, *Gilmore v. Waples* (Sup.) 188 S. W. 1037 (in dissenting opinion).

**Art. 3151. Certificate and printing name on ballot, on decision by committee, unless appeal.**

**Waiver of notice of contest.**—Under arts. 3151, 3078, requiring notice of election contests and service thereof on the county attorney, such notice and service are jurisdictional and may not be waived by the county attorney. *Moore v. Commissioners' Court of Titus County* (Civ. App.) 192 S. W. 805.

**Art. 3154. Review of certificates of nomination by district court; procedure.**

**Appeal to Court of Civil Appeals.**—Under arts. 3154, 3156, 3158, in proceeding to contest nomination for congressman at large, no appeal lies to the Court of Civil Appeals; that office not being a state office, especially in view of article 3084. *Lane v. McLemore* (Civ. App.) 169 S. W. 1073.

**Art. 3156. Judgment of court final in what cases.**

**Appeal to Court of Civil Appeals.**—See *Lane v. McLemore* (Civ. App.) 169 S. W. 1073; note under art. 3154.

**Art. 3158. Appeal to court of civil appeals in what cases; advanced.**

**Appellate Jurisdiction.**—Under arts. 3154, 3156, 3158, in proceeding to contest nomination for congressman at large, no appeal lies to the Court of Civil Appeals; that office not being a state office, especially in view of article 3084. *Lane v. McLemore* (Civ. App.) 169 S. W. 1073.

## 6. MISCELLANEOUS PROVISIONS

**Art. 3172. Nomination declined, how; vacancy how filled, etc.; posters used when, etc.**

**Judicial supervision.**—Political parties have authority to make nominations for elective officers, and, while the method may be regulated, it cannot be absolutely inhibited, and where a proposed action by the executive committee of a political party affects only a political right, the matter will be remitted to the party forum. *Gilmore v. Waples* (Sup.) 188 S. W. 1037.

**Statute as measure of powers.**—Where before his term of office expired an incumbent died, the state executive committee of a party cannot, under arts. 3172, 3173, make a nomination; such nomination not being expressly authorized, and all others being prohibited. *Gilmore v. Waples* (Sup.) 188 S. W. 1037.

**Application of statute.**—Where after a primary election an official died, causing a vacancy for which no nomination was made, arts. 3172, 3173, as to powers of party executive committee to fill vacancies caused by declination or death of nominee, do not apply, and the committee could nominate as it chose, in accordance with party rules. *Waples v. Gilmore* (Civ. App.) 189 S. W. 122.

**Art. 3173. No executive committee to nominate, except.**

**Judicial interference.**—Where the state democratic executive committee was proceeding to make a nomination in violation of this article, to the injury of plaintiff, the matter is one of which the courts will take cognizance—legal, and not merely political, rights being involved, and where plaintiff was entitled as member of Democratic party to run as a Democrat for office of state railroad commissioner, nomination by state Democratic executive committee would be enjoined. *Gilmore v. Waples* (Sup.) 188 S. W. 1037.

That one party so predominates as to assure its nominee of election is no ground for interference by the courts with the nominating machinery of such party, where the question of nominations is unprovided for in law and wholly political. *Waples v. Gilmore* (Civ. App.) 189 S. W. 122. See, also, notes under art. 3172.

## CHAPTER TEN A

## ELECTION OF UNITED STATES SENATORS BY DIRECT VOTE

Art. 3174a.	Election of United States senators; time of holding; qualification of voters.	Art. 3174w.	Officers at primary elections; compensation.
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**Article 3174a. Election of United States senators; time of holding; qualification of voters.**

Cited, *Beene v. Waples* (Sup.) 187 S. W. 191.

**Art. 3174w. Officers at primary elections; compensation.**

**Constitutionality.**—This article is not unconstitutional as violating Const. art. 3, § 52, relating to use of public funds and credit, Const. art. 3, § 3, requiring taxes to be levied by general laws, and for public purposes only, Const. art. 1, § 3, relating to equal rights, or Const. art. 1, § 19, providing for due course of law. *Beene v. Waples* (Sup.) 187 S. W. 191.

**Construction.**—This article and the General Primary Election Law, are to be construed together as one act. *Beene v. Waples* (Sup.) 187 S. W. 191.

**Compensation how paid.**—Under this article, election officers at primaries for nomination for United States Senator are to be paid out of funds provided by reasonable assessments against candidates for party nominations as provided by general primary election law. *Beene v. Waples* (Sup.) 187 S. W. 191.

**Assessments against candidates.**—In absence of constitutional or statutory restrictions, authorities of political party may reasonably regulate nominations, including assessments against candidates. *Beene v. Waples* (Sup.) 187 S. W. 191.



## CHAPTER ELEVEN

## NATIONAL CONVENTION, STATE CONVENTION TO SELECT DELEGATES TO

**Article 3175a. Nomination of candidates for president and vice-president and party presidential electors, and election of party delegates to national conventions.**

**Constitutionality.**—The Presidential Primary Act, applying only to political parties polling 50,000 votes for Governor, is not invalid because it applies at present to only the Democratic party. *Waples v. Marrast* (Sup.) 184 S. W. 180.

The Legislature has authority to require the holding of a primary election by the parties of the state to enable their members to vote for party nominees for state or national elective offices, or for delegates to party conventions. *Id.*

That the Presidential Primary Act is impracticable, unworkable if literally observed, and deficient for failing to provide for the legal number of presidential electors does not render it unconstitutional. *Id.*

The Presidential Primary Act, providing that the expenses of the election shall be paid out of the county treasury, held violative of Const. art. 8, § 3, providing that taxes shall be levied for public purposes only. *Id.*

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 TITLE 50

## ELECTORS OF PRESIDENT AND VICE-PRESIDENT

**Article 3184. [1819] [1768] Governor shall issue proclamation, etc.**  
Cited, *Young v. Bank of Miami* (Civ. App.) 161 S. W. 436.

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 TITLE 51

## ESCHEAT

**Article 3197. [1831] [1780] Writ of seizure and proceedings thereunder.**

**Sale of property.**—Escheat proceedings vest title in purchaser, and heirs, devisees, or legatees must assert their claim against the proceeds. *Unknown Heirs of Buchanan v. Creighton-McShane Oil Co.* (Civ. App.) 176 S. W. 914.

Recitals in sheriff's deed and in order of confirmation of sale in escheat proceedings held to show valid order of sale. *Id.*

Issuance of order of sale provided for in this article, need not be noted in the execution docket to be valid. *Id.*

Under Acts 16th Leg. c. 139, notice of sale under escheat proceedings need not be published. *Id.*

## TITLE 52

## ESTATES OF DECEDENTS

Chap.	Chap.
1. Jurisdiction.	17. Allowance to widow and minor children.
2. Record books.	18. Setting apart the homestead and other exempt property to widow and children.
3. General provisions.	19. Presentment, etc., of claims against an estate.
4. Applications for the probate of wills and for letters.	20. Classification and payment of claims.
5. Probate of wills.	22. Sales.
6. Granting letters.	23. Report of sales, etc.
7. Temporary administration.	24. Enforcing specific performance of contracts.
10. Inventory, appraisal and list of claims.	26. Partition and distribution.
11. Certain rights, duties and powers of executors and administrators.	29. Administration of community property.
12. Administration under a will.	31. Costs.
14. Withdrawing estates from administration.	32. Appeals to the district court.
15. Removal of executors and administrators.	

## CHAPTER ONE

## JURISDICTION

Art.	Art.
3206. Probate jurisdiction of county court.	3209. In what counties will shall be probated and letters granted.
3207. Probate jurisdiction of district court.	

### Article 3206. [1840] [1789] Probate jurisdiction of the county court.

**Jurisdiction—In general.**—Even if the probate court had jurisdiction of the question of title to land and such title had been put in issue by pleadings therein, its judgment that the fee-simple title therein vested in decedent's widow would not be binding on a surviving brother and heir who was not a party to that suit. *Perkins v. Perkins* (Civ. App.) 166 S. W. 915.

An order of the county court in a guardianship proceeding reciting that land belonged to the community held not a conclusive adjudication that the surviving parent was entitled to one-half of the property, the court having no jurisdiction. *United States Fidelity & Guaranty Co. v. Hall* (Civ. App.) 173 S. W. 892.

Notwithstanding Const. art. 5, § 16, the probate court does not acquire jurisdiction of a trust for a minor because the original testamentary trustee died, but the district court has jurisdiction and will appoint a trustee to carry out the purpose of the trust. *Kent v. McDaniel* (Civ. App.) 178 S. W. 1006.

The Constitution confers, not only general probate jurisdiction upon the county court, but also an auxiliary and ancillary equity jurisdiction upon the district court over questions affecting administration. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

— **Exclusive.**—In an original proceeding, a suit to set a will aside, the district court cannot forestall action of the county court and deprive it of its original jurisdiction to determine validity of the will. *Milner v. Sims* (Civ. App.) 171 S. W. 784.

The county court has exclusive jurisdiction in proceedings to recover the homestead or allowance in lieu thereof, and also to partition and distribute real estate. *McMahan v. McMahan* (Civ. App.) 175 S. W. 157.

The probate court has exclusive, original jurisdiction in a pending administration of claims and liens against the estate, and the remedy upon the administrator's rejection of a lien is in that court, and the district courts have no jurisdiction over the management of the estate, except on appeal. *Ralston v. Stainbrook* (Civ. App.) 187 S. W. 413.

Under Const. art. 5, § 16, and this article and art. 3457, held, that county court had exclusive original jurisdiction of claim against administrator of deceased principal in a note signed by sureties and secured by mortgage, in view of art. 1843, giving right to sue sureties alone, though one of the sureties was dead, and administration was pending on his estate. *Putney v. Livingston* (Civ. App.) 192 S. W. 259.

Under this article and art. 3207, a district court had no original jurisdiction over probate of a will. *Daniel v. Finley* (Civ. App.) 194 S. W. 955.

— **Collateral and direct attack.**—Final judgments of the county court rendered in matters within its probate jurisdiction can only be attacked directly, and set aside only for want of jurisdiction or for mistake or fraud. *White v. Bedell* (Civ. App.) 173 S. W. 624.

— **Presumptions as to.**—Probate courts are courts of general jurisdiction in probate matters, and all presumptions in favor of their jurisdiction in such matters will be indulged. *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.

**Art. 3207. [1841] [1790] Probate jurisdiction of district court.**

See notes under art. 1706.

**Jurisdiction of district court.**—Under this article and art. 3206, a district court had no original jurisdiction over probate of a will. *Daniel v. Finley* (Civ. App.) 194 S. W. 955.

**Art. 3209. [1843] [1792] In what counties wills shall be probated and letters granted.**

**Non-residents.**—An assignee of the father and mother of one who died in New Mexico unmarried and without issue need not allege that there was no administration in New Mexico, in view of this article. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

As a general rule, for the purpose of founding administration, simple contract debts, and tort actions, are assets of the domicile of the debtor, and where a switchman was injured in interstate commerce on a Texas railroad operating wholly within the state and was entitled to recover under Act Cong. April 22, 1908, as amended by Act Cong. April 5, 1910 (1916 U. S. Comp. Stats. Ann. §§ 8657-8665), but died pending suit, an administrator was properly appointed in the Texas county where deceased sued. *St. Louis Southwestern Ry. Co. of Texas v. Smitha* (Civ. App.) 190 S. W. 237.

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## CHAPTER TWO

### RECORD BOOKS

**Article 3216. [1850] [1799] Shall be evidence.**

**In general.**—Under this article, an applicant for letters of administration de bonis non can read orders from the books themselves in evidence. *Kimmons v. Abraham* (Civ. App.) 158 S. W. 256.

In trespass to try title, a certified copy of a sale and probate proceedings in the settlement of the estate of a decedent under whom a party claims is properly received in evidence. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

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## CHAPTER THREE

### GENERAL PROVISIONS

<b>Art. 3218.</b> Decisions, etc., of court shall be rendered in open court.	<b>Art. 3236.</b> Any person interested in an estate may file opposition, etc.
<b>3219.</b> And shall be entered of record, etc.	<b>3241.</b> Annual exhibits required; final settlement, when.
<b>3227.</b> County judge may enforce orders, etc., of previous court.	<b>3242.</b> Twenty days' notice of filing of exhibit shall be given, etc.
<b>3235.</b> In whom property vests upon death of testator or intestate.	<b>3245.</b> Titles made by executors, etc., valid, although, etc.

**Article 3218. [1852] [1801] Decisions, etc., of court shall be rendered in open court, etc.**

**After adjournment for the day.**—The appointment of a permanent administratrix without a formal reopening of the court after adjournment for the day is not void under this article. *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.

**Art. 3219. [1853] [1802] And shall be entered of record.**

Cited, *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.

**Art. 3227. [1861] [1809] County judge may enforce orders, etc., of previous court.**

Cited, *Spence v. Fenchler* (Sup.) 180 S. W. 597.

**Art. 3235. [1869] [1817] In whom property vests upon death of testator or intestate.**

Cited, *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

**Will as evidence of title.**—Until a will is probated, it is no evidence of title. *Milner v. Sims* (Civ. App.) 171 S. W. 784.

**Right of possession.**—This article does not authorize an administrator to assume possession of property not in the possession or right to possession of decedent at his death. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

**Right of possession, to property of a debtor, of receiver appointed in her lifetime, does not pass on her death to administrator, by virtue of this article, as to administrator's right of possession, in absence of showing of loss of jurisdiction of court appointing receiver. Id.**

**Liability of devisees, heirs, etc., for debts.**—Under Const. art. 16, §§ 50, 52, this article, and arts. 3422, 3427, 3785, 3786, a homestead, on the death of the owner, vests in his heirs free from debts, and the proceeds of a voluntary sale are also free from debts, though the probate court failed to set aside the homestead under article 3413, notwithstanding article 3787, declaring that the proceeds of a voluntary sale shall not be subject to forced sale within six months after such sale. *American Bonding Co. of Baltimore v. Logan*, 166 S. W. 1132, 106 Tex. 306.

Under Const. art. 16, §§ 50, 52, this article, and arts. 3413, 3414, and 3421-3428, inclusive, the homestead, whether decedent's estate is solvent or insolvent, descends to his heirs, subject to the rights of the widow and minor children, exempt from liability for the decedent's debts, and this status is not affected by a subsequent voluntary sale or abandonment. *Hoefling v. Hoefling*, 167 S. W. 210, 106 Tex. 350.

Under this article and arts. 3422, 3427, 3428, the amount received from a sale of the homestead by the heirs is not liable for the debts of the decedent. *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 167 S. W. 771, certified question answered by Supreme Court 166 S. W. 1132, 106 Tex. 306.

The surviving wife of the deceased maker of a note is not personally liable thereon, but the creditor should proceed against the property of the decedent in her hands. *Hamlet v. Leicht* (Civ. App.) 187 S. W. 1004.

**Heirs may sue to recover property, when.**—In suit by divorced wife to recover of bank money which buyers of community property from husband paid in for him, legatees and heirs of husband, interpleaded, who failed to allege and prove that there was no administration upon his estate in Texas, and no necessity for administration, could not recover nor complain of judgment, but divorced wife could sue bank, though administration was still pending on his estate and all claims had not been finally adjusted. *Baber v. Galbraith* (Civ. App.) 186 S. W. 345.

In action on policy, failure of petition to allege any administration of plaintiff's deceased father, the original beneficiary under whom she claimed, held error of law apparent upon the face of the record and fundamental. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

For an heir to sue a debtor of his ancestor's estate, he must allege and prove there was no administration and none necessary. *Freeman v. Klaerner* (Civ. App.) 190 S. W. 543.

**Donation certificate.**—A donation certificate issued by the state to the heirs of one who fell at the Alamo in 1836, being a mere gratuity, did not belong to his estate. *Moody v. Bonham* (Civ. App.) 178 S. W. 1020; *Id.* (Civ. App.) 179 S. W. 670.

**Art. 3236. [1870] [1818] Any person interested in an estate may file opposition, etc.**

**Pleading.**—Where a will is contested for alleged undue influence, it is not necessary that contestant allege what the arguments were, or in what form the importunities charged against the person alleged to have influenced testator were presented. *Mayes v. Mayes* (Civ. App.) 159 S. W. 919.

**Art. 3241. [1875] [1822a] Annual exhibits required; final settlement, when.**

Cited, *Grice v. Cooley* (Civ. App.) 179 S. W. 1098.

**Art. 3242. [1876] [1823] Twenty days notice of filing exhibit shall be given, etc.**

Cited, *Grice v. Cooley* (Civ. App.) 179 S. W. 1098.

**Art. 3245. [1879] [1826] Titles made by executor, etc., valid although, etc.**

**Bona fide purchasers.**—A purchaser of land at an administrator's sale may be an innocent purchaser regardless of the form of the deed, if it was the intention to sell the land, as distinguished from a mere change of title, and the purchaser intended to buy the land and was without notice of an adverse claim, but an administrator's deed only purporting to convey the interest of the estate in the property is prima facie a quitclaim only and insufficient to support a plea of innocent purchaser, and where an administrator's deed purported to convey only the estate's interest, which was nil, to the knowledge of the grantee, a subsequent purchaser was charged with notice and could not occupy the position of an innocent purchaser. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 171 S. W. 537.

**Confirmation of grant by heir.**—A grantee in a bond for title executed by the sole heir of the deceased owner held to acquire title at a subsequent administrator's sale, ordered and confirmed by the court. *Word v. Colley* (Civ. App.) 173 S. W. 629.

## CHAPTER FOUR

## APPLICATIONS FOR THE PROBATE OF WILLS AND FOR LETTERS

Art.	Art.
3247. Application for letters must be filed within four years after death of testator or intestate, exception.	will produced in court shall state, what.
3248. Wills shall not be probated after lapse of four years, unless, etc.	3253. What the application shall state where the will cannot be produced in court.
3251. Application for probate of written	3263. Administration may be prevented, how.

**Article 3247.** [1880] [1827] Application for letters must be filed within four years after death of testator, or intestate, exception.

Cited, *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

**Art. 3248.** [1881] [1828] Will shall not be probated after a lapse of four years, unless, etc.

Cited, *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

**In general.**—Where more than four years after testator's death a will is admitted to probate on application of parties not in default, those in default are, under this article and art. 3274, entitled to the benefit of the probate. *Masterson v. Harris* (Sup.) 174 S. W. 570, answer to certified questions conformed to (Civ. App.) 179 S. W. 284.

**Under this article,** the probate of a will at the instance of one not in default under that statute inures to the benefit of all of the heirs. *Michaelis v. Nance* (Civ. App.) 184 S. W. 785.

**Applicant held in default.**—Where proponent was advised of the contents of a will within a month after testator's death, and waived its provision in favor of a verbal agreement made with other beneficiaries, pursuant to which the estate was administered, the fact that the other parties refused to carry out the agreement was not an excuse for not applying for probate within four years from testator's death, as required by this article. *Armendariz de Acosta v. Cadena* (Civ. App.) 165 S. W. 555.

**Applicant held not in default.**—Under this article, evidence that delay in discovering and offering for probate a holographic will was due to intrusting possession of testator's papers to another of his children held not insufficient as a matter of law to prove that the proponent was not in default. *Michaelis v. Nance* (Civ. App.) 184 S. W. 785.

**Probate as muniment of title.**—A party claiming to be a devisee under a will which he alleges defendants wrongfully suppressed, but who is not an heir of testator, cannot sue to recover land under provisions of said will before its probate. *Daniel v. Finley* (Civ. App.) 194 S. W. 955. See *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

**Art. 3251.** [1884] [1831] Application for probate of written will produced in court shall state what.

Cited, *Low v. Troy Laundry Machinery Co.* (Civ. App.) 160 S. W. 136.

**Pleadings.**—Where the replication of the proponent asked that a subsequent will be admitted to probate in connection with proponent's alleged will, the pleadings were sufficient to authorize probate of the subsequent will. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

**Art. 3253.** [1886] [1833] What the application shall state where the will cannot be produced in court.

**Destruction of will.**—The destruction of a will does not prevent its being probated. *Daniel v. Finley* (Civ. App.) 194 S. W. 955.

**Art. 3263.** [1896] [1843] Administration may be prevented, how.

Cited, *Rowe v. Dyess* (Civ. App.) 177 S. W. 521.

## CHAPTER FIVE

## PROBATE OF WILLS

Art.	Art.
3267. How a written will which is produced in court may be proved.	3276. Will probated in another state or country may be filed and recorded in this state.
3271. Facts which must be proved.	
3274. Order shall be entered, will, etc., shall be recorded, when.	

**Article 3267.** [1900] [1847] How a written will which is produced in court may be proved.

**Witness' testimony as to date of will.**—In view of this article, providing that, where subscribing witnesses are dead, a will may be probated by proof of two witnesses as to

their handwriting, it was immaterial that a subscribing witness could not remember exact date. *Berryhill v. Berryhill* (Civ. App.) 193 S. W. 218.

**Effect of will not probated.**—A will not probated does not constitute a cloud on title. *Milner v. Sims* (Civ. App.) 171 S. W. 784.

### Art. 3271. [1904] [1851] Facts which must be proved.

See art. 7855 and notes.

**Presumptions and burden of proof—Testamentary capacity.**—A general demurrer filed by contestant in proceedings for probate of a will has the effect of requiring proponent to prove the mental capacity of testator, even if, in the absence of a contest, such proof is not required by this article. *Baker v. McDonald* (Civ. App.) 159 S. W. 450.

In a will contest, the burden is on the proponent, under this article, to show testamentary capacity. *Navarro v. Garcia* (Civ. App.) 172 S. W. 723.

There is no presumption in Texas of testamentary capacity on the part of a testator. *Id.*

— **Fraud and undue influence.**—Where an antecedent fiduciary relation exists between testator and the beneficiary, a court of equity will presume confidence placed and influence exerted, but otherwise such relation and influence must be proved by the contestant, and where there was no such fiduciary relation as to raise presumption of undue influence by a granddaughter, the sole beneficiary, the burden of establishing undue influence was on the contestant, nor did fact that testatrix lived with her granddaughter and her husband, and the husband looked out for land on which she had filed establish such a fiduciary relation as to raise a presumption of undue influence by the granddaughter. *Rounds v. Coleman* (Civ. App.) 139 S. W. 1086.

To establish undue influence in execution of will, contestants have burden of showing opportunity with respect to time and place, and that the condition of testator's mind would subject him to undue influence, and that undue influence was in fact exercised and affected the will. *Clark v. Briley* (Civ. App.) 193 S. W. 419.

Undue influence in execution of a will cannot be presumed or inferred from opportunity or interest. *Id.*

**Admissibility of evidence.**—In a proceeding for the probate of a will the erroneous admission in evidence of a deposition of the testatrix taken in another suit which she instituted before her death, wherein she stated that the proponent was the custodian of her will, held prejudicial, where the evidence was conflicting. *Rucker v. Carr* (Civ. App.) 163 S. W. 632.

Declarations of the testator made before or after the date of the will, and relating to its execution, but not a part of the *res gestæ*, are not admissible, and declarations of a testator at the time of executing a will that he "already had Adams and Henry fixed" were not admissible to establish the execution of a prior will, nor to identify a note claimed to have been found with a letter asking the payee to accept "this," in a sealed envelope, indorsed "Notes," as one of the notes referred to on the envelope. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

Declarations of a testator that the will was produced by undue influence, or that it is not his will or his statement of like nature, held incompetent to prove the fact of undue influence or as direct evidence that it produced the will, and where undue influence, as distinguished from mental incapacity, is in issue and is independently proved, testator's declarations, expressive of a mental state produced by such influence, whether made contemporaneously with the execution of the will or within a reasonable time before or after its execution, are admissible on the question of his free agency in executing it, and in a will contest on the ground of undue influence exercised by the testatee, the wife of testator, to the exclusion of a daughter, testator's declaration, expressive of affection for his daughter and her son, and an intention to provide for both of them in his will, held admissible, but testator's declaration that his wife had always wanted him to make his will and had always manifested a hostile or unfriendly attitude toward his daughter held hearsay in character and inadmissible to show the effect of such influence on testator's mind. *Scott v. Townsend*, 166 S. W. 1138, 106 Tex. 322, reversing judgment (Civ. App.) 159 S. W. 342.

Declarations made by testatrix at or about the time of the alleged execution of a will offered for probate, disclosing unfriendly feeling towards persons who were beneficiaries under the will, were relevant and material in a contest charging fraud, as tending to show that testatrix did not knowingly and willingly make the bequest. *Sockwell v. Sockwell* (Civ. App.) 166 S. W. 1188.

In a will contest by a disinherited son on the grounds of testamentary incapacity, evidence that another son had unlawfully deprived contestant of property was inadmissible. *Kell v. Ross* (Civ. App.) 175 S. W. 752.

The financial condition of the beneficiary, especially where the facts show that testatrix knew or should have known thereof, in a case dependent upon circumstances to establish the beneficiary's undue influence, is admissible. *Rounds v. Coleman* (Civ. App.) 139 S. W. 1086.

Where contestants claimed will was not act of testator, evidence that testator submitted will to lawyer for his opinion as to its validity was admissible. *Berryhill v. Berryhill* (Civ. App.) 193 S. W. 218.

**Sufficiency of evidence—Testamentary capacity.**—Evidence held to show that one making a will did not possess sufficient mental capacity. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

Evidence held not to sustain a finding that the execution of either of two wills was the result of an insane delusion upon the part of testatrix, since, though testatrix had an insane delusion that she had been told that a daughter whom she disinherited, would poison her, yet, as testatrix stated she did not believe it, and ate meals prepared by the daughter, the delusion could not have influenced the bequest to the daughter, nor did fact that testatrix made an inaccurate statement in her will in giving her reason for making a bequest constitute evidence of insanity or insane delusion. In *re Bartels' Estate* (Civ. App.) 164 S. W. 859.

Evidence in a will contest held not to sustain a finding by the jury that the testatrix did not possess testamentary capacity at the time of the execution of either of two wills. *Id.*

Proof of the making of an unnatural will is some evidence of testamentary incapacity, but is insufficient alone to establish it. *Navarro v. Garcia* (Civ. App.) 172 S. W. 723.

Evidence as to testamentary capacity held sufficient to discharge proponent's burden of formal proof under Rev. Civ. St. art. 3271. *Rounds v. Coleman* (Civ. App.) 139 S. W. 1086.

— **Fraud and undue influence.**—Evidence held to show that a will was procured by undue influence. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

Evidence in a will contest held to sustain a finding of the jury that the execution of the will was procured by undue influence. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

In proceedings to probate a will, evidence held insufficient to justify a finding that it was the result of undue influence. *Mayes v. Mayes* (Civ. App.) 159 S. W. 919.

In a will contest, evidence held not sufficient to raise the issue of undue influence. *In re Bartels' Estate* (Civ. App.) 164 S. W. 859.

Proof of the making of an unnatural will is some evidence of undue influence, but is insufficient alone to establish it. *Navarro v. Garcia* (Civ. App.) 172 S. W. 723.

Evidence showing that will was properly executed and witnessed, and that testator had provided for omitted children by previous deeds, held sufficient to justify direction of verdict for proponent. *Berryhill v. Berryhill* (Civ. App.) 193 S. W. 218.

That two children were paid small sums to release their interest in their mother's estate and that two others released their interest without payment, although evidence of motive for excluding the first children from participation in the father's estate, and fact that testator lived ten years after executing his will without revoking it would not be conclusive against contestants on the issue of undue influence. *Clark v. Briley* (Civ. App.) 193 S. W. 419.

**Effect of finding of jury as to revocation.**—Where jury found that a will proposed has been revoked, until that finding was set aside, court could not admit will to probate, however well its execution is established. *Palmer v. Logan* (Civ. App.) 189 S. W. 761.

**Art. 3274. [1907] [1854] Order shall be entered, will, etc., shall be recorded, when.**

**Effect of probate.**—A judgment of probate is, as a rule, binding on the whole world; the proceeding being one in rem, and where more than four years after testator's death a will is admitted to probate on application of parties not in default, those in default are, under this article and art. 3248, entitled to the benefit of the probate. *Masterson v. Harris* (Sup.) 174 S. W. 570, answer to certified questions conformed to (Civ. App.) 179 S. W. 284.

**Art. 3276. [1909] [1856] Will probated in another state or country may be filed and recorded in this state.**

**Necessity of filing and recording.**—An attempt by a foreign executor to act as such in the state, without first complying with this article, is without authority of law. *Lane v. Miller & Vidor Lumber Co.* (Civ. App.) 176 S. W. 100.

**Necessity of probating will.**—An executor could not convey land located in Texas, though the will was recorded in the deed records, if it was not regularly probated in this state. *Sparkman v. Davenport* (Civ. App.) 160 S. W. 410.

## CHAPTER SIX

### GRANTING LETTERS

<p>Art. 3279. When administration shall be granted.</p> <p>3280. Administration shall not be granted, unless, etc.</p> <p>3281. Order in which letters shall be granted.</p> <p>3283. Certain persons entitled to letters may waive right in favor of another, how.</p>	<p>Art. 3289. Executor of will proved in another state entitled to letters within this state, when.</p> <p>3291. Further administration shall be granted, when.</p> <p>3293. What facts must appear before granting letters testamentary.</p> <p>3295. Order of court granting letters.</p>
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**Article 3279. [1912] [1859] When administration shall be granted.**

**Renunciation of trust by testamentary trustees.**—Testamentary trustees possess the unrestricted power and right to refuse for any reason to act when unaccompanied by any species of intermeddling amounting to mismanagement, and, although probate court is without authority to accept resignation of testamentary trustees, it has authority to hear testimony of renunciation, in view of this article, and where testamentary trustees renounced their trust to the court, he accepting the same and appointing an administrator, the renunciation is final. *Lednum v. Dallas Trust & Savings Bank* (Civ. App.) 192 S. W. 1127.

**Art. 3280. [1913] [1860] Administration shall not be granted unless, etc.**

**Necessity.**—Appointment of an administrator may be refused if there is no necessity for administration, there are no debts, the widow is in possession of the homestead, and the other matters, partition and allowances to the widow, may be had in a pending suit by her for partition, for where the ground for refusal is fairly sustained by the evidence, and where everything may be adjusted in the pending suit for partition, the refusal will not be disturbed. *Hart v. Hart* (Civ. App.) 170 S. W. 1071.

Estate of decedent leaving widow and minor children, consisting only of a homestead, held not subject to administration by administrator de bonis non under Rev. St. 1911, tit. 52, cc. 17, 18, especially articles 3411, 3413, 3422, 3427. *Kimmons v. Abraham* (Civ. App.) 176 S. W. 671.

In view of Acts Cong. April 22, 1908, § 1, and April 5, 1910, § 2 (1916 U. S. Comp. Stats. Ann. §§ 8657, 8665), providing that interstate carriers are liable in damages to injured servants or their survivors, and that the right of action shall survive to their personal representatives, such right is an estate on which administration may be granted. *St. Louis Southwestern Ry. Co. of Texas v. Smitha* (Civ. App.) 190 S. W. 237.

**Art. 3281. [1914] [1861] Order in which letters shall be granted.**

Cited, *Kimmons v. Abraham* (Civ. App.) 158 S. W. 256.

**Art. 3283. [1916] [1863] Certain persons entitled to letters may waive right in favor of another, how.**

**Place of filing.**—Under this article, a waiver filed with the clerk of the district court is admissible on trial de novo of the application for appointment as administrator in that court on appeal from the county court. *Kimmons v. Abraham* (Civ. App.) 158 S. W. 256.

**Art. 3289. [1922] [1869] Executor of will proved in another state entitled to letters within this state, when.**

**Necessity of qualification within state.**—In suit by divorced wife for funds paid into bank for husband in payment for community property, executors named in such husband's will, one qualified in another state, but neither in Texas, had no standing to sue for the fund. *Baber v. Galbraith* (Civ. App.) 186 S. W. 345.

**Art. 3291. [1924] [1871] Further administration shall be granted, when.**

**Administrator de bonis non, appointment.**—A final order discharging administrators held insufficient to negative the power of the probate court to appoint an administrator de bonis non. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

**Executor's abandonment of office.**—Under this article and art. 3362, though an executor named in a will qualified by taking required oath he abandoned his office where he failed to take possession of any of the property, to give bond, or in any way act as such executor and is contesting the will. *Huth v. Huth* (Civ. App.) 187 S. W. 523.

**Art. 3293. [1926] [1873] What facts must appear before granting letters testamentary.**

Cited, *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

**Art. 3295. [1928] [1875] Order of court granting letters.**

Cited, *Boynton v. Brown* (Civ. App.) 164 S. W. 893.

## CHAPTER SEVEN

### TEMPORARY ADMINISTRATION

Art.  
3297. County judge may appoint temporary administrator, when.  
3298. Appointment may be made without application, etc.

Art.  
3301. Pending contest, the county judge may appoint temporary administrator.

**Article 3297. [1930] [1877] County judge may appoint temporary administrator, when.**

**Power of appointment.**—Under this article and art. 3298, probate court had authority to appoint deceased railroad brakeman's widow temporary administratrix to sue for her husband's death under federal Employers' Liability Act (1916 U. S. Comp. Stats. Ann. §§ 8657-8665); appointment being made October 18, 1915, and suit tried November 24th, before next meeting of probate court. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

**Void appointment.**—An allowance of claim on approval by a permanent administratrix is valid, though it was previously allowed on approval by the same person acting under a void appointment as temporary administratrix. *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.



**Art. 3298. [1931] [1878] Appointment may be made without application, etc.**

Cited, *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682; *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

**Art. 3301. [1934] [1881] Pending contest the county judge may appoint temporary administrator.**

Duty to appoint mandatory.—Under this article, held, that a county judge not only may but must appoint a temporary administrator, to preserve an estate from waste pending the contest of a will. *Huth v. Huth* (Civ. App.) 187 S. W. 523.

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## CHAPTER TEN

### INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

Art.	Art.
3332. Inventory and appraisal.	3346. New appraisalment in place of original.
3338. Order of approval.	
3343. Erroneous inventory or list may be corrected.	3348. Shall be evidence, to what extent.

**Article 3332. [1965] [1912] Inventory and appraisalment.**

Conclusiveness and effect.—That the appraisers of an estate appraised certain land as decedent's separate estate would not be binding upon a purchaser of any interest which decedent's wife in fact had in the land. *Sparkman v. Davenport* (Civ. App.) 160 S. W. 410.

**Art. 3338. [1971] [1918] Order of approval.**

Effect on land titles.—Title to land does not pass by an order of probate court, where it was not owned by decedent. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

**Art. 3343. [1976] [1923] Erroneous inventory or list may be corrected.**

Effect and conclusiveness of correction.—An order of the county court in guardianship proceedings, if valid as a correction of an inventory under this article and art. 4120, held only prima facie evidence that land owned by a deceased parent was community property. *United States Fidelity & Guaranty Co. v. Hall* (Civ. App.) 173 S. W. 892.

**Art. 3346. [1979] [1926] New appraisalment stands in place of original.**

Necessity of seeking correction before suit.—Under this article and arts. 3443, 3452, 3450, 3457, and 3488, administrator's refusal to recognize a lien upon a part of land, if a money claim had been allowed, did not authorize claimant to sue in district court to subject the land to payment of claim. *Ralston v. Stainbrook* (Civ. App.) 187 S. W. 413.

**Art. 3348. [1981] [1928] Shall be evidence to what extent.**

Conclusiveness and effect of inventory.—The act of an executor in placing property on the inventory returned is only prima facie evidence of title in the estate, which may be rebutted by proof that the title was not in testator, and does not estop the executor from suing to recover the property in his individual capacity. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

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## CHAPTER ELEVEN

### CERTAIN RIGHTS, DUTIES AND POWERS OF EXECUTORS AND ADMINISTRATORS

Art.	Art.
3351. Duty in regard to plantation, manufactory or business.	3352. Action of executor, etc., in regard to plantation, etc., may be controlled by court.

**Article 3351. [1984] [1931] Duty in regard to plantation, manufactory or business.**

Estate liable for expenses in carrying on.—Cost of replenishing the stock, where administratrix, under authority of this article, carries on decedent's business, is "expenses of administration," entitled, under articles 3458 and 3460, to priority of payment over general claims. *Stoughton Wagon Co. v. S. G. Dreyfus Co.* (Civ. App.) 181 S. W. 703.

**Art. 3352. [1985] [1932] Action of executor, etc., in regard to plantation, etc., may be controlled by court.**

Cited, *Stoughton Wagon Co. v. S. G. Dreyfus Co.* (Civ. App.) 181 S. W. 703.

## CHAPTER TWELVE

## ADMINISTRATION UNDER A WILL

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| <p><b>Art.</b><br/>3358. Directions in will to be executed, unless, etc.</p> <p>3362. Testator may provide that no action be had in court, except probate of will, etc.</p> <p>3363. Creditor may sue executor in such case.</p> | <p><b>Art.</b><br/>3364. Executor without bond may be required to give bond, when.</p> <p>3374. Executor may sell property without order of court, when.</p> <p>3375. Personal property reserved from sale by will.</p> |
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**Article 3358. [1991] [1938] Directions in will to be executed, unless, etc.**

Cited, *McAdams v. Wilson* (Civ. App.) 164 S. W. 59.

**Nature of proceedings to annul.**—Under this article, after a will has been probated, a proceeding to annul it must be commenced as a separate proceeding, but the district court has no jurisdiction to annul the probate of a will by a county court; its jurisdiction in such cases being acquired by appeal or certiorari to the county court. *Hilgers v. Hilgers* (Civ. App.) 159 S. W. 851.

**Art. 3362. [1995] [1942] Testator may provide that no action be had in the court, except probate of will, etc.**

Cited, *Wood v. Priddy* (Civ. App.) 164 S. W. 1099; *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

**Words necessary and sufficient to withdraw.**—To create an independent administration under this article depends upon the testator's intent as ascertained from the entire instrument, and a will held not to create an independent administration, and hence the probate court had jurisdiction of proceedings involved in the administration. *McMahan v. McMahan* (Civ. App.) 175 S. W. 157.

**Jurisdiction of court.**—The administration of a will by an independent executor does not deprive the probate court of jurisdiction of the estate of a minor devisee, and it may, when necessary, appoint a guardian to take charge of such estate. *McAdams v. Wilson* (Civ. App.) 164 S. W. 59.

An executor acting under an independent administration is free from the control of the probate court. *McMahan v. McMahan* (Civ. App.) 175 S. W. 157.

**Removal of temporary administrator.**—Where a will appointing the testator's wife an independent executrix was admitted to probate, one appointed temporary administrator cannot complain of an illegal order removing him; the wife being entitled to administer the estate. *Hall v. Davison* (Civ. App.) 176 S. W. 642.

**Executor's abandonment of office.**—Under this article and art. 3291, though an executor named in a will qualified by taking required oath he abandoned his office where he failed to take possession of any of the property, to give bond, or in any way act as such executor and is contesting the will. *Huth v. Huth* (Civ. App.) 187 S. W. 523.

**Art. 3363. [1996] [1943] Creditor may sue executor in such case.**

**In general.**—A suit to foreclose on land which the maker of the trust deed had conveyed will not be abated as a suit on a claim against the estate of the maker who died before foreclosure, and which could not be maintained under this article and art. 3362, within a year from probate of will. *Wood v. Priddy* (Civ. App.) 164 S. W. 1099.

In trespass to try title, judgment in a previous suit against plaintiffs tending to show title in defendants' predecessor held not inadmissible in evidence as not purporting to be against such plaintiffs in their representative capacity as executors, under this article and art. 3362. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

**Art. 3364. [1997] [1944] Executor without bond may be required to give bond, when.**

**Independent executor.**—The fact that a will appoints an independent executor will not deprive the probate court of jurisdiction of the administration of the estate, so that it may annul a provision of the will, or require the executor to give bond while he acts. *McAdams v. Wilson* (Civ. App.) 164 S. W. 59.

**Art. 3374. [2007] [1954] Executor may sell property without order of court, when, etc.**

Cited, *American Bonding Co. of Baltimore v. Logan*, 106 Tex. 306, 166 S. W. 1132.

**Will construed.**—A will devising half the property to testator's children and half to his wife, making her executrix, and providing that all transfers by her to the children or any other person shall be good, without the intervention of any court or authority, constitutes her a trustee with power of sale, so that a conveyance thereof by her alone gives good title. *Joyce v. Hagelstein* (Civ. App.) 163 S. W. 356.

**Marriage of executrix.**—The power of an executrix, testator's widow, under a will to convey land, does not cease on her remarriage. *Holman v. Houston Oil Co.* (Civ. App.) 174 S. W. 886.

**Art. 3375. [2008] [1955] Personal property reserved from sale by will.**

Cited, *American Bonding Co. of Baltimore v. Logan*, 106 Tex. 306, 166 S. W. 1132.

## CHAPTER FOURTEEN

## WITHDRAWING ESTATES FROM ADMINISTRATION

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| <p>Art.<br/>3384. Persons entitled to estate may cause executor or administrator to be cited, etc.</p> <p>3385. May give bond to pay debts of estate, etc.</p> | <p>Art.<br/>3386. Bond shall be filed and recorded and order of court thereon.</p> <p>3389. Creditor whose claim has been allowed, etc., may sue on bond.</p> <p>3392. Order discharging executor or administrator, and closing estate.</p> |
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**Article 3384. [2017] [1964] Persons entitled to estate may cause executor or administrator to be cited, etc.**

**Withdrawing estate from administration.**—Upon compliance with this article and art. 3386, an estate may be withdrawn from administration and the court will under article 3392 discharge the administrator so that attorney's services in resisting the discharge are not a liability of the estate. *Dyess v. Rowe*, 177 S. W. 523. And the assignee of an heir complying with this article and art. 3385 held entitled to have an estate withdrawn from administration. *Rowe v. Dyess* (Civ. App.) 177 S. W. 521.

**Art. 3385. [2018] [1965] May give bond to pay debts of estate, etc.**

**Withdrawing estate from administration.**—Upon compliance with arts. 3384 and 3386, an estate may be withdrawn from administration and the court will under article 3392 discharge the administrator so that attorney's services in resisting the discharge are not a liability of the estate. *Dyess v. Rowe*, 177 S. W. 523. And the assignee of an heir complying with this article and art. 3384 held entitled to have an estate withdrawn from administration. *Rowe v. Dyess* (Civ. App.) 177 S. W. 521.

**Art. 3386. [2019] [1966] Bond shall be filed and recorded and order of court thereon.**

Cited, *Rowe v. Dyess* (Civ. App.) 177 S. W. 521.

**Art. 3389. [2022] [1969] Creditor whose claim has been allowed, etc., may sue on bond.**

Cited, *Sparks v. Kaufman County* (Civ. App.) 194 S. W. 605.

**Art. 3392. [2025] [1972] Order discharging executor or administrator and closing estate.**

**Attorney's services.**—Upon compliance with arts. 3384, 3386, an estate may be withdrawn from administration and the court will under this article discharge the administrator so that attorney's services in resisting the discharge are not a liability of the estate. *Dyess v. Rowe* (Civ. App.) 177 S. W. 523.

## CHAPTER FIFTEEN

## REMOVAL OF EXECUTORS AND ADMINISTRATORS

**Article 3394. [2027] [1974] In what cases may be removed with notice.**

**Illegality of removal order cannot be questioned.**—Where a will appointing the testator's wife an independent executrix was admitted to probate, one appointed temporary administrator cannot complain of an illegal order removing him; the wife being entitled to administer the estate. *Hall v. Davison* (Civ. App.) 176 S. W. 642.

## CHAPTER SEVENTEEN

## ALLOWANCE TO WIDOW AND MINOR CHILDREN

**Article 3411. [2044] [1991] Allowance to be paid in preference to other debts or charges, except, etc.**

**Reasonableness.**—The reasonableness of allowances to the widow from the estate of the deceased husband is not affected by the question whether the estate will ever be sufficient to pay them. *Jones v. Bartlett* (Civ. App.) 189 S. W. 1107.

**Administrator de bonis non.**—Estate of decedent leaving widow and minor children, consisting only of a homestead, held not subject to administration by administrator de bonis non under Rev. St. 1911, tit. 52, cc. 17, 18, especially this article and arts. 3413, 3422, 3427. *Kimmons v. Abraham* (Civ. App.) 176 S. W. 671.

## CHAPTER EIGHTEEN

## SETTING APART THE HOMESTEAD AND OTHER EXEMPT PROPERTY TO WIDOW AND CHILDREN

Art. 3413. Court shall set apart exempt property, etc.	Art. 3425. When homestead may be partitioned.
3414. Allowance in lieu of exempt articles.	3426. No distinction between separate and community homestead.
3419. Sale to raise allowance, when.	3427. Homestead not liable for debts, except, etc.
3420. Property upon which liens exist shall not be set aside, etc.	3428. Other exempt property, liable for what debts.
3421. When estate proves to be solvent.	
3422. When estate proves to be insolvent.	
3424. When homestead shall not be partitioned.	

**Article 3413. [2046] [1993] Court shall set apart exempt property, etc.**

3. **Property exempt in general.**—Where the fund due upon certificate of insurance is exempt property, it is not subject to administration. *Modern Woodmen of America v. Yanowsky* (Civ. App.) 187 S. W. 728.

5. **Homestead.**—Estate of decedent leaving widow and minor children, consisting only of a homestead, held not subject to administration by administrator de bonis non under Rev. St. 1911, tit. 52, cc. 17, 18, especially this article and arts. 3411, 3422, 3427. *Kimmons v. Abraham* (Civ. App.) 176 S. W. 671.

Wife's partition of separate tracts owned by husband and wife at husband's death held to have the effect of designation as part of homestead of certain tracts. *Compton v. Woodward* (Civ. App.) 188 S. W. 271.

10. **Conveyance or abandonment of homestead.**—Under Const. art. 16, §§ 50, 52, and this article and arts. 3235, 3414, and 3421-3428, inclusive, the homestead, whether decedent's estate is solvent or insolvent, descends to his heirs, subject to the rights of the widow and minor children, exempt from liability for the decedent's debts, and this status is not affected by a subsequent voluntary sale or abandonment. *Hoefling v. Hoefling*, 106 Tex. 350, 167 S. W. 210.

14. **Priority.**—Mortgage creditor of deceased who gave the mortgage before marriage and in which the wife did not join after marriage, held not entitled to lien superior to her right to an allowance under this article and arts. 3414, 3420, 3422, 3428. *Newnom v. Hedeman* (Civ. App.) 184 S. W. 298.

18. **Necessity of order of court.**—Under Const. art. 16, §§ 50, 52, and arts. 3235, 3422, 3427, 3785, 3786, a homestead, on the death of the owner, vests in his heirs free from debts, and the proceeds of a voluntary sale are also free from debts, though the probate court failed to set aside the homestead under this article, notwithstanding article 3787, declaring that the proceeds of a voluntary sale shall not be subject to forced sale within six months after such sale. *American Bonding Co. of Baltimore v. Logan*, 166 S. W. 1132, 106 Tex. 306.

Where the homestead is clearly defined, so that its identity can be determined, the actual setting apart of the homestead of an insolvent decedent by the probate court, under this article, is not essential to the vesting of the title thereto in the heirs. *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 167 S. W. 771, certified question answered by Supreme Court, 166 S. W. 1132, 106 Tex. 306.

**Art. 3414. [2047] [1994] Allowance in lieu of exempt articles.**

**Mortgage lien.**—Mortgage creditor of deceased who gave the mortgage before marriage and in which the wife did not join after marriage, held not entitled to lien superior to her right to an allowance under this article and arts. 3413, 3420, 3422, 3428. *Newnom v. Hedeman* (Civ. App.) 184 S. W. 298.

**Sale or abandonment of homestead.**—Under Const. art. 16, §§ 50, 52, and this article and arts. 3235, 3413, and 3421-3428, inclusive, the homestead, whether decedent's estate is solvent or insolvent, descends to his heirs, subject to the rights of the widow and minor children, exempt from liability for the decedent's debts, and this status is not affected by a subsequent voluntary sale or abandonment. *Hoefling v. Hoefling*, 106 Tex. 350, 167 S. W. 210.

**Art. 3419. [2052] [1999] Sale to raise allowance, when.**

Cited, *American Bonding Co. of Baltimore v. Logan*, 106 Tex. 306, 166 S. W. 1132; *Hoefling v. Hoefling*, 106 Tex. 350, 167 S. W. 210.

**Art. 3420. [2053] [2000] Property on which liens exist shall not be set aside.**—No property upon which a lien or liens have been given by an unmarried person, or by the husband and wife acknowledged in a manner legally binding upon the wife, or upon which a vendors lien or other lien or liens existing at the date of acquisition of property exists, shall be set aside to the widow or children as exempted property or appropriated to make up allowances made in lieu of exempted property, or for the support of the widow or children, until the debts secured by such

liens are first discharged, and provided that this article shall apply to all estates regardless of whether solvent or insolvent. [Act Aug. 9, 1876, p. 106; Act Feb. 22, 1917, ch. 34, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

**Decisions under prior act—Insolvent estate.**—This article does not apply when the estate is insolvent. *Newnom v. Hedeman* (Civ. App.) 184 S. W. 298.

— **Lien given before marriage.**—Mortgage creditor of deceased who gave the mortgage before marriage and in which the wife did not join after marriage, held not entitled to lien superior to her right to an allowance under this article and arts. 3413, 3414, 3422, 3428. *Newnom v. Hedeman* (Civ. App.) 184 S. W. 298.

#### Art. 3421. [2054] [2001] When estate proves to be solvent.

**Sale or abandonment of homestead.**—Under Const. art. 16, §§ 50, 52, and arts. 3235, 3413, 3414, and 3421-3428, inclusive, the homestead, whether decedent's estate is solvent or insolvent, descends to his heirs, subject to the rights of the widow and minor children, exempt from liability for the decedent's debts, and this status is not affected by a subsequent voluntary sale or abandonment. *Hoefling v. Hoefling*, 167 S. W. 210, 106 Tex. 350.

#### Art. 3422. [2055] [2002] When estate proves to be insolvent.

**Construction and application.**—Under Const. art. 16, §§ 50, 52, and this article and arts. 3235, 3427, 3785, 3786, a homestead, on the death of the owner, vests in his heirs free from debts, and the proceeds of a voluntary sale are also free from debts, though the probate court failed to set aside the homestead under article 3413, notwithstanding article 3787, declaring that the proceeds of a voluntary sale shall not be subject to forced sale within six months after such sale. *American Bonding Co. of Baltimore v. Logan*, 166 S. W. 1132, 106 Tex. 306.

Surviving spouse, regardless of solvency or insolvency, held entitled to use homestead exempt from forced sale for the payment of his own debts, which right ends upon the abandonment of the homestead. *Hoefling v. Hoefling*, 167 S. W. 210, 106 Tex. 350.

Under this article and arts. 3235, 3427, 3428, the amount received from a sale of the homestead by the heirs is not liable for the debts of the decedent. *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 167 S. W. 771, certified question answered by Supreme Court, 166 S. W. 1132, 106 Tex. 306.

Estate of decedent leaving widow and minor children, consisting only of a homestead, held not subject to administration by administrator de bonis non under Rev. St. 1911, tit. 52, cc. 17, 18, especially this article and arts. 3411, 3413, 3427. *Kimmons v. Abraham* (Civ. App.) 176 S. W. 671.

Under this article, express liens on homestead give way to rights of widow and children, unless within exceptions in section, nor does fact that lien was created on land before marriage of owner affect priority of their claim to homestead. *Investors' Mortgage Security Co. v. Newton* (Civ. App.) 184 S. W. 291.

Mortgage creditor of deceased who gave the mortgage before marriage and in which the wife did not join after marriage, held not entitled to lien superior to her right to an allowance under this article and arts. 3413, 3414, 3420, 3428. *Newnom v. Hedeman* (Civ. App.) 184 S. W. 298.

#### Art. 3424. [2057] [2004] When homestead shall not be partitioned.

**In general.**—Const. art. 16, § 52, determines the disposition of a homestead after the death of the owner, and determines who shall take it and their respective interests, but not the conditions which may be imposed on the inheritance. *American Bonding Co. of Baltimore v. Logan*, 166 S. W. 1132, 106 Tex. 306.

**Occupancy by widow.**—Since, under Const. art. 16, § 52, a surviving wife is entitled to the use and occupation of the homestead for life, the deceased husband's brothers and sisters took their interest therein subject to the wife's right. *Allen v. Allen* (Civ. App.) 158 S. W. 1049.

The court, in a partition suit by the children of a deceased husband and his surviving wife, must set aside the homestead for the use of the wife and her minor children. *Meyers v. Riley* (Civ. App.) 162 S. W. 955.

Though plaintiff failed to establish defendant's abandonment of her homestead right, and hence was not entitled to partition, it was proper for the court to determine the issue of defendant's asserted title to all the property, so that a judgment decreeing title to each of the parties, but denying plaintiff's right to partition so long as defendant might occupy it as a homestead, was proper. *Perkins v. Perkins* (Civ. App.) 166 S. W. 915.

**Proceeds of homestead.**—Under Const. art. 16, §§ 50, 52, and arts. 3235, 3422, 3427, 3785, 3786, a homestead, on the death of the owner, vests in his heirs free from debts, and the proceeds of a voluntary sale are also free from debts, though the probate court failed to set aside the homestead under article 3413, notwithstanding article 3787, declaring that the proceeds of a voluntary sale shall not be subject to forced sale within six months after such sale. *American Bonding Co. of Baltimore v. Logan*, 166 S. W. 1132, 106 Tex. 306.

Under Const. art. 16, §§ 50, 52, and arts. 3235, 3413, 3414, and 3421-3428, inclusive, the homestead, whether decedent's estate is solvent or insolvent, descends to his heirs, subject to the rights of the widow and minor children, exempt from liability for the decedent's debts, and this status is not affected by a subsequent voluntary sale or abandonment. *Hoefling v. Hoefling*, 167 S. W. 210, 106 Tex. 350.

**Selection of homestead.**—A surviving wife may select her homestead, not to exceed 200 acres, in any shape that she may see proper, provided she selects such lands as have been impressed with the homestead character and lands contiguous thereto. *Meyers v. Riley* (Civ. App.) 162 S. W. 955.

**Mortgage foreclosure.**—Notwithstanding Const. art. 16, § 52, a mortgage on a homestead dedicated by a surviving widow, who had minor children, may be foreclosed. *Spencer v. Schell* (Sup.) 173 S. W. 867, affirming judgment (Civ. App.) 142 S. W. 111.

**Art. 3425. [2058] [2005] When homestead may be partitioned.**

**Abandonment of homestead.**—A widow's offer to sell the property, or fact that she was not living on the property was not an abandonment of her homestead rights, where she had not acquired another home. *Perkins v. Perkins* (Civ. App.) 166 S. W. 915.

**Art. 3426. [2059] [2006] No distinction between separate and community homestead.**

**Wife's forfeiture of homestead rights.**—Where a wife, without fault of the husband, voluntarily separates from him and leaves the homestead, which is his separate property or community property, she forfeits her homestead right therein. *Gardenhire v. Gardenhire* (Civ. App.) 172 S. W. 726.

**Art. 3427. [2060] [2007] Homestead not liable for debts, except, etc.**

**In general.**—The exemption provided for by Const. art. 16, § 50, applies to the homestead while the head of the family is living, but furnishes no rule for its distribution after his death. *American Bonding Co. of Baltimore v. Logan*, 166 S. W. 1132, 106 Tex. 306.

Under Const. art. 16, §§ 50, 52, and this article and arts. 3235, 3422, 3785, 3786, a homestead, on the death of the owner, vests in his heirs free from debts, and the proceeds of a voluntary sale are also free from debts, though the probate court failed to set aside the homestead under article 3413, notwithstanding article 3787, declaring that the proceeds of a voluntary sale shall not be subject to forced sale within six months after such sale. *Id.*

Under Const. art. 16, §§ 50, 52, and arts. 3235, 3413, 3414, and 3421–3428, inclusive, the homestead, whether decedent's estate is solvent or insolvent, descends to his heirs, subject to the rights of the widow and minor children, exempt from liability for the decedent's debts, and this status is not affected by a subsequent voluntary sale or abandonment. *Hoefling v. Hoefling*, 167 S. W. 210, 106 Tex. 350.

Under this article and arts. 3235, 3422, 3428, the amount received from a sale of the homestead by the heirs is not liable for the debts of the decedent. *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 167 S. W. 771, certified question answered by Supreme Court, 166 S. W. 1132, 106 Tex. 306.

Estate of decedent leaving widow and minor children, consisting only of a homestead, held not subject to administration by administrator de bonis non under Rev. St. 1911, tit. 52, cc. 17, 18, especially this article and arts. 3411, 3413, 3422. *Kimmons v. Abraham* (Civ. App.) 176 S. W. 671.

**Art. 3428. [2061] [2008] Other exempt property, liable for what debts.**

Cited, *American Bonding Co. of Baltimore v. Logan*, 106 Tex. 306, 166 S. W. 1132; see, also, notes under article 3427.

**Mortgage debt contracted before marriage.**—Mortgage creditor of deceased who gave the mortgage before marriage and in which the wife did not join after marriage, held not entitled to lien superior to her right to an allowance under this article and arts. 3413, 3414, 3420, 3422. *Newnom v. Hedeman* (Civ. App.) 184 S. W. 298.

Where the only community property was the homestead, which the husband sold for payment of debts of the community, such sale was not a necessary sale in a legal sense, since the homestead in no event was subject to payment of the debt. *Priddy v. Tabor* (Civ. App.) 189 S. W. 111.

## CHAPTER NINETEEN

### PRESENTMENT, ETC., OF CLAIMS AGAINST AN ESTATE

Art.		Art.	
3435.	Claims shall be postponed if not presented in twelve months; proviso.	3447.	Action of the court upon claims.
3436.	Claims for funeral expenses and of last sickness to be presented in sixty days.	3449.	When claim has been rejected the owner may bring suit.
3439.	Affidavit to claim.	3451.	Costs of suit to be adjudged against claimant, when.
3441.	Affidavit made before whom.	3452.	Action of court on claim a judgment, etc.
3442.	Allowance or approval without affidavit, void.	3455.	Provisions of this chapter do not apply to certain claims.
3443.	Memorandum of allowance of rejection.	3457.	Judgment shall not be rendered in favor of claim which has not been presented and rejected.
3446.	Claims shall be acted upon by the court.		

**Article 3435. [2068] [2015] Claims shall be postponed, if not presented within twelve months; proviso.**

Cited, *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

**Claim for personal services.**—Where personal services are rendered during lifetime of a decedent without express agreement, bar of limitations would be determined by

law applicable to claims generally against estates of deceased persons. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

**Art. 3436. [2069] [2016] Claims for funeral expenses and of last sickness to be presented in sixty days, or, etc.**

Cited, *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

**Art. 3439. [2072] [2018] Affidavit to claim.**

Cited, *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.

**Art. 3441. [2074] [2020] Affidavit made before whom.**

Cited, *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.

**Art. 3442. [2075] [2021] Allowance or approval without affidavit, void.**

Cited, *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.

**Art. 3443. [2076] [2022] Memorandum of allowance or rejection.**

**Suit in district court.**—Under this article and arts. 3446, 3452, 3450, 3457, and 3488, administrator's refusal to recognize a lien upon a part of land, if a money claim had been allowed, did not authorize claimant to sue in district court to subject the land to payment of claim. *Ralston v. Stainbrook* (Civ. App.) 187 S. W. 413.

**Art. 3446. [2079] [2025] Claim shall be acted upon by the court.**

Cited, *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

**Art. 3447. [2080] [2026] Action of the court upon claims.**

**Approval of claim.**—An allowance of claim on approval by a permanent administratrix is valid, though it was previously allowed on approval by the same person acting under a void appointment as temporary administratrix. *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.

**Garnishment of claim.**—Under this article and arts. 3447, 3452, 3458, 3459, 3464, 3466, 3467, 3470, an order allowing and classifying a claim of the second class held not to subject the executor to garnishment during the 12 months allowed for payment, though it be alleged the estate is solvent. *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

**Art. 3449. [2082] [2028] When claim has been rejected the owner may bring suit.**

**Sufficiency of evidence.**—Evidence in action against decedent's estate held insufficient to show execution of alleged oral contract to pay for care of deceased the sum of \$30 per month, as alleged. *Lans v. Bristow* (Civ. App.) 188 S. W. 970.

In an action against estate of a decedent for personal services, evidence held insufficient to support a finding disallowing part of plaintiffs' claim. *Morrison v. Brooks* (Civ. App.) 189 S. W. 1094.

In an action against estate of decedent, evidence sufficient to show that personal services rendered by plaintiff during lifetime of decedent were not rendered gratuitously, with evidence of value, would support a judgment for compensation. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

**Art. 3451. [2084] [2030] Cost of suit to be adjudged against claimant, when.**

**Costs on appeal to county court.**—In action against administrator on claim, where plaintiffs had judgment below, with costs, and on appeal to county court plaintiffs had judgment for a smaller amount, art. 2046, and not this article, applies, and defendant was entitled to recover costs of county court. *Morrison v. Brooks* (Civ. App.) 189 S. W. 1094.

**Art. 3452. [2085] [2031] Action of court on claim a judgment, etc.**

Cited, *Reeves v. Fuqua* (Civ. App.) 184 S. W. 682.

**Suit in district court.**—Under this article and arts. 3443, 3446, 3450, 3457, and 3488, administrator's refusal to recognize a lien upon a part of land, if a money claim had been allowed, did not authorize claimant to sue in district court to subject the land to payment of claim. *Ralston v. Stainbrook* (Civ. App.) 187 S. W. 413.

**Garnishment of claim.**—Under this article and arts. 3447, 3458, 3459, 3464, 3466, 3467, 3470, an order allowing and classifying a claim of the second class held not to subject the executor to garnishment during the 12 months allowed for payment, though it be alleged the estate is solvent. *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

**Art. 3455. [2088] [2034] Provisions of this chapter do not apply to certain claims.**

Cited, *Rowe v. Dyess* (Civ. App.) 177 S. W. 521.

**Art. 3457. [2090] [2036] Judgment shall not be rendered in favor of claim which has not been presented and rejected.**

**Jurisdiction of suits on claims.**—Under this article and arts. 3443, 3446, 3452, 3450, and 3488, administrator's refusal to recognize a lien upon a part of land, if a money claim had been allowed, did not authorize claimant to sue in district court to subject the land to payment of claim. *Ralston v. Stainbrook* (Civ. App.) 187 S. W. 413.

Under Const. art. 5, § 16, this article, and art. 3206, held, that county court had exclusive original jurisdiction of claim against administrator of deceased principal in a

note signed by sureties and secured by mortgage, in view of art. 1843, giving right to sue sureties alone, though one of the sureties was dead, and administration was pending on his estate. *Putney v. Livingston* (Civ. App.) 192 S. W. 259.

## CHAPTER TWENTY

### CLASSIFICATION AND PAYMENT OF CLAIMS

Art.	Art.
3458. Classification of claims.	3466. Order for the payment of claims in full.
3459. Claims to be paid pro rata, when.	3467. Order for the payment of claims pro rata.
3460. Order of payment of claims.	3470. Liability of executor, etc., for failure to pay money, etc.
3462. Owner of claim may obtain order for payment, when.	
3464. Exhibit of condition of estate after twelve months.	

#### Article 3458. [2091] [2037] Classification of claims.

Cited, *Rotan Grocery Co. v. Pate* (Civ. App.) 169 S. W. 378.

**Funeral expenses.**—Others than the widow or next of kin of a deceased person may lawfully incur expenses for the interment of his body and recover the amount of such expenses from his estate, provided they are not mere interlopers, and the expenses are reasonable and suitable to the estate, but where an undertaker procured and placed a dead body in a casket more expensive than the wife of deceased desired, and she immediately repudiated his action, and caused the body to be buried by other undertakers in another casket, the expensive casket being stored by such other undertakers, the first undertaker was not entitled to recover from the estate the price of the casket furnished by him. *Wright v. Harned* (Civ. App.) 163 S. W. 685.

**Expenses of administration.**—Cost of replenishing the stock, where administratrix, under authority of art. 3351, carries on decedent's business, is "expenses of administration," entitled, under this article and art. 3460, to priority of payment over general claims. *Stoughton Wagon Co. v. S. G. Dreyfus Co.* (Civ. App.) 181 S. W. 703.

**Garnishment of executor.**—Under this article and arts. 3447, 3452, 3459, 3464, 3466, 3467, 3470, an order allowing and classifying a claim of the second class held not to subject the executor to garnishment during the 12 months allowed for payment, though it be alleged the estate is solvent. *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

#### Art. 3459. [2092] [2038] Claims to be paid pro rata, when.

Cited, *Rotan Grocery Co. v. Pate* (Civ. App.) 169 S. W. 378; *Stoughton Wagon Co. v. S. G. Dreyfus Co.* (Civ. App.) 181 S. W. 703.

**Garnishment of executor.**—See note under art. 3458.

#### Art. 3460. [2093] [2039] Order of payment of claims.

Cited, *Rotan Grocery Co. v. Pate* (Civ. App.) 169 S. W. 378; *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

**Expense of administration.**—See note under art. 3458.

#### Art. 3462. [2095] [2041] Owner of claim may obtain order for payment, when.

Cited, *Gulf Nat. Bank v. Shelton* (Civ. App.) 182 S. W. 337.

#### Art. 3464. [2097] [2043] Exhibit of condition of estate after twelve months.

**Garnishment of executor.**—See note under art. 3458.

#### Art. 3466. [2099] [2045] Order for the payment of claims in full.

**Garnishment of executor.**—See note under art. 3458.

#### Art. 3467. [2100] [2046] Order for payment of claims pro rata.

**Garnishment of executor.**—See note under art. 3458.

#### Art. 3470. [2103] [2049] Liability of executor, etc., for failure to pay money, etc.

**Garnishment of executor.**—See note under art. 3458.



## CHAPTER TWENTY-TWO

## SALES

Art.	Art.
3480. No sale without order of court.	3501. Order of court for sale of property.
3488. Order for sale of property mortgaged, etc.	3504. Executor or administrator shall not purchase property of the estate.
3491. Citation in such case.	3505. Bidder failing to comply with bid shall be liable, etc.
3496. Sale may be public or private for cash or part credit; minimum cash payment; lien; adequacy of price; security.	3506. Public sale may be continued from day to day.

**Article 3480. [2113] [2059] No sale without order of court.**

**Jurisdiction of probate court.**—Only the probate court has jurisdiction to sell, for the payment of debts, the property of a decedent whose estate is being administered, even where a sale of property is made necessary by a judgment of the district court in the exercise of its auxiliary, probate jurisdiction. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

**Art. 3488. [2121] [2067] Order for sale of property mortgaged, etc.**

**Suit in district court.**—See note under art. 3452.

**Rights acquired by sale.**—Where in foreclosure suit for protection of third person, part of the land was ordered first sold, and thereafter judgment debtor gave a mortgage for an unsecured indebtedness and the amount of the judgment which the mortgagee paid, taking a transfer thereof, and after debtor's death mortgagee had property sold by administrator, under this article, for more than the amount of the judgment, held that equity would apply the proceeds in the manner decreed in the foreclosure, and hence the part of the land to be sold last was free from any lien, and purchaser acquired all title of the debtor, but took subject to the third person's rights under the foreclosure decree. *Cole v. Lewis* (Civ. App.) 159 S. W. 180.

**Art. 3491. [2124] [2070] Citation in such case.**

**Rights of wife and heirs.**—Neither a wife nor her heirs can be made parties to a sale of her interest in the common property by her husband's legal representative, unless it is rightfully taken to pay community debts, and if disposed of for any other purpose she is not bound thereby. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 571.

**Art. 3496. [2129] [2075] Sale may be public or private for cash or part credit; minimum cash payment; lien; adequacy of price; security.**—When it shall appear to be to the interest of the estate, the county judge may order a sale of real estate to be made at public or private sale for cash, or for part cash and part credit, and if so for part cash and part credit, then upon terms to be determined by the judge of said court; provided, that one-fifth of the purchase price must be paid in cash, and the executor or administrator shall retain a lien upon said premises to secure the payment of the deferred payment. It must be shown, in addition to the other requirements of the statutes of the State of Texas, that said sale was made for a fair price, and no personal security shall be required of the purchaser of said property, unless the county judge shall deem it necessary. [Act Aug. 1876, p. 112, § 81; Act March 12, 1915, ch. 46, § 1.]

**Explanatory.**—Sec. 2 of the act repeals all laws in conflict. The act took effect 90 days after adjournment on March 20, 1915.

**Art. 3501. [2134] [2080] Order of court for sale of property.**

**Description of property.**—As regards validity of the administrator's deed, the description in the probate court's orders of sale and confirmation of the sale, "810 acres, N. Hayden survey, S. A. county," is sufficient. *Holman v. Houston Oil Co.* (Civ. App.) 174 S. W. 886.

**Art. 3504. [2137] [2083] Executor or administrator shall not purchase property of the estate.**

**Purchase by administrator.**—Where certain land of a decedent was partitioned by the probate court, the administrator was not bound to pay the taxes thereafter, and could purchase the land set apart to one of the heirs at a tax sale, and such records of administration as were not destroyed by fire held to support a finding that the administration was closed before the administrator so purchased the land. *Griswold v. Comer* (Civ. App.) 161 S. W. 423.

**Art. 3505. [2138] [2084] Bidder failing to comply with his bid shall be liable, etc.**

**Completion of sale.**—A sale ordered by a probate court is not completed until the purchaser accepts the deed and complies with the conditions of sale. *Ennis & Dale v. Cator* (Civ. App.) 174 S. W. 947.

**Art. 3506. [2139] [2085] Public sale may be continued from day to day.**

**Postponement order made in vacation.**—Under Acts 12th Leg. c. 81, § 250, providing that if the administrator shall fail to sell realty, ordered to be sold, at the time specified in the order, he shall report the facts to the court or judge, who may appoint another day for the sale, and so on from time to time until the property is sold, an order postponing an administrator's sale was valid though made in vacation. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

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## CHAPTER TWENTY-THREE

### REPORT OF SALES, ETC.

Art. 3511. Action of court on report of sale.	Art. 3513. Conveyance of property sold.
3512. Sale shall be set aside, when.	3514. Conveyance of real estate.

**Article 3511. [2144] [2090] Action of court on report of sale.**

Cited, *Ennis & Dale v. Cator* (Civ. App.) 174 S. W. 947.

**Art. 3512. [2145] [2091] Sale shall be set aside, when.**

**Purchaser's refusal to complete sale.**—An order, confirming an administrator's sale and allowing a broker a commission, may at a subsequent term by direct proceeding by the administrator be vacated on the purchaser refusing to complete the purchase. *Ennis & Dale v. Cator* (Civ. App.) 174 S. W. 947.

**Art. 3513. [2146] [2091a] Conveyance of property sold.**

Cited, *Ennis & Dale v. Cator* (Civ. App.) 174 S. W. 947.

**Art. 3514. [2147] [2092] Conveyance of real estate.**

**Estate conveyed, etc.**—A purchaser of an estate's interest in land at an administrator's sale held to have acquired no title, where he knew at the time of the sale that the intestate had conveyed the land long prior to his death by a deed of record. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 171 S. W. 537.

An administrator's deed of a certain number of acres in a survey in which the estate has several tracts, embracing more, conveys an undivided interest, but not all the acreage the estate owns therein, merely because the administrator thought it owned no more than sold, and the figures "2,031" in the order of confirmation of sale and the administrator's deed will be considered a clerical error, where the application and order for sale were for 2,081 acres. *Waterhouse v. Gallup* (Civ. App.) 178 S. W. 773.

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## CHAPTER TWENTY-FOUR

### ENFORCING SPECIFIC PERFORMANCE OF CONTRACTS

**Article 3518. [2151] [2096] Proceeding to enforce specific performance of bond, etc.**

**Variance.**—In suit under this article, for specific performance of a contract for sale of land by defendant's testatrix, where the petition alleged a misdescription in the contract and stated a correct description, and such allegations were shown by evidence, there was no variance. *Bender v. Bender* (Civ. App.) 187 S. W. 735.

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## CHAPTER TWENTY-SIX

### PARTITION AND DISTRIBUTION

Art. 3527. Application for partition and distribution.	Art. 3557. Action of court, and bond in such case.
3542. Action of court upon report of commissioners.	3559. Common property shall be held by executor, etc., until, etc.
3556. Surviving husband or wife may have partition of common property.	3560. Joint owners with estate may have partition.

**Article 3527. [2154] [2099] Application for partition and distribution.**

**Jurisdiction.**—The county court has exclusive jurisdiction in proceedings to recover the homestead or allowance in lieu thereof, and also to partition and distribute real estate. *McMahan v. McMahan* (Civ. App.) 175 S. W. 157.

**Parties.**—Where the whole estate had been converted into money as directed by the will, which was an “independent will,” and the determination of the amount to which each legatee was entitled was a mere matter of calculation, it was not necessary that all persons entitled to parts of the fund be made parties to an action for a legatee’s interest, notwithstanding this article. *Wells v. Margraves* (Civ. App.) 164 S. W. 881.

**Art. 3542. [2169] [2114] Action of court upon report of commissioners.**

**Ratification of defective partition.**—Where the report of commissioners appointed by the probate court to partition land was not recorded, filing and recordation of report under a nunc pro tunc order secured nearly 50 years after report was made did not add any legal force to action theretofore had, but where interested parties had by recognition and ratification of the defective partition established equivalent of oral partition, such proceedings of probate court and actions of parties are not, after nearly 50 years, subject to collateral attack, and evidence held to show that the partition had been recognized and ratified by deeds and acts of ownership. *Adams v. Adams* (Civ. App.) 191 S. W. 717.

**Art. 3556. [2183] [2128] Surviving husband or wife may have partition of common property.**

**Power of temporary administrator.**—Under this article, held that a temporary administrator appointed pending contest of a will has the power, when so given by the court in his order of appointment, to take possession of all common property of the estate and hold same in trust for benefit of those entitled until such contest is determined. *Huth v. Huth* (Civ. App.) 187 S. W. 523.

**Art. 3557. [2184] [2129] Action of court and bond in such case.**

**Duty to partition.**—Under this article and art. 3560, upon application for partition by owner of a joint interest with estate of a decedent in any property in which administration is pending, it is the duty of court to make partition between applicant and estate of deceased. *Huth v. Huth* (Civ. App.) 187 S. W. 523.

**Art. 3559. [2186] [2131] Common property shall be held by executor, etc., until, etc.**

**Constitutionality.**—Appointment of a temporary administrator to take charge of all of community property belonging to plaintiff and estate of his deceased wife made under this article, held not unconstitutional. *Huth v. Huth* (Civ. App.) 187 S. W. 523.

**Art. 3560. [2187] [2132] Joint owners with estate may have partition.**

**Duty to partition.**—See note under art. 3557.

DECISIONS RELATING TO SUBJECT IN GENERAL

**Who may sue.**—Where plaintiff by patrol partition accepted a tract of land in full as his interest in his father’s estate, he had no further interest in such estate, and could not recover in trespass to try title involving other lands of the estate. *Moore v. Reid* (Civ. App.) 186 S. W. 245.

CHAPTER TWENTY-NINE

ADMINISTRATION OF COMMUNITY PROPERTY

<p>Art. 3592. Community property liable for community debts, etc.</p> <p>3594. Where there is a child survivor holds subject, etc.</p> <p>3595. Application for community administration.</p> <p>3597. Inventory, appraisement, and list of</p>	<p>Art. indebtedness, sworn to and returned, etc.</p> <p>3598. Bond of survivor.</p> <p>3599. Action of court upon inventory, etc.</p> <p>3612. Persons entitled to estate may have partition, when.</p> <p>3614. Duty of guardians in such cases.</p>
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**Article 3592. [2219] [2164] Community property liable for community debts, etc.**

**6. Sale and conveyance of property.**—A surviving husband can convey community property to pay community debts, even without administration, if he is sane and the transaction is free from fraud. *Pyle v. Pyle* (Civ. App.) 159 S. W. 488.

A husband, after the death of his wife, held entitled to convey the undivided one-half interest of her son in lands which constituted part of the community estate, in consideration of an assumption of the debt to the state for purchase money due. *Morgan v. Lomas* (Civ. App.) 159 S. W. 869.

Evidence held to show that there was a surplus of the community property after payment of community debts and expenses of administration. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

A widow has power to sell or mortgage the community estate to pay off purchase-money notes, for which the property, which she represents as survivor, is liable, but she cannot give notes for \$600, and interest, secured by mortgage on the land and payable

in cash, to pay the purchase-money notes executed by her husband for less than \$585, payable in cash, or cotton in the alternative. *W. C. Belcher Land Mortgage Co. v. Taylor* (Civ. App.) 173 S. W. 278.

7. — **Homestead.**—A surviving husband may convey the community estate in payment of the community debts; this right extending even to the homestead and authorizing a conveyance, although the proceeds realized from the sale are greatly in excess of the debts. *Morgan v. Lomas* (Civ. App.) 159 S. W. 869.

The power of the survivor of the community to sell the property to pay community debts or to reimburse for sums paid on the debts applies to the homestead as well as other property. *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

8. — **Validity of conveyance.**—A judgment confirming a conveyance of community property in ostensible payment of community debts by the surviving husband, who was insane, is not binding upon the children, where neither the court nor their guardian ad litem knew of the husband's insanity. *Pyle v. Pyle* (Civ. App.) 159 S. W. 488.

Abstract of title showing that the land has been conveyed to a husband and wife, and that subsequently the former, when a widower, conveyed, does not show clear and merchantable title. *Gaut v. Dunlap* (Civ. App.) 188 S. W. 1020.

14. — **Rights and liabilities of purchasers in general.**—One who purchased land from the community administrator, knowing that the heirs claimed a half interest therein, and agreed to settle with them for their interest, in effect agreed, upon purchasing, to pay such heirs the reasonable value of their one-half interest in the land, and the children could either proceed against the community bond or against defendant on his agreement without first seeking a partition, and the other children were not necessary parties to an action by a part of the children on defendant's agreement. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

15. — **Bona fide purchasers.**—Where a town conveyed certain land in controversy to a husband, his wife's interest was equitable only, so that her heirs by a former husband inherited no such interest in the land as would defeat the rights of an innocent purchaser for value from the husband after the wife's death. *Loomis v. Cobb* (Civ. App.) 159 S. W. 305.

16. — **Termination of power to convey.**—Where a husband died leaving community property to the widow, and children, who had no separate estate, and debts of various classes, the fact that the widow was entitled to sell community property as a survivor of the community, and made an assignment thereof for the benefit of her husband's creditors, did not bar her right, as administratrix thereafter appointed, to recover the property for administration from the assignee and his vendee. *Rotan Grocery Co. v. Pate* (Civ. App.) 169 S. W. 378.

19. **Rights of children.**—If property belonging to the community was sold by the husband, acting as community administrator, and the proceeds invested in other land, the children could claim the same interest in the land purchased as in the original land, and were not bound to sue on the bond of the community administrator to obtain their rights in the community property. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

Where the survivor of a community estate paid the full value of the personal property to settle community debts, an heir of the deceased spouse could not recover anything from the survivor on that account. *Suggs v. Singley* (Civ. App.) 167 S. W. 241.

Where a widow continued to live on community property, which was the homestead, after the death of her husband, so long as her homestead existed, the children could claim no homestead rights, and their interests were therefore subject to sale on execution. *Johnston v. Rockhold* (Civ. App.) 171 S. W. 282.

A son in whose name one to defraud his wife takes title to property bought with community funds, to participate in partition of the community estate, must account for the present value of the whole land deeded, and not merely half of it. *Krenz v. Strohmair* (Civ. App.) 177 S. W. 178.

21. **Payments to children.**—A daughter having received certain real property on the death of her mother from her father as survivor of the community, and acquiesced in a family settlement, held to have received the same in full satisfaction of her claim against her mother's estate. *Suggs v. Singley* (Civ. App.) 167 S. W. 241.

Where a father at the death of his wife conveyed real estate to his children in settlement of their interest in community property, and they on attaining majority, ratified the conveyance, they had no interest in community property. *Word v. Colley* (Civ. App.) 173 S. W. 629.

Deeds of portions of community estate from husband to children by first marriage held to be presumed advancements for interests of such children in such property, and evidence held to sustain finding of jury that such deeds were accepted in settlement of rights of grantees in the community estate of their parents, and made an equitable partition of the parents' community estate between such children. *Nowlin v. Clary* (Civ. App.) 178 S. W. 571.

23. **Contracts.**—A contract by defendant, upon purchasing land from the community administrator, which was the property of the community, to pay the children the value of their interest in the community land so sold held not too uncertain to be enforced. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

Where a man and wife, having no children, acquired a community interest, by part payment on land contract, the notice required of vendor's intention to rescind, after the husband's death could legally be given to his widow, as survivor of the community. *Hughes v. Burton Lumber Corp.* (Civ. App.) 188 S. W. 1022.

27. **Community and separate debts.**—On the death of the husband the interest of the widow can be sold only to pay debts of the community, under Pasch. Dig. art. 1363. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

The survivor can be sued and property in his hands as such subjected to payment of community debt, but separate estate of the husband, which is also liable for payment of such debt, cannot be reached in suit against surviving wife. *First Nat. Bank of New Boston v. Daniel* (Civ. App.) 172 S. W. 747.

30. **Reimbursement of expenditures and adjustment of equities.**—Right of surviving husband to appropriate community property to reimburse him for paying community debts, not being a claim against minor children, may be exercised by suit to divest title out of them, though administration of their estate be pending, but expenditure by surviving husband for support of his children is not a "community debt" for which he can appropriate the community property to reimburse himself. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

31. **Administration on death of both spouses.**—A sale of land by an administrator of a wife, who was also executor of the husband, was valid, and conveyed the interest of both the husband and wife, where part of the money received from the sale was used in paying community debts and the children accepted the proceeds of the property. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

37. **Limitations.**—Under art. 5704, suspending limitations until qualification of administrator, a community administratrix authorized under articles 3595-3598 and 3592-3614, to manage community estate, held not an "administratrix," so that order for her management did not start running of statute. *First Nat. Bank of New Boston v. Daniel* (Civ. App.) 172 S. W. 747.

**Art. 3594. [2221] [2166] Where there is child, survivor holds subject, etc.**

**Sales by husband.**—As surviving member of a marital partnership, a husband, on death or insanity of a wife, may, to pay community debts, sell community property under this article, without giving bond provided for on administration. *Pierce v. Gibson* (Sup.) 184 S. W. 502.

Under this article, and Const. art. 16, § 50, a deed of the husband during wife's insanity granting the homestead, though in consideration of debts of the community, without a showing of necessity thereof, is invalid. *Priddy v. Tabor* (Civ. App.) 189 S. W. 111.

**Art. 3595. [2222] [2167] Application for community administration.**

**Limitations.**—Under art. 5704, suspending limitations until qualification of administrator, a community administratrix authorized under articles 3595-3598 and 3592-3614, to manage community estate, held not an "administratrix," so that order for her management did not start running of statute. *First Nat. Bank of New Boston v. Daniel* (Civ. App.) 172 S. W. 747.

**Art. 3597. [2224] [2169] Inventory, appraisal, and list of indebtedness, sworn to and returned, etc.**

**Effect of unsigned inventory.**—Under Act Aug. 26, 1856, §§ 2, 3, 7 (see 4 Gammel's Laws, p. 469), inventory of community property filed with authority of surviving wife, though not signed by her, gave her authority to convey title to community land. *Sealey v. Mutual Land Co.* (Civ. App.) 184 S. W. 1073.

**Art. 3598. [2225] [2170] Bond of survivor.**

Cited, *Pierce v. Gibson* (Sup.) 184 S. W. 502.

**Limitations.**—See note under art. 3595.

**Art. 3599. [2226] [2171] Action of court upon inventory, etc.**

**Effect of administrator's qualification upon children's rights.**—The qualification of the husband as community administrator, upon his wife's death did not divest the one-half interest in the community property which vested absolutely in the children, subject to payment of community debts. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

**Art. 3612. [2238] [2183] Persons entitled to estate may have partition, when.**

Cited, *Hales v. Peters* (Civ. App.) 162 S. W. 386.

**Art. 3614. [2238b] Duty of guardians in such cases.**

**Limitations.**—See note under art. 3595.

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## CHAPTER THIRTY-ONE

### COSTS

**Article 3623. [2247] [2192] Shall be allowed expenses, etc.**

Cited, *Stoughton Wagon Co. v. S. G. Dreyfus Co.* (Civ. App.) 181 S. W. 703.

**Attorney's fees.**—An administrator held not entitled to an allowance for fees paid attorneys who represented him in contest over administration and in establishing a claim against the estate. *Dyess v. Rowe* (Civ. App.) 177 S. W. 523.

## CHAPTER THIRTY-TWO

### APPEALS TO THE DISTRICT COURT

<p>Art. 3631. Right of appeal. 3632. Appeal bond, requisites of. 3633. Bond not required of executors, etc., unless, etc. 3634. Affidavit that party is too poor to give bond.</p>	<p>Art. 3635. Duty of county clerk to make and transmit transcript, etc. 3637. Duty of district clerk who receives transcript, etc. 3638. Appeals shall be tried de novo in regular order upon the docket.</p>
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#### Article 3631. [2255] [2200] Right of appeal.

Cited, *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290.

**Necessity of appeal.**—Under this article, a person aggrieved by the decision of a county court relating to administration of community property in which he has a joint interest with decedent must appeal to district court of county in which administration is pending and cannot restrain enforcement of such decision of county court. *Huth v. Huth* (Civ. App.) 187 S. W. 523.

**Necessity of notice.**—Under this article and art. 3632, and despite article 2084 notice of an appeal from a judgment admitting a will to probate is unnecessary, the giving of the bond being sufficient. *Beversdorff v. Dienger* (Sup.) 174 S. W. 576, reversing judgment (Civ. App.) 141 S. W. 533.

**Failure to offer evidence.**—Where appellants did not sue to establish a will, but were made parties to a suit brought by appellee to probate a will, when they alleged the making of a subsequent will to that sought to be probated, appellants' failure to offer any evidence would not prevent them from appealing from the judgment of probate under this article. *Wolnitzek v. Lewis* (Civ. App.) 162 S. W. 963.

#### Art. 3632. [2256] [2201] Appeal bond; requisites of.

**Necessity of notice.**—See note under art. 3631.

**Sufficiency of bond.**—The appeal bond in probate proceedings is payable to the county judge, as such, and hence the fact that an appeal bond was made payable to the county judge of the county, who was disqualified to try a probate case instead of to the special judge appointed in his place, was immaterial, since the special judge would be held to be the "county judge." *Wolnitzek v. Lewis* (Civ. App.) 162 S. W. 963.

#### Art. 3633. [2257] [2202] Bond not required of executor, etc., unless, etc.

**Time for filing transcript.**—Under this article and art. 2106, held that, on an appeal by one in her individual capacity, the transcript was filed in time when filed within 90 days after she filed her appeal bond, though more than 90 days after notice of appeal, wherein she erroneously stated that she appealed as administratrix as well as in her individual capacity. *Reeves v. Fuqua* (Civ. App.) 183 S. W. 34.

#### Art. 3634. [2258] [2203] Affidavit that party is too poor to give bond.

**Sufficiency of affidavit.**—Where one of two parties appealing from a decree admitting a will to probate made affidavit under this article, of inability to give a cost bond, but failed to state diligent effort to secure a bond, and the affidavit was not signed by the other, such defects were not jurisdictional, and in any event were waived by failure to raise them in the court below. *Clark v. Briley* (Civ. App.) 193 S. W. 419.

#### Art. 3635. [2259] [2204] Duty of county clerk to make and transmit transcript, etc.

Cited, *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290; *Reeves v. Fuqua* (Civ. App.) 183 S. W. 34.

#### Art. 3637. [2261] [2206] Duty of district clerk who receives transcript, etc.

Cited, *Reeves v. Fuqua* (Civ. App.) 183 S. W. 34.

#### Art. 3638. [2262] [2207] Appeals shall be tried de novo in regular order upon the docket.

**Nature of proceeding in district court.**—The district court, on appeal from the county court in proceedings for the probate of a will, tries the case de novo, and may probate the will or declare it void. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

District court had only appellate jurisdiction to revise, declare void, or set aside orders of county court, sitting in probate, relative to sale of land of minors on their guardian's application, and had no authority to consider facts of innocent purchasers, question of title, etc. *Goodman v. Schwind* (Civ. App.) 186 S. W. 282.

#### DECISIONS RELATING TO APPEAL IN GENERAL

**Presentation of question in county court.**—Error in admitting the alleged will in evidence in a will contest cannot be reviewed, where the objections to its introduction on the ground of failure to prove that the attesting witnesses were credible and over 14 years of age, was not specifically pointed out. *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290.

TITLE 53

EVIDENCE

Chap.

1. Personal attendance of witnesses.
2. Depositions of witnesses.

Chap.

3. Depositions of parties.
4. General provisions.

CHAPTER ONE

PERSONAL ATTENDANCE OF WITNESSES

Art.

3640. Witnesses subpoenaed.

Art.

3647. Party may be examined as a witness.

**Article 3640. [2264] [2209] Witnesses subpoenaed.**

Cited, *T. W. Marse & Co. v. Flockinger* (Civ. App.) 189 S. W. 1017.

**Art. 3647. [2271] [2216] Party may be examined as a witness.**

In general.—By express provision of this article a party may, like any other person, be examined as a witness by the opposing party. *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

CHAPTER TWO

DEPOSITIONS OF WITNESSES

Art.

3649. Depositions of witness may be taken, when.

Art.

3663. Depositions by oral examination and answer.

3650. Notice and service thereof.

3676. Objections to depositions.

3653. When suit has not been commenced.

3677. Depositions to be read in evidence, subject, etc.

**Article 3649. [2273] [2218] Depositions of witnesses may be taken, when.**

Cited, *Rucker v. Carr* (Civ. App.) 163 S. W. 632.

In general.—Application for a continuance for absence of a nonresident witness not being a statutory application under this article and art. 1918, the discretion of the court will not be disturbed in the absence of abuse. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

Under this article and art. 3677, deposition of witness resident in county of trial held admissible in evidence. *Rhea v. Cook* (Civ. App.) 174 S. W. 892.

**Art. 3650. [2274] [2219] Same subject; notice and service thereof.**

Sufficiency of service of citation.—Defendant cannot object to depositions taken and used on behalf of plaintiff, on the ground that defendant had not been legally served with citation when the depositions were taken, in that it was served in the wrong name. *Mis-souri, O. & G. Ry. Co. of Texas v. Browning* (Civ. App.) 166 S. W. 34.

**Art. 3653. [2277] [2222] When suit has not been commenced.**

In general.—Under this article, as to taking depositions, a deposition taken in another action after filing the petition in the instant action is not admissible, but can be used only in actions filed after it was taken. *Texas Rice Land Co. v. Langham* (Civ. App.) 193 S. W. 473.

**Art. 3663. Depositions by oral examination and answer.**

In general.—Since this and following articles do not provide for taking depositions of parties on oral interrogatories, such interrogatories, addressed to plaintiffs, will not be taken as confessed because of their failure to answer. *Farmers' & Merchants' Nat. Bank of Abilene v. Ivey* (Civ. App.) 182 S. W. 706.

**Art. 3676. [2289] [2235] Objections to depositions.**

Application of article.—The statutory rule that objections to the manner and form of taking depositions, not made by motion to quash prior to the trial, are waived cannot be invoked against one who is offering the evidence. *Putnam Land & Development Co. v. Elser* (Civ. App.) 159 S. W. 190.

**Time for objection.**—Objections that answers to questions in a deposition are not responsive must be taken before announcement of ready for trial. *E. R. & D. C. Kolp v. Brazer* (Civ. App.) 161 S. W. 899.

When not urged by motion before announcing ready for trial, an objection that answer to a question in a deposition was not responsive was waived. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

**Enumeration of objections.**—An admission by a party in an ex parte deposition is not as binding as an admission in pleading, but may be explained by showing that the witness was insane when his answers were taken, without raising the issue of insanity by any pleading, or first moving to suppress the deposition, etc. *Kellner v. Randle* (Civ. App.) 165 S. W. 509.

**Grounds of objection.**—The fact that depositions were sworn to as true to the best of deponent's knowledge and belief, instead of absolutely, held no ground for suppressing the depositions, especially where the answers themselves were direct and positive statements, and in no sense the opinion of the witness or based on hearsay. *Senter v. Teague* (Civ. App.) 164 S. W. 1045.

A deposition will not be suppressed because counsel for the adverse party was not present at the taking of the deposition, where it does not appear that any harm thereby resulted to such party. *Leventhal v. Hollamon* (Civ. App.) 165 S. W. 6.

Under this article, a motion to suppress depositions on the ground that notice of the filing of interrogatories for the purpose of taking depositions was not served with the citation could be denied, where not made until the second term after the depositions were filed. *Missouri, O. & G. Ry. Co. of Texas v. Browning* (Civ. App.) 166 S. W. 34.

A deposition cannot be excluded from evidence merely because it was in the possession, with the permission of the court, of the attorneys for one of the parties for one night. *Arno Co-operative Irr. Co. v. Pugh* (Civ. App.) 177 S. W. 991.

Where X-ray photographs were made exhibits to a deposition in a personal injury case, but were unnecessary to a proper understanding of the deposition, it was not error to refuse to suppress such depositions on the ground that they were unintelligible without the exhibits. *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17.

It is not ground for suppressing a deposition that the attorney of the party taking it, before doing so, merely submitted to the witness certain private interrogatories and had him put his answers in writing. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

— **Disqualification of officer.**—That an officer taking depositions had represented deponents as attorney in other suits is not ground for quashing them. *Jones v. Nix* (Civ. App.) 174 S. W. 685.

— **Certificate of officer.**—The absence of the seal on the envelope in which depositions were returned is not a ground for suppressing the depositions; the seal being imprinted where the officers certified to the deposition proper. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 163 S. W. 621.

— **Failure of witness to answer, Irresponsive answers or failure to take answers of all witnesses.**—Where cross-interrogatory is not answered, deposition should be suppressed, whether omission is fault of witness or of officer taking deposition, and hence evidence of notary taking deposition that, if any question were not fully answered, it was due to his own inadvertence, was inadmissible. *Rotge v. Simmler* (Civ. App.) 176 S. W. 614.

Failure of witness to answer a cross-interrogatory is ground for suppressing the deposition if the question is important. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

**Withdrawal of deposition for correction.**—The court may return a deposition to the officer in a sister state taking it to enable him to make his certificate attached thereto conform to the facts and the law. *National Surety Co. v. American Compound Door Co.* (Civ. App.) 158 S. W. 1177.

**Discretion of trial court.**—Denial of a motion to suppress a deposition will not be reversed on appeal, in the absence of a showing of abuse of discretion. *Missouri, O. & G. Ry. Co. of Texas v. Love* (Civ. App.) 169 S. W. 922.

## Art. 3677. [2290] [2236] Depositions to be read in evidence, subject, etc.

**In general.**—A party taking a deposition, on its being offered in evidence by the adverse party, is not estopped from objecting to answers to interrogatories. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

Where a deposition is offered in evidence, it is evidence of the party offering it, though taken at the instance of the adverse party. *Id.*

In a suit on a vendor's lien note, in which the holder of a companion note intervened, the depositions of the vendee and intervener showing the facts as to the indorsements and transfers of intervener's note were properly admitted; there being nothing to show that the trial court considered the depositions of one of the parties as against the other. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

Under this article and art. 3649, deposition of witness resident in county of trial held admissible in evidence. *Rhea v. Cook* (Civ. App.) 174 S. W. 892.

Where testimony by deposition was not material under the allegations of the petition on file at the time the deposition was taken, but found support in the allegations of an amended petition thereafter filed, the rejection of the testimony was not called for. *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

Where exhibits to depositions are identified with certainty, they are admissible, although not inclosed with the depositions. *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17.

That an answer to an interrogatory is responsive does not render admissible that portion of the answer which is hearsay. *Fox v. Houston & T. C. Ry. Co.* (Civ. App.) 186 S. W. 852.



Under this article and articles 7778, 7779, as to trial or right of property, depositions taken by claimants held to be in claimant's suit, although entitled in original suit, *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522.

**Witness present at trial.**—Unless an abuse of the discretion of the trial court appears, a refusal to quash a deposition because the witness whose deposition was taken was present will not be reviewed. *Holt v. Guerguin*, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136, reversing judgment (Civ. App.) 156 S. W. 581.

**Former suit.**—Under Rev. St. 1895, arts. 2273, 2290, a deposition of the alleged testatrix taken before her death in a suit to set aside a deed cannot be read in a proceeding for the probate of her will. *Rucker v. Carr* (Civ. App.) 163 S. W. 632.

A deposition taken in a suit was not admissible in a suit other than the one in which it was taken. *Castleberry v. Bussey* (Civ. App.) 166 S. W. 14.

**Cross-Interrogatories.**—It is not ground for objection to a cross-interrogatory, eliciting an opinion, that it did not state sufficient facts on which to base an opinion; all the facts having been stated and the witness qualified in the direct interrogatories. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

### CHAPTER THREE

#### DEPOSITIONS OF PARTIES

<p>Art. 3679. Party may take his own deposition. 3680. May take deposition of adverse party.</p>	<p>Art. 3685. Refusal to answer, etc.</p>
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**Article 3679. [2292] [2238] Party may take his own deposition.**

**Interrogatories must be written.**—Under tit. 53, c. 3, written interrogatories must be filed as a prerequisite to taking the depositions of a party to the suit. *Farmers' & Merchants' Nat. Bank of Abilene v. Ivey* (Civ. App.) 182 S. W. 706.

**What not ground for suppressing.**—The fact that the plaintiff, who was subpoenaed by the defendant, disobeyed the subpoena is not sufficient ground for the suppression of his deposition, where no attachment was requested. *Leventhal v. Hollamon* (Civ. App.) 165 S. W. 6.

**Art. 3680. [2293] [2239] May take deposition of adverse party.**

**Bill of discovery.**—*Vernon's Sayles' Ann. Civ. St. 1914*, arts. 3679-3686, giving a party the right to examine the opposite parties as witnesses to secure information for maintaining an action or defense, superseded the bill of discovery as known to equity practice. *Farmers' & Merchants' Nat. Bank of Abilene v. Ivey* (Civ. App.) 182 S. W. 706.

**Examination of party.**—Where plaintiff claimed under a conveyance of land which a debtor received in exchange for his homestead, made within six months after exchange, and defendant claimed by purchase at a sale under a judgment against the debtor, plaintiff may be interrogated as to whether he holds the land for the debtor. *Witt v. Teat* (Civ. App.) 167 S. W. 302.

**Art. 3685. [2297] [2243] Refusal to answer, etc.**

Cited, *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404 (in dissenting opinion).

**Taking interrogatories as confessed.**—Where complainants did not refuse to answer certain interrogatories as certified by the notary, the court did not err in permitting complainants to testify, and in not regarding the interrogatories as confessed. *Connell v. Nickey* (Civ. App.) 167 S. W. 313.

Under this article answers to oral interrogatories cannot be taken as confessed because of party's failure to answer them. *Farmers' & Merchants' Nat. Bank of Abilene v. Ivey* (Civ. App.) 182 S. W. 706.

### CHAPTER FOUR

#### GENERAL PROVISIONS

<p>Art. 3687. Common law rules of evidence. 3688. Color or interest does not disqualify. 3689. Husband or wife not disqualified, except, etc. 3690. In actions by or against executors, etc., certain testimony not allowed. 3694. Copies of records of public officers and courts to be prima facie evidence. 3696. Copies and certificates from certain officers are evidence. 3697. Notarial acts and copies thereof are evidence. 3698. In suits against delinquent officers,</p>	<p>Art. 3700. Recorded instruments admitted in evidence without proof, when. 3703. Transcribed records, certified copies of, evidence, etc. 3707. Certified copies from heads of departments, evidence. 3708. Assessment or payment of taxes may be proven, how. 3710. Execution of notes and other instruments presumed, unless, etc. 3712. Suit on sworn account. 3713. Records of corporation are evidence.</p>
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## Article 3687. [2299] [2245] Common law rules of evidence.

### COMMON LAW RULES OF EVIDENCE

#### INTRODUCTORY

##### *I. Competency of Evidence in General*

**1. Nature and source of evidence in general.**—Testimony of a witness that a conversation between buyer and seller, whom he could not positively identify, when the contract was claimed to have been made, was substantially as testified to by the seller, held improperly excluded. *Stafford v. Patterson & Nelson* (Civ. App.) 184 S. W. 1095.

Consignee, in suit against carrier for negligent damages to goods, may show his own efforts to minimize damage. *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804.

**2. Results of tests, examinations and experiments.**—A party seeking to introduce in evidence public documents showing results of experiments must show that the conditions under which the experiments were made were similar to the conditions involved in the case. *Texas & P. Ry. Co. v. Graham & Price* (Civ. App.) 174 S. W. 297.

Evidence, in a passenger's action for injuries as to experiments by witness under substantially similar conditions, held admissible. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

**2½. Telephone conversations.**—In an action on a fire policy, evidence of a telephone request upon the agent of the insurer to change the location of the policy held admissible. *Delaware Ins. Co. v. Wallace* (Civ. App.) 160 S. W. 1130.

In action on assigned policy, evidence that insured telephoned office of insurer's agent and told some person there of the transfer held competent, though the witness did not know to whom insured was talking. *Northern Assur. Co., Limited, of London v. Morrison* (Civ. App.) 162 S. W. 411.

Statements made over the telephone, by the driver of an automobile which struck plaintiff, that he had bought the car, held admissible as to his intention to purchase it. *Olds Motor Works v. Churchill* (Civ. App.) 175 S. W. 785.

**3. Testimony by a witness as to his intent, motive or condition of mind.**—In an action for damages for mental anguish caused by the negligent failure to deliver a telegram to plaintiff's sister, which prevented the sister from being present with plaintiff immediately after her husband's death, evidence by plaintiff of her mental condition when the message was sent was admissible on the question of the necessity of her sister's presence. *Western Union Telegraph Co. v. Mooney* (Civ. App.) 160 S. W. 318.

Where newspaper market quotations were admitted in evidence to prove market value, witnesses were properly permitted to testify that they relied upon such newspaper quotations; it being admissible upon the issue of the credit to be given the quotations. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

On the issue of abandonment of homestead by moving to another place, the owner may testify as to his intention to return. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

In an action against a sleeping car company for loss of passenger's clothes, testimony of plaintiff as to mental anxiety or fear which was in fact unfounded held inadmissible. *Pullman Co. v. Moise* (Civ. App.) 187 S. W. 249.

**4. — Execution and delivery of contracts and conveyances.**—On the issue whether a deed absolute in form is, in fact, a mortgage, the grantor may testify whether the deed was executed to secure a debt, but not that he did not intend to execute a mortgage. *Kidd v. Sparks* (Civ. App.) 167 S. W. 799.

A conveyance by defendant canal corporation of its canal bed, not being ipso facto an abandonment of such land, testimony of its officers that there was no intention to abandon was admissible. *Lawson v. Port Arthur Canal & Dock Co.* (Civ. App.) 185 S. W. 600.

In suit on note executed by defendant to own order and indorsed in blank, evidence of defendant that he never intended to put it into circulation at all was admissible against plaintiff, who took after maturity. *Kanamam v. Gahagan* (Civ. App.) 185 S. W. 619.

Where defendant fire insurance company claimed that a policy had been canceled by mutual consent in a conversation between its agent and assured, the assured's explanation that he understood the policy was void only during certain foreclosure proceedings is admissible where the conversation was somewhat ambiguous. *Glens Falls Ins. Co. v. Walker* (Civ. App.) 187 S. W. 1036.

**10½. Testimony of agent as to agency.**—Testimony of agent is competent to prove parol agency, or to establish nature and scope of authority. *Alamo Live Stock Commission Co. v. Heimer* (Civ. App.) 192 S. W. 591.

**11. Testimony as to character or reputation.**—Where the only reputation plaintiff had in any particular locality was formed in a certain county, evidence of his reputation there four or five years before trial was not incompetent, especially where there was nothing to indicate that his reputation had since changed for the better. *Clark v. Hendricks* (Civ. App.) 164 S. W. 57.

**12. Evidence admissible by reason of admission of similar evidence of adverse party.**—Plaintiff having, without objection, testified to a matter pertinent to the issue, it was not error to permit another witness for plaintiff to testify to the same matter. *Lattimore v. Puckett & Wear* (Civ. App.) 161 S. W. 951.

In an action against a physician for malpractice, it was not an abuse of discretion to refuse to permit defendant's witnesses to illustrate with a manikin, the proper method of delivering a child, though similar evidence, offered by plaintiff, had been previously admitted. *Lee v. Moore* (Civ. App.) 162 S. W. 437.

In an action for injury to realty by the construction and operation of railroad yards, in which a witness for plaintiff was asked why the house was vacant, and replied that he was told that they wanted too much rent for it, defendant's counsel could ask

whether the witness was told why they wanted too much rent for it. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 165 S. W. 560.

Where, in an action for injuries to a brakeman, defendant offered proof that he was discharged by his former employer for intoxication, plaintiff was entitled to introduce a service letter given him by such employer, reciting that he had resigned and that his services were generally satisfactory. *Missouri, O. & G. Ry. Co. of Texas v. Love* (Civ. App.) 169 S. W. 922.

Where the question of a parol trust was in issue, one party, having introduced evidence of declaration of the deceased grantor, cannot complain that the other introduced similar evidence. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

Where a telegraph company made a telephone company its agent for delivery of a message, and parts of conversations between the agent and employes of the companies were received, the whole of such conversations should be received. *Western Union Telegraph Co. v. Oakley* (Civ. App.) 181 S. W. 507.

## II. Competency of Witnesses

14. **Knowledge or means of knowledge of facts, as affecting capacity.**—In an action against a carrier for conversion, testimony that witness could enumerate articles packed for shipment, and was present and helped pack the goods, held to qualify her to testify as to identity of property. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

15. **Age and maturity of mind.**—See C. C. P. art. 788, and notes.

The determination of the competency of children to testify will not be disturbed unless an abuse of discretion is shown. *Finch v. State*, 71 Cr. R. 325, 158 S. W. 510.

18. **Infamy or conviction of crime.**—See C. C. P. art. 788, and notes.

The deposition of a witness whose conviction for murder was suspended by appeal at the time of the taking of the deposition becomes incompetent for use at a trial after such conviction has been affirmed. *Berry v. Godwin* (Civ. App.) 188 S. W. 30.

One who has been convicted of murder is incompetent as a witness, although he is plaintiff in an action of trespass to try title to land which he claims as a home-  
stead. *Id.*

23. **Fiduciary or contract relations in general.**—An arbitrator is a competent witness to show what was in controversy before the arbitrators, what matters entered into their decision, and whether they were fair and impartial. *Holcomb v. Blankenship* (Civ. App.) 180 S. W. 918.

24. **Communications to or advice by attorney or counsel.**—Where, in an action on a contract, an attorney's fidelity, in the transaction in which such contract was executed, was attacked, the attorney could testify to the facts so far as necessary to defend his character, notwithstanding the rule against the disclosure of confidential communications. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

Where defendant sought to rescind the contract of her deceased husband sued on, and also attacked the fidelity of her husband's attorney in negotiating the contract letters written the attorney by the husband prior to the negotiations leading up to the contract, held not competent under the rule that an attorney may disclose confidential communications where his fidelity is attacked. *Id.*

27. — **Subject-matter of communications or advice in general.**—Statements contained in a letter written by a client to his attorney, which were to be used as answers to interrogatories and evidence upon the trial of the case were not privileged. *League v. Galveston City Co.* (Civ. App.) 192 S. W. 350.

30. — **Confidential character of communications or advice.**—Communications by an injured person to an attorney employed to get a settlement from the railroad company held not confidential. *Texas & P. Ry. Co. v. Spann* (Civ. App.) 173 S. W. 600.

31. — **Communications through or in presence or hearing of others.**—The testimony of an attorney as to what took place at a meeting between him, his client, a third person, and the third person's attorney was not incompetent as relating to a confidential communication in a suit between his client's heir and the third person, based on a contract executed at such a meeting. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

Statements by accused while carrying on a general conversation in the presence of his attorney and a third person are not privileged communications. *Johnson v. State*, 76 Cr. R. 346, 174 S. W. 1047.

A communication to an attorney was not a privileged one, where the parties had the same attorney and made communications in the presence and hearing of all for the information of all. *Minor v. Bishop* (Civ. App.) 180 S. W. 909.

32. **Persons entitled to assert privilege.**—A client's privilege as to confidential communications between him and his attorney may be claimed by his heir in a proper case until waived. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

34. **Opinion and expert testimony.**—The action of the trial court in admitting witnesses as competent to testify as to market value will not be revised in an appellate court, so long as reason has been exercised. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

Competency of a witness to testify as an expert is for the trial court, and its decision will not be disturbed unless manifestly wrong. *Texas & P. Ry. Co. v. Martin Bros.* (Civ. App.) 175 S. W. 707.

## III. Demonstrative Evidence

37. **Wounds and other injuries.**—Exhibition of injured leg to the jury held proper to show the extent of the injuries. *Texas Traction Co. v. Scoggins* (Civ. App.) 175 S. W. 1128.

38. **Compelling person injured to submit to examination by physicians.**—Where plaintiff removed dark glasses from his eyes and submitted them to the inspection of

the jury, he thereby waived the inviolability of his person, and it was error to refuse defendant's request for an inspection by experts. *Galveston, H. & S. A. Ry. Co. v. Chojnacky* (Civ. App.) 163 S. W. 1011.

In a personal injury action, the refusal of the court to appoint a committee of physicians to examine plaintiff held not error. *Chicago, R. I. & G. Ry. Co. v. Pemberton* (Civ. App.) 170 S. W. 108.

In a personal injury action, the refusal of the court to compel plaintiff to submit to an X-ray examination held not an abuse of discretion. *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 177 S. W. 137.

Whether a proper physical examination can be made before the jury is to be determined by the nature of the injuries and defendant is entitled to such examination, where the injuries have been exhibited to the jury, and where no suggestion that plaintiff will indicate pain has been made. *San Antonio & A. P. Ry. Co. v. Stuart* (Civ. App.) 178 S. W. 17.

In an action for injuries, it was not error to refuse an examination of plaintiff's leg except separately by defendant's expert witnesses before the jury, where such witnesses had already examined plaintiff. *Id.*

41. **Articles subject of or connected with controversy.**—The shoes which plaintiff wore when injured by the coming off of a belt while he was putting it on, being in the same condition as at the time of the accident, are admissible. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

43. **Writings submitted for comparison.**—A signature cannot be proved by comparison when the signature is not before the court. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

A disputed handwriting may not be compared by the court or jury with other writing used as a standard, unless the genuineness of the standard is admitted or has been established by clear proof. *Cow Boy State Bank & Trust Co. v. Roy* (Civ. App.) 174 S. W. 647.

In action for goods sold, where defendant denied ordering the goods or signing the contract, a letter written by defendant and bill of lading with his signature held properly admitted in evidence as a standard of comparing his signature. *Foutz & Zinkler v. Western Picture Frame Co.* (Civ. App.) 180 S. W. 943.

Where the original petition bearing the signatures of attorneys is not in evidence, the attorneys' signatures thereto cannot be considered as evidence that they are the same persons who wrote a letter notifying the defendant of the death of the plaintiff's intestate. *Grand Fraternity v. Mulkey* (Civ. App.) 185 S. W. 582.

#### IV. Documentary Evidence

47. **Admissibility of public or official records and certificates in general.**—Notice of view by jury—Maps.—A map from the land office was admissible in an action to define boundaries, though made subsequent to the beginning of the action. *Thatcher v. Matthews* (Civ. App.) 183 S. W. 810.

Recently made maps and plats of lands are of no value in determining a boundary existing 60 years before, such boundary being the bank of a river shown to have shifted since the grant. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

50. — **Judicial acts and records in general.**—Where defendant asserted plaintiffs' title was divested by a sale by their guardian during their minority, evidence of the minutes of the probate court and the deed of the guardian are admissible. *Shields v. Ferrine* (Civ. App.) 181 S. W. 232.

In suit by heirs for recognition as stockholders, documentary evidence that share issued to plaintiffs' ancestor was among assets of New Orleans decedent and had been sold pursuant to order of court, held admissible on issue whether plaintiffs' ancestor disposed of stock. *Condit v. Galveston City Co.* (Civ. App.) 186 S. W. 395.

52. — **Records of justices of the peace.**—In an action on a note, held error to admit as evidence the bond upon appeal from the justice's court. *Wilson v. Thompson* (Civ. App.) 186 S. W. 773.

55. — **Records and returns of surveyors.**—Field notes of subsequent surveys by a surveyor, not shown to have had any knowledge of the location of the original lines or corners, are inadmissible to show by their calls for the original surveys the location of the lines and corners thereof. *State v. Dayton Lumber Co.* (Civ. App.) 159 S. W. 391.

Field note book admitted by agreement of parties, so far as it related to certain surveys, should have been considered by the court in passing on the issues. *Crews v. Powers* (Civ. App.) 184 S. W. 363.

It was error to admit against objection, as evidence of a boundary line, a report to commissioners' court of a survey, where neither objector nor any one under whom he claimed had anything to do with the report. *Petty v. Wilkins* (Civ. App.) 190 S. W. 581.

In a boundary case record of a certificate in the Spanish language, properly translated, shown to be made by original surveyor of grant under which defendant claimed, which stated the location of a point designated on a map, held not admissible. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

In a boundary dispute, action of trial court in permitting plaintiff to read from a memorandum book of the county surveyor, containing data of applications to purchase school lands, memoranda concerning applications by defendant to purchase portions of sections, which was the register provided for in articles 3894 and 3895, Rev. St. 1879, held erroneous. *Id.*

56. — **Records kept by United States officers in general.**—In an action for conversion by a carrier on refusal of the shipper to pay an excessive freight rate, the award of the Interstate Commerce Commission, determining the proper rate for the shipment, was admissible in evidence. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

62. **Admissibility of transcripts and certified copies—Ancient instrument.**—Certified copies of ancient instruments are entitled to the same weight as the ancient instruments themselves. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

63. — **Judicial records and proceedings in general.**—A copy of an order of a court authorizing the receiver of a national bank to sell the assets of the bank, authenticated by the Comptroller of the Currency, as required by U. S. Comp. St. 1901, p. 669, § 884, but which order was never recorded or made a minute in any court, is inadmissible to establish such order as an order of a court of record. *Tourtelot v. Booker* (Civ. App.) 160 S. W. 293.

Records of the courts of a sister state may be proved by copies thereof authenticated as required by U. S. Comp. St. 1901, p. 677, § 905, or by copies duly examined by some witness, but it must first be shown that an order has been entered of record before proof thereof can be made in any of these forms. *Id.*

A certified copy of an unsigned report of commissioners to partition land held admissible, in connection with other evidence in trespass to try title, to show partition. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

72. **Admissibility of private writings and documents in general.**—In action on accident policy, physician's certificate that death was caused by paralysis of the heart due to tetanus held admissible to show compliance with requirement of policy as to furnishing notice of the accident, with full particulars thereof. *Commonwealth Bonding & Casualty Co. v. Hendricks* (Civ. App.) 168 S. W. 1007.

73. — **Corporate records and proceedings.**—In an action against a corporation for the balance due on its own stock purchased from plaintiff, where the defense was *ultra vires*, held, that the corporate records as to the written authority of its president to purchase the stock were admissible as showing whether authority had been given to him, but not as a conclusive circumstance on that issue. *W. R. Case & Sons Cutlery Co. v. Palsom* (Civ. App.) 170 S. W. 1066.

In an action for wood sold f. o. b. cars at A., in the absence of evidence as to the correctness of the statement in freight bills of the railroad as to the number of cords of wood on arrival at H., the exclusion of such bills was proper. *McLaughlin v. Terrell Bros.* (Civ. App.) 179 S. W. 932.

In suit to enforce materialman's claim against corporation, exclusion of its by-laws specifying powers of its president, who made the contract sued on, held erroneous. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

75. **Admissibility of conveyances, contracts and other instruments.**—In action for commission by party employed to sell land, where owner did not deny he executed deed to purchaser procured by plaintiff, and evidence was sufficient to show delivery, such deed was admissible to show owner accepted purchaser procured by plaintiff and delivered a deed to him. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

In trespass to try title, where plaintiff claimed under a deed which had previously in another action been held valid, the description of which applied on the ground to the land sued for, the deed was admissible. *Hays v. Hinkle* (Civ. App.) 193 S. W. 153.

76. — **Relation to matters in controversy in general.**—In action for broker's commission, deeds which would not disprove anything testified to by the purchaser procured by plaintiff, and had no tendency to show that plaintiff was not the procuring cause of sale, held properly excluded. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

77. — **Recitals of fact in general.**—A deed contained in an abstract of title which recites that grantors are the only heirs of the immediate preceding grantee and title holder upon the public records would not be a sufficient showing that the purported heirs are in fact heirs. *Sparkman v. Davenport* (Civ. App.) 160 S. W. 410.

Recitals as to payment of the purchase price in deeds under which defendants claimed might be considered in connection with other circumstances as tending to show payment. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

A statement in a deed, such as that the grantor was a married woman, held admissible for the purpose of identification, and to establish relationship, pedigree, etc. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

Where, in trespass to try title, the issue involved was the location of the old bed of a river, and defendant claimed under a town to which a grant was made, bounded by the old bed, a statement in a deed executed by the town with reference to the location of the old bed was admissible. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

A recital in conveyance by a husband that the land in question was not his homestead is competent evidence to show that at the time of the conveyance it had not been claimed by him as such. *Johnson v. Conger* (Civ. App.) 166 S. W. 405.

Recitals in proof of loss of land certificate and in an instrument transferring such certificate held admissible to prove that vendor claimed to own the land. *Dunn v. Epperson* (Civ. App.) 175 S. W. 837.

Such recitals held admissible to prove title of plaintiffs' predecessor. *Id.*

In action to recover for cars of wood sold f. o. b. A., exclusion of original freight bills of railroad to show number of cords of wood received in each car by defendant at H. held proper. *McLaughlin v. Terrell Bros.* (Civ. App.) 179 S. W. 932.

In trespass to try title to land sold under nonjudicial foreclosure of deed of trust which provided that trustee's deed should be evidence that trustee had legally executed trust, the deed established *prima facie* the posting of necessary notices. *Adams v. Zellner* (Sup.) 183 S. W. 1143.

An ancient deed is not proof of the fact recited of the grantor qualifying as survivor of the marital partnership; this presumably being a matter which can be shown by the court records of the proper county. *Ketchum v. Boggs* (Civ. App.) 194 S. W. 201.

79. — **Nature of instruments in general.**—In suit against attorney to recover amount realized by him in dealing with notes entrusted to him by clients, defendants in former suit, instrument, signed by plaintiff in former suit, which purported to "give, grant and will" notes to daughter, defendant in such suit, a plaintiff herein, held admissible. *Padgett v. Hines* (Civ. App.) 192 S. W. 1122.

A purported will which was never probated is inadmissible in evidence. *Jung v. Pe-termann* (Civ. App.) 194 S. W. 202.

85. — **Documents insufficient or incomplete when standing alone.**—Where a deed showed no ambiguity on its face, held error to exclude it on the assertion of counsel that there was no survey, plat, or streets, such as those given in the description; the burden of proving these facts being on subsequent purchasers claiming that the deed was insufficient. *Young v. Gharis* (Civ. App.) 170 S. W. 796.

87. **Admissibility of books of account.**—Where, in an action for gravel sold and delivered, a witness testified that the books of the seller would show the price and the number of pounds per cubic yard agreed on, and defendant showed that the witness had stated that the gravel was contracted for at a specified number of pounds to the cubic yard, the books were admissible. *Richard Cocks & Co. v. New Era Gravel & Development Co.* (Civ. App.) 168 S. W. 988.

88. — **Character of books in general.**—In an action against a railroad for goods lost in the burning of a store, a ledger, whose correctness showing the amount of cash sales and credit sales from the first of the year to the date of the fire was testified to by plaintiff, was properly admitted. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 164 S. W. 442.

Where it was shown that written slips, statements, and accounts constituted all the bookkeeping in plaintiff's business, and that they were regularly kept by himself and his clerk, it was error to exclude those made by the clerk. *Elias v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 166 S. W. 417.

In an action for the price of lumber sold, plaintiff's daybook, or journal, containing the first permanent entry of sales items taken from slips made out by yardmen, held admissible as a book of original entry. *Scruggs v. E. L. Woodley Lumber Co.* (Civ. App.) 179 S. W. 897.

In action for price of lumber, addition to name of party charged of the word "residence" held not such an alteration as to render plaintiff's account book inadmissible. *Id.*

Books of account are not admissible under the rule admitting accounts kept by the parties, where they do not contain items and charges made in the regular course of business. *Id.*

92. — **Entries made from memoranda or other information.**—Entries in books on information received by the witness from third person were not admissible in evidence. *Thrift & Edwards v. Holland* (Civ. App.) 183 S. W. 1189.

93. — **Purposes of proof in general.**—In partner's suit for dissolution and accounting, court properly refused to permit defendants to offer in evidence trial balance made from the firm's books, which would simply show they were in balance or out of balance, and not properly show net profits. *Tyler v. McChesney* (Civ. App.) 190 S. W. 1115.

96. **Admissibility of private memoranda and statements in general.**—In a bank's action on a draft drawn by contractors on a school district for the balance due under a contract, held, that the architect's final estimate was properly admitted in evidence. *Crowell Independent School Dist. v. First Nat. Bank of Benjamin* (Civ. App.) 174 S. W. 878.

In action for repairs to building, letter head of defendant with picture of building and the words, "Our Brass Foundry and Machine Shops," held admissible on question of defendant's ownership or control of the building. *Texas Mfg. Co. v. Fitzgerald* (Civ. App.) 176 S. W. 891.

A railway equipment register as to the dimensions of cars being admissible, it was proper to admit a memorandum, condensing the information desired, from the book. *McLaughlin v. Terrell Bros.* (Civ. App.) 179 S. W. 932.

In action on life policy written by fraternal order, held, that court properly excluded certificates of plaintiff, attending physician, and coroner, furnished insurer by plaintiff under policy, offered to show cause of death. *Brotherhood of American Yeomen v. Hickey* (Civ. App.) 191 S. W. 162.

97. — **Items of property and value thereof.**—In an action against a railroad for a stock of goods lost in the burning of a store, a tabulated statement or summary, prepared by plaintiff, showing the value of the goods, etc., was properly admitted; it being based upon testimony before the jury. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 164 S. W. 442.

98. **Admissibility of letters, telegrams, and other correspondence.**—A letter from an insurance company canceling a policy for failure to pay the premium, which was shown to the agent who had accepted a note for the premium and agreed to pay the amount to the company, was admissible in evidence against him in an action against him by the policy holder for damages. *Newman v. Tarwater* (Civ. App.) 159 S. W. 495.

In trover for conversion of a rice mixer, so much of a letter written by plaintiff to defendant as demanded possession of the machine and gave notice of possible damages flowing from refusal to deliver held admissible. *Texas Warehouse Co. v. Imperial Rice Co.* (Civ. App.) 164 S. W. 396.

Where the holder of an equitable interest in land wired defendants, who had already paid the purchase price to the agent of the vendor, to assist her in establishing her title and that she would protect them, but defendants refused, the telegram was inadmissible in a suit by the holder of the equitable title. *Meador Bros. v. Hines* (Civ. App.) 165 S. W. 915.

In an action by a railroad against a street railway for breach of contract to keep a subway free from inflammable material, a letter with an attached bill against defendant for damages held inadmissible as proof of the claim. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Civ. App.) 171 S. W. 1103.

In action for damages to shipment, letter written connecting carrier's claim agent held admissible to show that notice of the claim was given as required by the contract. *Galveston, H. & S. A. Ry. Co. v. Itule* (Civ. App.) 172 S. W. 1123.

In action to recover on defendant's promise to pay for part of plaintiffs' wheat crop which had been ground at a mill and delivered to defendant, letters from the mill to defendant and from him to the mill, properly proven, held material and relevant. *Mendiola v. Garza Bros.* (Civ. App.) 185 S. W. 391.

99. **Maps, plats, and diagrams.**—In suit by the buyer of lands for false representations of the seller's agent as to the quantity, a map furnished the buyer by the agent held admissible. *Vaden v. Buck* (Civ. App.) 184 S. W. 318.

In a suit to enjoin enforcement of an order of Railroad Commission requiring plaintiff to build a station at a designated place, if plaintiff's road was in fact, if not in name, built and owned by another railroad company, a map issued by immigration department of such other railroad showing place indicated by Railroad Commission as a station on plaintiff's road was admissible. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas* (Civ. App.) 193 S. W. 770.

101. **Photographs—Physical appearance and identity of persons.**—Photographic tracings showing the pulsation of the heart of one suing for personal injuries, as well as photographs showing his impairment of vision and injuries to other organs, when shown to have been taken with scientific accuracy, are properly received in evidence. *Missouri, K. & T. Ry. Co. of Texas v. Heacker* (Civ. App.) 168 S. W. 26.

Explanation of evidence of physician attending plaintiff switchman, injured while in the employ of the defendant, by X-ray photographs of plaintiff's anatomy after injury, is admissible, if preliminary evidence has established the correctness of the photographs. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

102. — **Condition of premises.**—In an action for death of plaintiffs' decedent at a railroad crossing, photograph held admissible in evidence, although in a certain position it showed a car different from the car which stood there at the time of the accident. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

103. **Books and other printed publications.**—A published tariff, not affecting an initial carrier, may be considered in determining the through rate on an interstate shipment from a combination of the local rate of the initial carrier and the published rate of the other carrier. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

In an action for the price of wood in which defendant claimed shortage, a copy of the American Railway Equipment Register, with testimony to its general use, was admissible as to the capacity of freight cars. *McLaughlin v. Terrell Bros.* (Civ. App.) 179 S. W. 932.

In an action for damages for negligent transportation of stock, it is not error to exclude government reports of tests of shrinkage of stock in transportation, where there is nothing to show that they are accurate, authentic, or that the tests embraced therein were made under similar conditions. *Missouri, K. & T. Ry. Co. of Texas v. Dale Bros. Land & Cattle Co.* (Civ. App.) 179 S. W. 935.

In action for delay in delivering telegram, preventing addressee from attending funeral, the admission of a timetable of a railroad in force at the time was not error. *Mansell v. Western Union Telegraph Co.* (Civ. App.) 182 S. W. 1178.

106. — **Mortality tables and tables of expectancy of life.**—Standard mortality table, used generally by reputable life insurance companies for years, held admissible to show injured person's life expectancy. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

In action for death of engineer in a railway wreck, there was no error in admitting American life insurance table of mortality. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

108. **Compelling production of documents**—Nature of document and relation to issue.—Where suit of shipper of live stock for damages from negligence in handling was not based on written contract, the court did not err in failing, without any request, to require plaintiff to produce bill of lading or other written contract. *International & G. N. Ry. Co. v. Sutherland* (Civ. App.) 189 S. W. 575.

109. — **Notice in general.**—Where an original letter was in the hands of the addressee, notice to defendant who had no right or control thereof was insufficient to obtain it for use at the trial. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

116. — **Examined copies of records.**—In an action to recover on a judgment of another state, proof by witness of the attached copy as a compared copy of the judgment on the original docket of the court of such state is admissible. *Wallace v. Schneider* (Civ. App.) 185 S. W. 333.

117. — **Preliminary evidence for authentication in general.**—A recital therein to the identity of the signer of a waiver relinquishing a widow's right to administer is not sufficient to make it admissible. *Kimmons v. Abraham* (Civ. App.) 158 S. W. 256.

Where the original instrument is an archive of a foreign government and it is not possible to determine its genuineness by any record or other evidence within the jurisdiction of the court, some extrinsic evidence of the execution or genuineness of such instrument will be required before admitting it in evidence. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

A copy of a record of birth kept in a foreign country is inadmissible in evidence without proof of the existence of a law in the foreign country requiring the keeping of such records. *Guerra v. San Antonio Sewer Pipe Co.* (Civ. App.) 163 S. W. 669.

A copy of a record of birth kept in a foreign country is inadmissible in evidence, where there is no proof of the genuineness of the original record or of the copy. *Id.*

120. — **Proof of authority to execute.**—An assignment of a judgment executed by an agent of the judgment creditor is not admissible in evidence until the authority of the agent has been proved. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

Where undisputed evidence of a managing partner showed that he had express authority to execute note sued upon, there was no error in admitting note as evidence, although defendants had denied its execution. *Hill v. First State Bank of Oakwood* (Civ. App.) 189 S. W. 984.

126. — **Form and sufficiency in general.**—The opinion of the Supreme Court of a sister state, not published as an opinion of the court, is admissible in evidence only as a record and judicial proceeding of the Supreme Court, and must be authenticated as prescribed by Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677). *Whited v. Johnson* (Civ. App.) 167 S. W. 812.

In an action for negligent death, a written statement found near the place of the accident held properly received in evidence as a statement by decedent as against the objection that it had not been properly identified. *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880.

Under Rev. St. U. S. § 906, copies of deeds recorded in a sister state not duly authenticated are inadmissible. *Newsom v. Langford* (Civ. App.) 174 S. W. 1036.

Under Rev. St. U. S. § 882, and Act Cong. July 26, 1892, § 3, a copy of a part of the approved roll of Seminole freedmen, within Act May 27, 1908, § 3, not authenticated by any seal, is inadmissible. *Id.*

A land certificate is not inadmissible because it fails to show the seal of the officer taking the acknowledgment, or his recital that he affixed the seal. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

131. — **Books of account.**—The correctness of an account for supplies and labor on an automobile cannot be proved by a witness who did not make the entries, and who neither claimed nor had any personal knowledge thereof. *Randle v. Barden* (Civ. App.) 164 S. W. 1063.

The correctness of an account for supplies and labor on an automobile could not be proved by a witness, whose testimony was based on the fact that he was superintendent of the shops where the car was repaired, and that the time slips from which entries were made were made out and signed by men under him who actually did the work, delivered to the witness, and by him delivered to the office. *Id.*

133. — **Memoranda and statements.**—An inventory of a stock of goods, made jointly by plaintiff and his wife, was properly admitted in evidence, where plaintiff testified as to its correctness; it not being necessary for the wife to testify. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 164 S. W. 442.

Time slips made by mechanics repairing an automobile could only be admitted on their testimony as to their accuracy in a case where the shopbooks in which they were entered or the bookkeeper are not available, and it was error to admit them on the testimony of the foreman, identifying them as the slips turned over to him for delivery to the office, though, if he had signed them and made the other necessary preliminary proof, they would have been admissible. *Randle v. Barden* (Civ. App.) 164 S. W. 1063.

134. — **Letters, telegrams and other correspondence.**—An indorsement on a letter, sent by an insurer's state agent to its home office, of the words, "Received June 11, 1906," was not of itself evidence of the receipt of the letter, in the absence of connecting proof that the party making the indorsement represented the insurance company, and had authority to make it. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 163 S. W. 396.

136. — **Maps, plats and diagrams.**—A plat of land is not admissible as independent evidence on the mere testimony of a witness that he saw the surveyor make it, but did not know of his own knowledge that it was correct. *Kelley v. Fain* (Civ. App.) 168 S. W. 869.

It was a proper mode to prove the correctness of a survey as to a portion of which the surveyor had to rely on the notes of a county surveyor to have such county surveyor swear that his notes so used were correct, while the other also swore that his were correct. *Ashley v. Holland* (Civ. App.) 180 S. W. 635.

Alleged plat of town site based on survey not made from sufficient data or copied from another plat, the authenticity of which was not shown and the absence of which was not accounted for, held inadmissible. *Joyce v. City of Mt. Vernon* (Civ. App.) 184 S. W. 626.

Copy of plat not shown to be original or correct plat of town site or not to be producible, held not admissible, except to show that land had been laid off into lots. *Id.*

139. **Determination of question of admissibility.**—Where a writing was properly received under the evidence when offered, the fact that subsequent evidence attacked the identity and genuineness thereof did not affect the ruling. *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880.

141. **Conclusiveness and effect—Judicial and other records.**—A verified petition for probate reciting that testatrix was the widow of R. S., together with a former deed to her reciting that she was then the wife of R. S., held sufficient to show that the husband had predeceased her. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

The court admitting in evidence copies of records of a sister state, duly authenticated, cannot give effect to the records accorded to them by the laws of the sister state, unless the laws are proved. *Newsom v. Langford* (Civ. App.) 174 S. W. 1036.

142. — **Private contracts and other writings.**—Recitals of consideration in deeds on a resale by the grantee in a deed given as security, though admissible as a circumstance to show the value of the land, were not conclusive. *Norton v. Lea* (Civ. App.) 170 S. W. 267.

In action of trespass to try title on the ground of nonpayment of balance evidenced by a note, where there was no evidence save a recitation in the deed of the land to contradict defendant's testimony that the note was not part of the consideration, but that the recitation was fraudulently inserted in the deed, unknown to defendant, the probative force of the recitation was so weak that it should not be considered as any evidence in contradiction of the otherwise undisputed testimony of defendants. *Miller v. Poulter* (Civ. App.) 189 S. W. 105.

144. — **Books and other printed publications.**—A pamphlet or other document, purporting to have been used by the government or under the authority of some department of the government, has, prima facie, no more weight as evidence, nor greater authenticity or verity, than documents issued by other authority. *Missouri, K. & T. Ry. Co. of Texas v. Dale Bros. Land & Cattle Co.* (Civ. App.) 179 S. W. 935.

145. — **Effect of introducing part of document or record.**—In an action by shippers of live stock for delay in transit, where plaintiffs read in evidence part of the contract of shipment, the clause that the stock were not to be transported within any specified time, etc., not contrary to the federal statute touching the watering, etc., of stock



in transit, and not an attempt to contract against defendants' negligence, was admissible as showing the entire contract. *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384.

### V. Reception of Evidence at Trial

150. **Necessity and scope of proof—Matters not controverted at trial.**—Where, in trespass to try title, defendant pleaded that a deed made by plaintiff conveyed a half interest, and the court so construed it, and plaintiff did not contend that the deed was fraudulent and without consideration, unless construed to convey more than a half interest, there was no error in refusing to permit plaintiff to testify that she only intended to convey a half interest. *Pearce v. Heyman* (Civ. App.) 158 S. W. 242.

Exclusion of evidence to prove plaintiff's employment held not error, where execution of written employment contract was not disputed. *Williams v. Phelps* (Civ. App.) 171 S. W. 1100.

152. **Placing witnesses under the rule.**—There was no abuse of discretion in refusing to permit a witness to testify after he had been released from the rule on the grounds that he would not be used as a witness. *Weatherford, M. W. & N. W. Ry. Co. v. Thomas* (Civ. App.) 175 S. W. 822.

Permitting counsel to consult with a witness under the rule and tell him what another witness had testified, and to ask him if that evidence was true, and then allowing the witness to testify, is not an abuse of discretion where it does not appear to have influenced the testimony of the witness, and the case was tried by the judge. *Missouri, K. & T. Ry. Co. v. Pacheco* (Civ. App.) 185 S. W. 1051.

The discretion of the trial judge in permitting a witness to testify who has violated the rule of exclusion by hearing the testimony of other witnesses, will not be reversed, unless there is a clear abuse of discretion. *Id.*

That witness talks to another during trial, after rule has been invoked, does not disqualify him; but court may in its discretion refuse to permit him to testify. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

On rule for exclusion of witnesses, refusal to exclude next friend, suing for minor, after the minor's testimony has been given was not abuse of discretion in absence of showing that defendants were prejudiced. *Caffarelli Bros. v. Bell* (Civ. App.) 190 S. W. 223.

153. **Offer of proof.**—Where the court asked counsel for defendant whether he had any testimony to offer, and the counsel replied that he rested, an assignment that the court, over the objection of defendant, made defendant rest his case before introducing all his testimony was without merit. *Pope v. Commonwealth Bonding & Casualty* (Civ. App.) 166 S. W. 1195.

155. — **Evidence admissible in part or for particular purpose.**—Where a single declaration of a testator on the issue of undue influence was offered as a whole and was inadmissible in part, it should have been excluded upon objection. *Scott v. Townsend*, 166 S. W. 1138, 106 Tex. 322, reversing judgment (Civ. App.) 159 S. W. 342.

Where, in an action for the price of machinery, the buyer relied on a breach of warranty, a letter by the buyer's manager to the seller with reference to the working of the machinery was admissible only to show notice to the seller of the defective machinery. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 167 S. W. 256.

Where testimony, inadmissible in part, is offered as a whole, error cannot be predicated upon its rejection. *Colorado County v. Travis County* (Civ. App.) 176 S. W. 845.

Where a contract is offered in evidence as a whole, and part is illegal, and tends to establish a pleaded defense, rejection of it is authorized. *Gulf, C. & S. F. R. Co. v. Winn Bros.* (Civ. App.) 178 S. W. 697.

Testimony tending to establish one of two issues on trial incompetent or irrelevant as to the other issue is not inadmissible for such reason; as the duty is on the party against whom it is offered to request its limitation to the issue on which it is admissible. *Wilson v. Avery Co. of Texas* (Civ. App.) 182 S. W. 884.

Where defendant railroad company offered witness' written statement partly competent and partly incompetent, exclusion on plaintiff's objection held not error. *Missouri, K. & T. Ry. Co. of Texas v. Washburn* (Civ. App.) 184 S. W. 580.

Where certain parts of excluded testimony were hearsay, it could not be held that the court erred in excluding it as a whole. *Nevill v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 187 S. W. 388.

160. **Application of personal knowledge of jurors.**—Alleging and proving physical and mental condition which would necessarily result in loss of earning capacity is sufficient pleading and proof of diminished earning capacity, which may be ascertained by the jury from their common knowledge of men. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

161. **Effect of admission of evidence.**—Evidence irrelevant to any issue, though admitted by agreement, cannot be considered in rendering judgment. *State v. Country Club* (Civ. App.) 173 S. W. 570.

164. **Cumulative evidence in general.**—That other persons have testified to the same effect does not warrant exclusion of testimony as cumulative, when the other witnesses were subject to the criticism of interest and the proposed witness was not. *Hovey v. See* (Civ. App.) 191 S. W. 606.

168. **Right to object to evidence.**—Where appellant failed to test accuracy of witness as to stated percentage of depreciation, it could not complain on appeal. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

169. — **Estoppel or waiver.**—Where a party withdrew his objection to certain evidence which has been excluded, he did not thereby waive his right to object to leading questions asked the witness, when he was recalled to testify. *Yellow Pine Paper Mill Co. v. Lyons* (Civ. App.) 159 S. W. 909.

Error in admission of opinion evidence of a fact is waived by failure to object to like evidence thereof. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

Any error in admitting evidence that board was replaced and fastened after accident held waived, where photograph made after the accident was introduced, and witness testified with reference thereto. *Decatur Cotton Seed Oil Co. v. Taylor* (Civ. App.) 182 S. W. 401.

In a switchman's action for injuries against his employing railroad, the defense waived the right to object to a hypothetical question to a medical witness, as to whether the accident to plaintiff could or probably would result in paralysis, by its failure to object to other like testimony. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

170. **Time for objection.**—Where a party failed to object to a question asked a witness before answer, he could not, on appeal, urge his objection to the answer. *Glens Falls Ins. Co. of Glens Falls, N. Y., v. Melott* (Civ. App.) 174 S. W. 700.

In tenant in common's action for contribution, objection to testimony concerning improvement of adjacent street not alleged in the petition held interposed in time, and not waived. *Stephenson v. Luttrell* (Sup.) 179 S. W. 260.

Objection to shipper's testimony as to damage to stock shipped, not made until after he had fully testified, was too late to afford ground of exception. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

Error in the admission of testimony, not seasonably objected to, cannot be considered on appeal. *Niles v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 748.

171. **Sufficiency and scope of objection.**—An objection to a question as calling for an opinion as to the fact in issue does not support an assignment that the witness was not qualified to express an opinion. *Texas & N. O. R. Co. v. Francis* (Civ. App.) 165 S. W. 40.

In an action for negligence, where defendant objected and reserved a bill of exceptions to plaintiff's testimony that defendant said he had insurance, he was not required to ask that the cause be withdrawn from the jury and continued. *Carter v. Walker* (Civ. App.) 165 S. W. 483.

Objections to testimony should be made to questions or by motion to exclude answers, giving reasons, so that trial court may rule on objections made. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

A party objecting to evidence should state his objections clearly and specifically, that they may be understood by the court and obviated by the opposing party. *Kansas City, M. & O. Ry. Co. of Texas v. James* (Civ. App.) 190 S. W. 1136.

172. — **General or specific.**—In an action for negligent carriage of cattle, error in the admission of evidence for plaintiff of difference in the value of cattle when loaded and on their arrival was not sufficiently presented by the general objection that evidence "of any difference in value" between time of loading and of arrival would be incompetent. *Kansas City, M. & O. Ry. Co. of Texas v. James* (Civ. App.) 190 S. W. 1136.

173. — **Statement of grounds.**—District Court Rule 57 (142 S. W. xxi), providing that exceptions to the admission of evidence shall not be sustained where no reason is assigned for objecting thereto, if the evidence is competent, does not permit dragnet objections which do not specify the objections to the evidence offered. *Tompkins v. Pendleton* (Civ. App.) 160 S. W. 290.

An objection that offered evidence is incompetent, irrelevant, and immaterial is not sufficiently specific unless the real nature of the objection is so plain that the general phrase is sufficient to indicate it. *St. Louis, B. & M. Ry. Co. v. Fielder* (Civ. App.) 163 S. W. 606.

Error in admitting a letter in evidence will not be reviewed, where the bill of exceptions shows that no reason was given for objection to its introduction. *Draughon's Practical Business College v. Dorsett* (Civ. App.) 166 S. W. 495.

The exclusion of evidence rejected on one objection cannot on appeal be justified on a ground not raised. *King County v. Martin* (Civ. App.) 173 S. W. 960, judgment affirmed on rehearing, 173 S. W. 1200.

Error cannot be predicated on the admission of testimony of value, no reason for its inadmissibility having been given in the objection thereto. *Mendiola v. Gonzales* (Civ. App.) 185 S. W. 389.

174. — **Scope and questions raised.**—Testimony that, after the services were rendered to defendant's married daughter, defendant orally promised to pay if the daughter's husband did not, while objectionable because showing a contract in contravention of the statute of frauds, was properly received over objection that the promise, having been made after the services were rendered and not being in writing, was not binding on defendant. *Johnson v. Tindall* (Civ. App.) 161 S. W. 401.

In a personal injury action by a railroad brakeman, evidence tending to show his freedom from contributory negligence held admissible on general objection, as against the contention that it showed negligence of defendant not pleaded. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

Objections to the admission of evidence not urged in the court below cannot be urged on appeal. *Houston Oil Co. of Texas v. Drumwright* (Civ. App.) 162 S. W. 1011.

175. — **Evidence admissible in part.**—Overruling of objections to testimony as a whole, part of it being unobjectionable, is not error. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 194 S. W. 458; *Hutcheson v. Massie* (Civ. App.) 159 S. W. 315; *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138; *Brown v. State*, 71 Cr. R. 353, 162 S. W. 339; *Sanford v. John Finnigan Co.* (Civ. App.) 169 S. W. 624; *Ratliff v. Wakefield Iron & Coal Land Improvement Co.* (Civ. App.) 172 S. W. 198; *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880; *St. Louis Southwestern Ry. Co. of Texas v. Moore* (Civ. App.) 173 S. W. 904; *St. Louis, I. M. & S. Ry. Co. v. Wallace* (Civ. App.) 176 S. W. 764; *Texas Cent. R. Co. v. Claybrook* (Civ. App.) 178 S. W. 580; *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295; *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119; *Galveston, H. & S. A. Ry. Co. v. Vogt* (Civ. App.) 181 S. W. 841; *Missouri, K. & T.*

Ry. Co. of Texas v. Washburn (Civ. App.) 184 S. W. 580; Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 184 S. W. 1070.

Where evidence is offered as a whole, while a part of it is incompetent and objected to on the ground of incompetency of such part, and no offer is made to introduce the relevant part only, it is not error to exclude the evidence in its entirety. Magee v. Paul (Civ. App.) 159 S. W. 325.

In a will contest on the ground of the contestee's undue influence over the testator, contestee's declaration of ill feeling toward the contestant, or of an intention to induce testator to exclude her from a share in his estate, held admissible in toto, where the objections were valid only to parts of such declarations. Scott v. Townsend (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

A general objection to the admission in evidence of deeds was properly overruled where appellant was not entitled to have the instruments wholly excluded but merely to have their consideration limited to the issue upon which they were admissible. Sullivan v. Fant (Civ. App.) 160 S. W. 612.

General objections to the admissibility of a deed in evidence in trespass to try title were properly overruled if the deed were admissible as to any of the parties upon any issue. *Id.*

In action for injuries, testimony of physician as to examination of plaintiff held properly admitted over the objection, made to it as a whole, that it was based on information furnished by plaintiff, as some of the facts detailed were not necessarily derived from that source. Paris & G. N. R. Co. v. Flanders (Civ. App.) 165 S. W. 98.

A general objection that testimony is not admissible at all should not be sustained, where it is material and admissible for any purpose. Commonwealth Bonding & Casualty Co. v. Hendricks (Civ. App.) 168 S. W. 1007.

Where objections to report of acts of state surveyor went to the whole report and did not call the court's attention to objectionable matter consisting of argument and opinions, the court held not required to exclude such objectionable matter. Denton v. English (Civ. App.) 171 S. W. 248.

Error cannot be predicated on objection to the admission of two instruments, where one was admissible. Crowell Independent School Dist. v. First Nat. Bank of Benjamin (Civ. App.) 174 S. W. 878.

It was not error to overrule an objection which did not point out the particular part of an interrogatory objected to, and which did not separate the objectionable portion from the part admissible. Smith v. Guerre (Civ. App.) 175 S. W. 1093.

Where evidence was in part material, a general objection of immateriality will not warrant its exclusion. Hahl v. McPherson (Civ. App.) 176 S. W. 804.

A lawyer's testimony as to his qualifications, over those of the average man, in regard to knowledge of the human body and its injuries, held properly admitted over the objection that it was argumentative, where only part of it was objectionable. Texas & P. Ry. Co. v. Sherer (Civ. App.) 183 S. W. 404.

An objection to evidence admissible in part should separate the admissible evidence from that which is inadmissible. Briggs-Weaver Machinery Co. v. Pratt (Civ. App.) 184 S. W. 732.

Where part of a question and answer was admissible, and part inadmissible, the inadmissible part should have been segregated and proper objection made thereto. Street v. J. I. Case Threshing Mach. Co. (Civ. App.) 188 S. W. 725.

Admission of testimony of physician that plaintiff was very nervous, restless, and could not sleep at nights, over the objection that it was hearsay, was not error, the only portion that was hearsay being the reference to sleeping at nights. Caffarelli Bros. v. Bell (Civ. App.) 190 S. W. 223.

An assignment of error to the admission of testimony which was admissible only to impeach a witness cannot be sustained where only the general objection was made and no special charge limiting its effect was requested. Earhart v. Agnew (Civ. App.) 190 S. W. 1140.

**176. Motion to strike out—Grounds and purpose in general.**—A collateral oral contract to pay the debt of another being within the statute of frauds (Vernon's Sayles' Civ. St. 1914, art. 3965), testimony by plaintiff that defendant made such an agreement is incompetent to show an indebtedness on defendant's part and should be stricken. Johnson v. Tindall (Civ. App.) 161 S. W. 401.

Where evidence when received was admissible under the issues as then disclosed by the pleadings and the proof, but thereafter the evidence became immaterial because of the withdrawal of the issue under which it was admissible, the remedy was by motion to strike out the evidence. Missouri, O. & G. Ry. Co. v. Boring (Civ. App.) 166 S. W. 76.

**178. — Necessity of previous objection.**—When evidence is not objected to when offered, unless good reason for the delay is shown, the court has a wider discretion in passing upon its admissibility upon motion to strike out. Sockwell v. Sockwell (Civ. App.) 166 S. W. 1188.

**180. — Statement of grounds.**—An objection to evidence and a motion to strike out the answer failing to state the ground of objection is insufficient. St. Louis, B. & M. Ry. Co. v. Fielder (Civ. App.) 163 S. W. 606.

**181. — Evidence admissible in part.**—Where evidence was in part admissible, a general objection that it was a conclusion cannot be sustained. San Antonio, U. & G. R. Co. v. Galbreath (Civ. App.) 185 S. W. 901.

Objection to whole answer, though part of it is competent, held sufficient, where opinion of a witness as an expert is sought on an improper subject, and the parts of the answer are difficult to separate. Da Moth & Rose v. Hillsboro Independent School Dist. (Civ. App.) 186 S. W. 437.

Where a part of the testimony objected to as a whole was not hearsay, the objection was ineffectual to reach any part of the evidence to which it might be pertinent. Wichita Falls Traction Co. v. Berry (Civ. App.) 187 S. W. 415.

184. **Effect of failure to object or except.**—In an action on a benefit insurance certificate, where no objection was made at the trial to the manner of proving the loss of the certificate and its contents, no question could be raised relative thereto on appeal. *Sovereign Camp Woodmen of the World v. Ruedrich* (Civ. App.) 158 S. W. 170.

In an action against a railroad for a penalty for overcharge, plaintiff's testimony that defendant's agent told him that \$35 was the highest rate permitted by the Railroad Commission, not objected to, was sufficient to establish the fact of the rates fixed by the Commission, though not the best evidence thereof. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 163 S. W. 376.

A party who fails to object to a deed, when it is introduced in evidence, waives any objection to it. *Coleman v. Luetcke* (Civ. App.) 164 S. W. 1117.

Where inadmissible testimony was received without objection, and there was no motion to strike it out, the refusal to charge the jury not to consider the testimony was not erroneous. *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 680.

The admission of the testimony of witnesses called by the court on its own motion is not reviewable, where no objection was urged to the testimony at the time of its introduction. *Fitzgerald v. Fitzgerald* (Civ. App.) 168 S. W. 452.

The uncontradicted statement of the conclusion of a railway agent as to an interstate rate, admitted without objection, is sufficient proof of the rate. *Wichita Falls & W. Ry. Co. of Texas v. Asher* (Civ. App.) 171 S. W. 1114.

Assignments of error in admitting certain evidence cannot be considered, where there is nothing showing that appellant objected to the testimony. *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739.

Admission of evidence having been without objection, error cannot be predicated thereon. *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619.

The overruling of an objection to testimony cannot be reviewed, where no exception to the court's action appears to have been taken. *St. Louis Southwestern Ry. Co. of Texas v. Moore* (Civ. App.) 173 S. W. 904.

Where there was no objection below that hypothetical question did not correctly present the evidence, error therein, if any, was not ground for reversal. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

Admission of evidence to which an objection was not made and exception saved to the overruling thereof is not reviewable. *Unknown Heirs of Buchanan v. Creighton-McShane Oil Co.* (Civ. App.) 176 S. W. 914.

Failure to raise the objection of insufficiency of evidence to sustain the verdict in the trial court precludes raising the objection for the first time on appeal. *Hayes v. G. A. Stowers Furniture Co.* (Civ. App.) 180 S. W. 149.

On issue of attorney's fees allowed by *Vernon's Sayles' Ann. Civ. St. 1914, art. 4746*, upon the failure of an insurance company to pay loss after demand, in interrogating expert witnesses, in absence of objection, recitation of what was done by counsel in preparing case held not reversible. *American Nat. Ins. Co. v. Hollingsworth* (Civ. App.) 189 S. W. 792.

Whether a record of one county of the certified copy of a deed taken from the records of another county is admissible is not raised where no objection was made to its introduction or any ground therefor. *Vann v. George* (Civ. App.) 191 S. W. 585.

Failure to object to certain testimony furnishes no ground for admission of similar testimony properly objected to; a proposition which is a rule for the trial court. *Slyden v. Palmo* (Sup.) 194 S. W. 1103.

185. **Cure of error.**—Error in permitting secondary evidence of the contents of an instrument is not cured by a cross-examination eliciting the same testimony. *Galveston, H. & S. A. Ry. Co. v. Kellogg* (Civ. App.) 172 S. W. 180.

186. **Harmless error.**—In eminent domain, the exclusion of evidence admissible as an admission by plaintiff that his land was not of the value asserted held prejudicial. *Trinity & B. V. Ry. Co. v. Orenbaum* (Civ. App.) 173 S. W. 531.

In an action for damages to shipment of cattle, any error in allowing witness to testify as to condition of market, based on a telegram not originally admissible in evidence, held not ground for reversal. *Texas & P. Ry. Co. v. White* (Civ. App.) 174 S. W. 953.

#### VI. Admissibility of Evidence at Former Trial or in Other Proceeding

187. **Grounds for admission in general.**—A stenographer's transcript of the testimony of a physician in another case could not be used as a basis of the physician's competency to testify in the case on trial. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

188. **Death or disability of witness.**—On second trial of a case, the testimony of a witness on the first, since deceased, is admissible on behalf of either party, when properly proved. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

189. **Absence of witness.**—Under exception to hearsay rule, witness being beyond the court's jurisdiction, his testimony given on the first trial on substantially the same issue, where there was opportunity for cross-examination, is admissible on a new trial. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 194 S. W. 458.

192. **Identity of parties and issues.**—Issues on two trials held substantially the same, relative to admissibility on second trial of testimony given on first by witness since beyond court's jurisdiction. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 194 S. W. 458.

194. **Mode of proof.**—One who heard a witness, since deceased, testify on a former trial, may be utilized to prove the former testimony for the purposes of a second trial. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

## RULE 1. WITNESS MAY BE SWORN AND EXAMINED, HOW

*I. Examination of Witnesses in General*

4. **Questions assuming facts.**—Question asked accused by his counsel as to what he meant if he made a certain statement held properly excluded, where he denied making such statement and had not withdrawn his denial. *Hiles v. State*, 73 Cr. R. 17, 163 S. W. 717.

Questions as to accused's abortion, etc., held objectionable as assuming facts. *Harrison v. State* (Cr. App.) 191 S. W. 548.

5. **Leading questions.**—Questions as to what deceased and accused were talking about at the time of the killing, and whether deceased attempted to strike his wife and was prevented by accused, are not leading. *Rodriguez v. State*, 71 Cr. R. 108, 158 S. W. 537.

The state should not, as a rule, be permitted to ask leading questions. *Fox v. State*, 71 Cr. R. 318, 158 S. W. 1141.

A question to the prosecutrix as to whether she would have yielded to defendant but for his promise to marry her was not objectionable as leading. *Black v. State*, 71 Cr. R. 621, 160 S. W. 720.

An objection that a question is leading is addressed to the trial court's discretion. *Norton v. Lea* (Civ. App.) 170 S. W. 267.

The counsel for the state should never by his questions suggest an answer to a friendly witness. *Carter v. State* (Cr. App.) 170 S. W. 739.

In an action for fire set by defendant's locomotive, a question to a witness, "Was there any other means known to you by which the fire could have caught, except from that passing train?" was not objectionable as leading. *Arey v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 170 S. W. 802, judgment affirmed *St. Louis Southwestern R. Co. of Texas v. Arey* (Sup.) 179 S. W. 860.

Question to a witness whether her husband prior to his death acquired the interests of his brothers and sisters in the land in controversy by deed or deeds claimed to have been lost held not objectionable as leading. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 171 S. W. 537.

A leading question is one which may be answered in the affirmative or negative, and suggests the desired answer in a matter material to the issue. *Hill v. State*, 76 Cr. R. 269, 173 S. W. 1022.

Questions of prosecuting attorney in a murder trial whether deceased stopped running before he was killed held not leading. *Taylor v. State* (Cr. App.) 180 S. W. 242.

And the question whether witness saw the parties all the time before deceased was killed held not leading. *Id.*

In an action for commission for effecting a sale of land, it is improper to allow leading questions to the plaintiff broker as to whether defendant did not promise under stated circumstances to pay the commission. *Britain v. Rice* (Civ. App.) 183 S. W. 84.

In prosecution for seduction, it was not improper to permit such questions as, "State whether or not you loved the defendant," "State whether or not you would have submitted to the defendant that night if you had not loved him." *Gleason v. State* (Cr. App.) 183 S. W. 891.

Questions as to witnesses' knowledge of accused's abortion, etc., held objectionable as leading. *Harrison v. State* (Cr. App.) 191 S. W. 548.

A question which does not suggest the answer, although it may be answered "Yes" or "No," is not leading. *Marta v. State* (Cr. App.) 193 S. W. 323.

Permitting leading questions is within sound discretion of the trial court, and, in the absence of a showing of abuse of discretion, is no ground for reversal on appeal. *Id.* Leading questions are proper where it is difficult for the witness to understand the English language. *Id.*

A witness having testified that when defendant was arrested he had blood on his clothes and that he saw defendant the night before the arrest in a saloon lighted with three lamps, it was not leading to ask if the blood found on him when arrested was on him when he was in the saloon. *Id.*

A witness having testified that he was within about three feet of defendants in a building lighted with electric lights, a question whether he observed any blood on either of them was not leading. *Id.*

Asking a witness to state the cause of a shed falling and how it was caused to fall, held not leading. *Southern Pac. Co. v. Gordon* (Civ. App.) 193 S. W. 471.

8. — **Children and weak-minded or ignorant persons.**—In a prosecution for rape on a girl under 15 years of age, leading questions eliciting details held properly admitted, where she was slow to understand questions otherwise put. *Graham v. State*, 73 Cr. R. 28, 163 S. W. 726.

In trial for rape of accused's daughter, it was not error to permit the prosecutor to ask other children of accused leading questions and call their attention to their written and signed testimony before the grand jury and also before the county attorney; witnesses being hostile to the state. *Marion v. State* (Cr. App.) 190 S. W. 499.

9. — **Unwilling or hostile witnesses.**—Where prosecutrix in rape trial was a hostile and unwilling witness for state, it was proper to allow state to lead her. *Carter v. State* (Cr. App.) 181 S. W. 473; *Jones v. State*, 72 Cr. R. 504, 163 S. W. 81; *Atkison v. State* (Cr. App.) 182 S. W. 1099.

10. **Repetition of questions.**—In a prosecution for rape on a girl under 15 years of age, where a witness had testified fully as to his knowledge of the general understanding in the family that prosecutrix would be 17 her next birthday, a further question to him as to the rumor as to her age held properly excluded as a repetition. *Magee v. State*, 168 S. W. 96, 74 Cr. R. 296.

Court properly refused to permit defendant to propound questions involving matters as to which the witness had already testified. *De Arman v. State* (Cr. App.) 189 S. W. 145.

11. **Examination by court.**—It is not error for the court to propound questions to witnesses in order to obtain a clearer idea of the merits. *Davis v. State*, 70 Cr. R. 563, 158 S. W. 283.

13. **Responsiveness of answer.**—An answer to a question asked a party as to what he thought he was signing when signing an instrument, "I was full," is responsive. *Floegge v. Meyer* (Civ. App.) 172 S. W. 194.

Testimony not responsive to the questions should be excluded. *Hambleton v. South-west Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

That an answer is not responsive to the question is not ground for its exclusion, if it is competent evidence in the case. *Jones v. State*, 76 Cr. R. 398, 174 S. W. 1071.

19. **Refreshing memory—Memoranda or other writings which may be used.**—In a prosecution of a private banker for receiving deposits while insolvent, the cashier having testified that he kept the books and that they were correct, it was proper for him to testify from the books the amount, character, and value of the bank's resources and liabilities when it ceased business. *Brown v. State*, 71 Cr. R. 353, 162 S. W. 339.

A witness who made a memorandum from a tab sheet of the time that the burglary was called to his attention as an officer could refer to such memorandum to refresh his recollection as to the date of the burglary. *Daly v. State*, 72 Cr. R. 531, 162 S. W. 1152.

In an action for an injunction by a lessee under a verbal lease, the lessor's written promise to make a written lease held admissible as a memorandum to refresh the memory of the witness who had drawn it. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

A school teacher who testified that she always made a correct record of the age of the children in her room as furnished by them, but that she had no independent recollection of the age of a child, could testify to the age of the child by referring to the memorandum made by her. *Sorell v. State*, 167 S. W. 356, 74 Cr. R. 100.

Prosecuting attorney, in examining a witness, held properly permitted to read to him his testimony on preliminary hearing to refresh his memory. *Perryman v. State*, 76 Cr. R. 171, 173 S. W. 1195.

The memory of a witness may be refreshed by propounding questions to her and exhibiting to her her testimony given at the coroner's inquest. *Taylor v. State* (Cr. App.) 179 S. W. 113.

In an action against a commission merchant and his surety for the proceeds of a shipment of cattle, the surety could not complain that the merchant was allowed to examine an account of sales where the merchant, after his memory was refreshed, testified from his recollection. *Commonwealth Bonding & Casualty Ins. Co. v. Harper* (Civ. App.) 180 S. W. 1156.

One who loaded cars with goods sold and shipped, and furnished the memoranda thereof to the bookkeeper, may refresh his memory from a statement drawn from the books, and testify to its correctness. *Cobb v. Riley* (Civ. App.) 190 S. W. 517.

21. — **Admissibility of writing as evidence.**—Where plaintiff used copies of invoices received from wholesale dealers after a fire to refresh his memory in testifying as to the different items of the stock of goods, the invoices were properly admitted in evidence to assist the jury. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 164 S. W. 442.

22. **Testimony from memoranda or other writings.**—A witness testifying as to property destroyed by fire may testify that a carbon copy of the list attached to the proof of loss was a correct list of the property in the building burned. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

26. **Right to cross-examine and re-examine in general.**—The right of cross-examination is a valuable one, and its denial upon a material matter is reversible error. *Rich v. Park* (Civ. App.) 177 S. W. 184.

27. **Control and discretion of court.**—Manner of cross-examining a witness is largely in the trial court's discretion. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

28. **Scope and extent of cross-examination in general.**—Great latitude is allowed in cross-examination of witnesses, and the admissibility of such examination is not to be determined by its weight or probative force, but by its competency. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969; *Christian v. State*, 71 Cr. R. 566, 161 S. W. 101.

It is not error for the court to sustain an objection on cross-examination to a question whether witness came from the same community as another, when he had testified that he had known the other for 15 years, and the offer was to show he had not been in the community that long and had not known the other before. *Creech v. State*, 70 Cr. R. 229, 158 S. W. 277.

One who testified that a person standing near a church could not fire a gun and hit a certain post held properly asked, on cross-examination, if it was infrequent in shooting a shotgun for the course of a stray shot to take an angle that is unaccounted for, to which witness answered that several shots usually go a considerable distance from the main body. *Fox v. State*, 71 Cr. R. 318, 158 S. W. 1141.

Where accused's wife was attempting to show that the killing was a sudden affair, without any pre-existing unfriendly feeling between accused and his family and decedent, the state could show on her cross-examination that she did not inquire as to de-

cedent's condition after he was cut, or attend his funeral, though he was her son-in-law. *Ward v. State*, 70 Cr. R. 393, 159 S. W. 272.

In a homicide case, a question to a state's witness whether accused's son did not say certain things to him held properly excluded, where it did not appear that the statements of accused's son would have rendered witness' testimony clear. *Id.*

Where, in a homicide case in which accused pleaded self-defense, accused introduced evidence that decedent came to witness' home and offered to buy a pistol from him a few days before the hearing, the state could show on cross-examination that decedent went to witness' home to get him to take a trip, and also that the attempted purchase was before his difficulty with accused, and while they were still friendly. *Id.*

Where person injured while passing between cars of train blocking a crossing was a railroad employé, though not of defendant, and testified concerning customs of railroads and relied thereon, held, that it was not error to permit defendant to show on cross-examination that plaintiff knew that employés, even in their line of duty, were forbidden to go between the cars when they had been drinking or carousing. *Englefield v. International & G. N. Ry. Co.* (Civ. App.) 159 S. W. 1033.

There are not two standards of cross-examination, one for accused and one for the state; but the same rules apply to each. *Curry v. State*, 72 Cr. R. 463, 162 S. W. 851.

Where witness for defendant testified that he borrowed whisky from accused and did not buy or pay for it at the time, the county attorney was properly permitted to ask him on cross-examination if he did not give accused a dollar at the time of the transaction. *Howard v. State*, 72 Cr. R. 624, 163 S. W. 429.

In a prosecution for procuring an abortion, where a witness testified for defendant that he had seen nothing to lead him to believe the girl was pregnant, held that the state was properly permitted to inquire whether the girl was respected, and whether there was any reason why he would have made a critical observation. *Link v. State*, 73 Cr. R. 82, 164 S. W. 987.

In an action for the wrongful death of a servant, killed by an explosion of steam pipes, testimony by defendant's chief engineer, that after the accident the pipes were taken in charge by the boiler insurance company, could not be complained of by defendant; the matter being proper cross-examination. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

In a prosecution for pursuing the occupation of selling intoxicants in prohibition territory, accused could be asked, on cross-examination, how she accounted for so many people coming to her to buy whisky. *Hightower v. State*, 73 Cr. R. 258, 165 S. W. 184.

Where a witness for the defense was not interrogated on cross-examination about any matter not brought out by accused, it was not error to permit the state, on the cross-examination, to ask the witness about a written statement she had made, though the statement was not introduced nor offered in evidence. *Lopez v. State*, 166 S. W. 154, 73 Cr. R. 624.

Cross-examination of a witness for defendant in bigamy, his alleged second wife, held legitimate on the issue of whether or not she was married to defendant by a certain person on a certain date. *Edwards v. State*, 166 S. W. 517, 73 Cr. R. 380.

Where, in an action upon a benefit certificate, the defenses being that insured in her application falsely stated that she had never had a certain disease, defendant had introduced a physician showing that he had treated her for the disease, it was proper to permit plaintiff to show on cross-examination that she completely recovered from the disease in a few days. *Modern Brotherhood of America v. Jordan* (Civ. App.) 167 S. W. 794.

In a prosecution for carrying a pistol at a supper and dance, evidence that there was intoxicating liquor and drunkenness there, also that pistol shots were fired, and that there was a cutting scrape at the place, was admissible, in cross-examination of defendant's witnesses, to show the occasion for defendant having and presenting a pistol, and that he was the person who fired the shots. *Williams v. State*, 75 Cr. R. 56, 170 S. W. 708.

The county attorney, on cross-examining a witness for defendant and receiving an answer to several questions that the witness did not see various occurrences specified and testified to by other witnesses as having occurred, did not err in asking the witness, "Then that is one," "two," and "three things," etc., "that occurred that you did not see?" *Id.*

Cross-examination of state's witness to show that the sale of liquor occurred at a time without the period of limitations held proper. *Wade v. State*, 75 Cr. R. 531, 171 S. W. 713.

In a prosecution for wife desertion, where the wife testified the desertion occurred in Maryland, not in the county of trial, defendant should have been permitted to go into the question on cross-examination of why she did not institute proceedings against him in Maryland. *Redmond v. State* (Cr. App.) 180 S. W. 272.

29. Limitation of cross-examination to subjects of direct examination.—The cross-examination of a deputy sheriff testifying for accused is not limited to what was testified to on direct examination; but the state may ask him any question material in the case. *Martoni v. State*, 167 S. W. 349, 74 Cr. R. 90.

Admission of testimony on cross-examination held not erroneous where material and it followed the direct examination. *Chicago, R. I. & G. Ry. Co. v. Cosio* (Civ. App.) 182 S. W. 83.

Where a railroad servant was injured in starting a motor car by pushing it until the engine started, and defendant railroad introduced evidence on direct examination of a witness on the issue of its due care in providing a reasonably safe car, it was not error to admit on cross-examination testimony that the motor could have been equipped with a self-starter, although no pleading authorized the testimony. *Id.*

30. Cross-examination as to irrelevant, collateral or immaterial matters.—Where a witness for the state on trial for rape testified that accused had paid a specified sum

to the husband of prosecutrix and had received a fourth thereof, but there was no agreement that he should receive any part of the damages recovered by prosecutrix in a civil action, a question whether he thought he was entitled to any part of such damages was properly excluded. *Burge v. State*, 167 S. W. 63, 73 Cr. R. 505.

A question on cross-examination as to how many persons witness had run over held calculated to prejudice the jury against the witness' testimony as to whether another was a careful driver. *Gulf, C. & S. F. Ry. Co. v. Loyd* (Civ. App.) 175 S. W. 721.

31. **Cross-examination as to writings.**—In a prosecution for bigamy, where letters from defendant to the first alleged wife were not introduced, but where her mother was permitted to testify that she had received them, defendant had the right to cross-examine her as to how she knew the letters were written by him. *Harris v. State*, 72 Cr. R. 117, 161 S. W. 125.

32. **Cross-examination of witness to character of party.**—Reputation witnesses may be asked on cross-examination as to the source of their knowledge. *Clark v. Hendricks* (Civ. App.) 164 S. W. 57.

Where defendant was entitled to show specific communicated acts of violence on defendant's part, the state, on cross-examination, was entitled to show that they were justified. *Bullock v. State*, 73 Cr. R. 419, 165 S. W. 196.

Where defendant in homicide case put his reputation as a moral man in issue and called witnesses to prove it, cross-examination asking if, in forming their opinion of defendant's reputation, they had considered a report that he was unduly intimate with Mexican women, was permissible. *Duhig v. State* (Cr. App.) 180 S. W. 252.

33. **Cross-examination of party.**—Cross-examination of accused, see art. 790, Crim. Proc.

It was not error to permit plaintiff to ask leading questions of defendant on cross-examination. *Day v. Hunnicutt* (Civ. App.) 160 S. W. 134.

36. **Questions on cross-examination—Leading questions.**—The allowance of leading questions is not improper in cross-examination of a witness. *Finch v. State*, 71 Cr. R. 325, 158 S. W. 510.

Exclusion of leading and suggestive question on cross-examination relative to matter not covered by direct examination held not error, especially where the witness did testify in effect that he did not know. *Englefield v. International & G. N. Ry. Co.* (Civ. App.) 159 S. W. 1033.

Where a witness is called for plaintiff, defendant may propound leading questions to him on cross-examination, though the witness was not examined in chief as to the matter made the subject of the questions. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28.

37. — **Repetition of questions and questions calling for repetition of answers.**—Cross-examination of witness held properly excluded, where she had already fully testified as to the matter. *Abernathy v. State*, 76 Cr. R. 252, 174 S. W. 339.

Where witness had testified in detail on cross-examination as to how she came in possession of the child and why she kept him, exclusion of defendant's question as to her right to its custody was not error. *Carrel v. State* (Cr. App.) 178 S. W. 331.

The trial court has a wide discretion over the examination of witnesses, and may restrict unnecessary repetition in cross-examination. *Grimes v. State* (Cr. App.) 178 S. W. 523.

39. **Redirect examination.**—Where it was sought to show, on cross-examination of a state's witness, that he testified at the examining trial and had been induced by another to testify as he did at trial, it was not error to permit him to state on redirect that his testimony at the trial was true. *Gomez v. State*, 75 Cr. R. 239, 170 S. W. 711.

In a personal injury action, testimony as to whether plaintiff would consent to a physical examination held proper on redirect examination. *Missouri, O. & G. Ry. Co. of Texas v. Webb* (Civ. App.) 178 S. W. 728.

Question on redirect examination of witness, who claimed that he, and not accused, assaulted the prosecuting witness, as to whether he had ever testified on oath about this, held immaterial, in view of his cross-examination. *Vinson v. State* (Cr. App.) 179 S. W. 574.

Where sheriff, testifying to bad reputation of defendant's house, stated on cross-examination he could not remember who complained about it, question on redirect examination as to whether certain persons complained held properly permitted to aid recollection. *Bennett v. State* (Cr. App.) 181 S. W. 197.

40. — **Explanation of testimony.**—Where a witness for the state was asked on cross-examination whether he did not tell accused's sister that he had done her brother wrong, and that he would get out of the way for \$10, he was properly permitted on redirect examination to tell what did occur. *Smith v. State*, 71 Cr. R. 661, 160 S. W. 1184.

Where a witness to an assault testified on cross-examination that he had not interfered or promptly reported the offense, he was properly permitted on redirect to state the reason therefor. *Hooper v. State*, 72 Cr. R. 82, 160 S. W. 1187.

Where the defense had attempted to show in cross-examination of a witness for the prosecution that the witness was a spotter or detective, the state on redirect examination can show that the witness was a bonded deputy sheriff. *Clark v. State*, 169 S. W. 895, 74 Cr. R. 464.

Where witness, testifying about bad reputation of defendant's alleged disorderly house, was asked on cross-examination about signing local option petition, question on redirect examination as to why he signed it held proper. *Bennett v. State* (Cr. App.) 181 S. W. 197.

In a prosecution for homicide where defendant, on cross-examination, had introduced testimony that one of state's witnesses had complained against him at the place at which he was working, it was not error to permit the state, on redirect examination,



to elicit from the witness the reasons for his complaint. *Satterwhite v. State* (Cr. App.) 181 S. W. 462.

In a prosecution for manslaughter, where defendant, cross-examining deceased's widow, proved by her that she ran a hotel after her husband's death, and sought to leave the impression on the jury that her character was not good, the widow's testimony on redirect, that her husband left her no property and she ran the hotel to make a living, was admissible. *Mansell v. State* (Cr. App.) 182 S. W. 1137.

41. — **New matter on cross-examination.**—Where, in a prosecution for homicide claimed to have been committed because of a difference regarding a debt, accused attempted to prove on cross-examining his daughter as a witness that the debt had been paid, the state could show, on redirect examination, what she knew concerning the transaction of her own knowledge. *Ward v. State*, 70 Cr. R. 393, 159 S. W. 272.

Where, in a perjury case, defendant, in questioning a state's witness as to having appeared against a relative of his in the commissioners' court, elicited the fact that other citizens had also appeared for the same purpose, it was not error to permit the state's attorney on redirect to ask about these other citizens. *Poulter v. State*, 72 Cr. R. 140, 161 S. W. 475.

In a prosecution for incest, where the defense, in cross-examining the prosecuting witness, attempted to show that her statement that the act occurred while the parties were standing and that conception resulted was unreasonable, it was proper for the state to show on redirect examination that defendant and witness had previously had intercourse on numerous occasions. *Vickers v. State*, 75 Cr. R. 12, 169 S. W. 669.

42. — **Repetition of testimony on direct or cross-examination.**—Telephone conversation between plaintiff's attorney and defendant's president, already covered on direct examination, held properly excluded on redirect. *Magnolia Motor Sales Corp. v. Chaffee* (Civ. App.) 192 S. W. 562.

46. **Answer tending to subject witness to criminal prosecution.**—See C. C. P. art. 4, and notes.

In general, a witness may decline to answer any question which tends either directly to criminate him, or which may indirectly produce such result. *Sovereign Camp Woodmen of the World v. Bailey* (Civ. App.) 163 S. W. 683.

The privilege of refusing to answer questions on the ground that it would tend to incriminate the witness cannot be put forward for the purpose of concealing facts in the interest of some third person. *Id.*

The rule that a person cannot be compelled to give incriminating testimony against himself applies, not only to criminal cases, but to civil cases. *Sovereign Camp of Woodmen of the World v. Bailey* (Civ. App.) 183 S. W. 107.

49. **Waiver of privilege.**—A witness in a civil case, to be relieved from answering a question, on the ground that it will incriminate her, must swear that it will do so. *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

50. **Persons entitled to claim privilege.**—Where a witness unequivocally stated that to answer statements might incriminate him, the court properly refused to compel him to answer such questions, though on cross-examination he became confused as to the incrimination. *Sovereign Camp of Woodmen of the World v. Bailey* (Civ. App.) 183 S. W. 107.

## II. Credibility of Witnesses

52. **Credibility of witnesses in general.**—An instruction that if the prosecuting witness had been impeached on a material issue in the case, his testimony could not be considered for any purpose was erroneous and properly refused. *Brown v. State*, 72 Cr. R. 33, 160 S. W. 374.

It would not discredit the testimony given at the trial by a state's witness that he was not called as a witness at the examining trial. *White v. State*, 76 Cr. R. 612, 177 S. W. 93.

53. **Testimony of party.**—The jury need not believe the testimony of an interested witness, though it is not contradicted; especially where it might appear unreasonable. *Ganeson v. Ganeson* (Civ. App.) 162 S. W. 1169.

The testimony of a party to an action is not binding on the jury, where there are circumstances contradicting the testimony. *Groves v. Whittenberg* (Civ. App.) 165 S. W. 889.

The jury are not bound to accept the testimony of the parties to the cause. *A. J. Birdsong & Son v. Allen* (Civ. App.) 165 S. W. 1177.

In determining whether defendant's possession of land was under a claim of right or title, court held at liberty to disregard defendant's testimony, he being an interested witness. *Nunez v. McElroy* (Civ. App.) 174 S. W. 829.

In buyer's action for damages from seller's false representations as to a thresher, buyer's contradicted evidence that he had written and mailed letter notifying of defects held sufficient to show that notice had been given the seller. *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084.

That one party to a contract testified to by the other party testified that the contract was not made, did not conclusively show that the contract was lacking in mutuality. *O'Neil v. Gibson* (Civ. App.) 177 S. W. 183.

In an action between partners for an accounting, the court could refuse credence to defendant's statement, totally uncorroborated, that he made a disbursement. *Navarro v. Lamana* (Civ. App.) 179 S. W. 922.

In trespass to try title, the unsupported testimony of a defendant was legally sufficient to sustain a verdict that the tract of land involved part of a larger tract conveyed to defendant and by him, with the exception of the tract in litigation conveyed to plaintiffs, did not belong, by way of a trust agreement, to plaintiffs under their agreement with defendant. *Deweese v. Nicholson* (Civ. App.) 182 S. W. 396.

In an action on a note and to foreclose a deed of trust, where the defendants claimed a homestead in part of the land, the trial judge was not bound to believe their statements. *Bogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

In an action for damages for misrepresentations in effecting a sale of land, finding by the jury as to the actual value of the land held warranted under the evidence, though not in accordance with the exact estimates of the parties. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 184 S. W. 523.

**54. Testimony of interested persons.**—Testimony of an interested witness cannot be disregarded merely because he is interested when there is nothing in his testimony or that of any other witness or any act or physical fact casting suspicion on its truthfulness. *Malone v. National Bank of Commerce of Kansas City, Mo.* (Civ. App.) 162 S. W. 369.

The credibility of the maker of a note signing the name of a third person, on the issue whether the third person was liable as maker or surety, is unaffected by his knowledge of the law. *Connor v. Uvalde Nat. Bank* (Civ. App.) 172 S. W. 175.

### III. Impeachment and Corroboration of Witnesses

**55. Grounds of Impeachment in general.**—Accused, on the cross-examination of a witness, may show any fact affecting his credibility. *Burge v. State*, 167 S. W. 63, 73 Cr. R. 505.

Where a witness testified as to a statement of prosecutrix that she was over 17 at the time of an alleged rape, and that such statement had been made in the summer time, it was proper for the state on cross-examination to show that the witness had been in jail during that summer. *Magee v. State*, 168 S. W. 96, 74 Cr. R. 296.

An objection to a question to a witness as to why he resigned the office of justice of the peace held properly sustained. *Echols v. State*, 75 Cr. R. 369, 170 S. W. 786.

The state held entitled to show by one of defendant's witnesses that he had not disclosed his story to the prosecuting officer, but had first told it to one of defendant's attorneys, who had been his own attorney, and to ask him whether he had been indicted for a felony. *Latham v. State*, 75 Cr. R. 575, 172 S. W. 797.

Evidence that plaintiff had not set up the claim before suit held admissible to impeach plaintiff as showing fabrication of the claim. *Eailey v. Look* (Civ. App.) 174 S. W. 1010.

In prosecution for slander for asserting sexual relations, held proper to exclude a question to prosecuting witness on cross-examination whether she would submit to medical examination. *Robison v. State* (Cr. App.) 179 S. W. 1157.

Testimony that deceased's wife, who was an important witness for the defense, did not visit her husband's body for some time after his murder, is admissible. *Baker v. State* (Cr. App.) 187 S. W. 949.

In prosecution for murder, evidence that one of accused's witnesses failed to attend his wife's funeral is inadmissible. *Stanley v. State* (Cr. App.) 193 S. W. 151.

**56. Corroboration of unimpeached and uncontradicted witness.**—Where a state's witness testified as to the furniture in a room where a crime was committed, it was permissible for the state to show in corroboration by officers that they examined the room, and that there was a table and bed therein, as testified to by the witness. *Wilson v. State*, 70 Cr. R. 627, 158 S. W. 512.

Where the defendant claimed that he did not intend not to live with his wife until after his father informed him that she had stated she was going to send him to the penitentiary, it was proper for the father to testify that he so informed his son. *Qualls v. State*, 71 Cr. R. 67, 158 S. W. 539.

In a prosecution for violating the local option law, where the prosecuting witness, who testified to the unlawful sale, was not impeached by proof of contradictory statements, evidence of his statements to third persons that he had bought alcohol from accused was inadmissible. *Walker v. State*, 72 Cr. R. 536, 163 S. W. 71.

It is error to admit evidence sustaining a witness' reputation, if such witness has not been impeached. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

Evidence of good reputation of prosecuting witness held inadmissible, where such reputation had not been attacked. *Solis v. State*, 76 Cr. R. 230, 174 S. W. 343.

Where accused took the stand and contradicted the prosecutrix, he cannot, his reputation for veracity not having been attacked, show that he told other witnesses of statements by the prosecutrix which tended to corroborate his testimony. *Hart v. State*, 76 Cr. R. 339, 175 S. W. 436.

In a prosecution for murder, cross-examination of a witness for the state held not an impeachment justifying the introduction of evidence at the inquest in corroboration. *Satterwhite v. State* (Cr. App.) 177 S. W. 959.

The state cannot introduce testimony of the general reputation for truth of its witness, merely because the testimony of defendant's witnesses directly conflicts with his. *Clay v. State* (Cr. App.) 180 S. W. 277.

In trial for murder, where testimony of defendant's impeaching witness was shaken on cross-examination, although not impeached, the defendant could not introduce testimony in corroboration of such witness. *Ingram v. State* (Cr. App.) 182 S. W. 290.

In a prosecution for murder, the testimony of a witness that neither of her daughters, also witnesses, had told her after a former trial that they intended to change their statements because they could not see the defendant imprisoned, was inadmissible. *Carter v. State* (Cr. App.) 183 S. W. 881.

Where accused denied being at home on the day of the offense, and a witness who testified that on his way to visit a neighbor he saw and conversed with accused was not impeached, the state cannot prove that the witness visited the neighbor. *Taylor v. State* (Cr. App.) 184 S. W. 224.

In action for injuries permitting physician, witness for plaintiff, to testify that he had testified for certain railroads in similar cases, was error. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

57. **Right to impeach witness in general.**—See C. C. P. arts. 788–795, and notes. It is not error to permit impeachment of witnesses for defendant in a prosecution for murder upon proper predicates. *Satterwhite v. State* (Cr. App.) 181 S. W. 462. A witness cannot be impeached on an immaterial matter. *Beaumont, S. L. & W. Ry. Co. v. Manning* (Civ. App.) 186 S. W. 387.

58. **Right to impeach one's own witness.**—See C. C. P. art. 815, and notes.

62. **Right to impeach impeaching witness.**—Where witnesses for accused, who filed a plea for suspended sentence, testified that accused's reputation for truth, veracity, and honesty, and as a law-abiding citizen was good, the state on cross-examination could ask them whether they had not heard of his being charged with violations of law, though such violations did not involve moral turpitude. *Williamson v. State*, 167 S. W. 360, 74 Cr. R. 289.

63. **Impeachment of capacity of witness.**—The state may, to impeach the credibility of a witness for the defense, establish by cross-examination that the witness had been adjudged insane, and that said judgment had never been set aside. *Mason v. State*, 168 S. W. 115, 74 Cr. R. 256.

64. **Impeachment of knowledge or recollection of witness.**—Where, in an action involving a disputed boundary, a witness for defendant testified that he went with the county surveyor to properly locate surveys, plaintiff was entitled to cross-examine him as to his knowledge of the matter. *Denton v. English* (Civ. App.) 171 S. W. 248.

Where a witness had testified that defendant was not present on date false note was signed, exhibition to witness, on cross-examination, of various notes and documents not offered as exhibits, of different dates, which he had witnessed, and questions concerning his recollection of their dates held not improper. *Ferguson v. State* (Cr. App.) 187 S. W. 476.

Where defendant's character witness testified that he had never heard anything charged against defendant, it was proper to cross-examine him as to whether he was present when defendant was tried for perjury. *Cox v. State* (Cr. App.) 194 S. W. 138.

65. **Cross-examination to test reliability of witness.**—To test the credibility of one who had testified that deceased's reputation for chastity was good, the question, to him, on cross-examination, if it was not common report that deceased was keeping certain women, was proper. *Davis v. State*, 73 Cr. R. 49, 163 S. W. 442.

66. **Cross-examination to discredit witness or disparage testimony in general.**—Where witnesses had testified that accused's reputation for truth was good, the state could show, on cross-examination, that such witnesses had heard that accused had testified in a trial that he had been on a certain train and witnessed a certain accident, and that three men who were on the train swore that accused was not there. *Fox v. State*, 71 Cr. R. 318, 158 S. W. 1141.

Great latitude is allowed on cross-examination, and a witness may be asked anything which may have a tendency to affect his credibility. *Curry v. State*, 72 Cr. R. 463, 162 S. W. 851.

Where an ex-sheriff testified for defendant that prosecutrix had told him that defendant was not guilty, cross-examination as to whether he informed the prosecutor of this fact, as his office required, was permissible. *Id.*

Where a witness for accused stated that he was a church clerk, the state is entitled on cross-examination to ask him whether he was removed from that office and expelled from the church because of his attitude toward the prosecutrix and her family. *Id.*

In a prosecution for engaging in the business of selling intoxicating liquor, it was not error to exclude a question by accused as to whether the state's witness had bought whisky from any other person than accused, though asked for purposes of impeachment. *Cole v. State*, 72 Cr. R. 282, 162 S. W. 880.

In an action for injuries at a railroad crossing, statement of a witness, made immediately after accident, that he would be likely to lose his job for making a flying switch, held proper matter for cross-examination, as affecting weight to be given his direct testimony that such switches had been customary since he had been in the yard. *Pecos & N. T. Ry. Co. v. McMeans* (Civ. App.) 188 S. W. 692.

Defendant justifying on ground deceased had ruined his sister, where defendant introduced brother to show deceased had been guilty, court properly permitted state to draw from such brother, on cross-examination, statement that he and defendant had discussed, before the killing, alleged improper relations between another brother and their sister. *De Arman v. State* (Cr. App.) 189 S. W. 145.

In a prosecution for illegally selling liquor, where a witness for the state testified that he had seen whisky in defendant's room on only one occasion, it was proper cross-examination to elicit the admission that such witness on another occasion subsequent to the offense charged had seen liquor in defendant's room. *Matthews v. State* (Cr. App.) 189 S. W. 491.

Permitting cross-examination, "Don't you know that if you, \* \* \* as inspector of the track, \* \* \* swore ties were in bad condition, you would lose your job?" held not an abuse of court's discretion. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

67. **Competency of impeaching evidence in general.**—Where defendant relied on receipt, which plaintiff claimed was without consideration, photographic copy of a forged receipt, on which defendant at one time relied, held properly admitted, as showing attempt by defendant to fabricate evidence. *Richards v. Osborne* (Civ. App.) 164 S. W. 392.

Where defendants relied on a receipt, and there was evidence that one of them at one time relied on a receipt claimed to be forged, bank checks bearing an admitted signature held admissible on the question of forgery. *Id.*

Where a party testified that a witness had made a statement to him, the testimony of a third person that in conversation with him the witness had made a contrary statement was admissible as impeaching testimony. *Richard Cocke & Co. v. New Era Gravel & Development Co.* (Civ. App.) 168 S. W. 988.

In an action on stock subscriptions, evidence held admissible to impeach a witness' credibility. *Rich v. Park* (Civ. App.) 177 S. W. 184.

In a prosecution for homicide it was not error to refuse defendant permission to prove that the wife of a state's witness had sought to employ defendant's attorney to bring suit for divorce against the witness, such testimony being inadmissible to impeach the witness or for any other purpose. *Satterwhite v. State* (Cr. App.) 181 S. W. 462.

In a prosecution for murder, the fact that a witness after testifying was seen talking to his mother and sister in a "suspicious attitude," without showing something that was said or done that would reflect on his testimony, was inadmissible to impeach the testimony of the witness. *Carter v. State* (Cr. App.) 183 S. W. 881.

In a prosecution for assault to rape, where only prosecutrix, who was about 14, and her younger brothers and sisters, testified, evidence of her father's attempt to extort money as compensation from accused's father for dismissing prosecution held admissible; the girl's father having control of all the children. *Odell v. State* (Cr. App.) 184 S. W. 208.

Any evidence tending to affect credibility of witness is relevant and competent, and hearsay evidence affecting credibility is admissible if otherwise competent. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

Any evidence tending to affect credibility of witness is relevant and competent, and hearsay evidence affecting credibility is admissible if otherwise competent. *Id.*

In prosecution for riding on railroad pass of another, testimony of train auditor that defendant rode on pass on other trips and dates than that charged held not admissible to impeach owner of pass. *Leach v. State* (Cr. App.) 189 S. W. 733.

**72. Character as ground of impeachment—Particular traits of character or habits.**—Proof that defendant or any other witness in the case associated with lewd women or kept bad company held not admissible for the purpose of impeachment. *Ballard v. State*, 71 Cr. R. 587, 160 S. W. 716; *Hall v. State*, 70 Cr. R. 590, 158 S. W. 272; *Phillips v. State*, 73 Cr. R. 317, 164 S. W. 1004.

A witness may not be impeached by proof that his general reputation was that of a professional gambler, and that he gambled every time he was in town and had money. *Mares v. State*, 71 Cr. R. 303, 158 S. W. 1130.

Where, in a prosecution for seduction, the district attorney asked one of defendant's witnesses if he had not left another county because he carried a pistol, and if he had not so stated to a third party, it was error to permit the attorney to call such third party to contradict the witness; such evidence not being admissible for impeachment. *Capshaw v. State*, 166 S. W. 737, 73 Cr. R. 609.

Exclusion of evidence to show the character of state's witness, that she had been divorced for connection with other men, is not error. *White v. State*, 76 Cr. R. 612, 177 S. W. 93.

Where it is an issue whether a witness is of chaste character, and she had testified that she was, testimony of lascivious acts on her part is admissible as impeachment. *Reed v. State* (Cr. App.) 183 S. W. 1168.

In action on note claimed to have been forged by G., cross-examination of G. as to forging checks held not permissible to impeach him. *Lockney State Bank v. Bolin* (Civ. App.) 184 S. W. 553.

In a prosecution for an assault with intent to kill, evidence that the woman assaulted was a woman of loose character and in the habit of being indecently familiar with other men, was inadmissible as affecting her credibility. *Scott v. State* (Cr. App.) 185 S. W. 994.

**74. — Place and time of acquiring reputation.**—Questions asked a witness on cross-examination, in a prosecution for unlawfully carrying a pistol, if the witness had not some 20 years before been engaged in selling intoxicants, and had not also run a tenpin alley, were properly excluded as too remote to affect the witness' credit. *Boyette v. State*, 72 Cr. R. 231, 162 S. W. 872.

In a prosecution for murder, where defendant did not offer to prove the reputation for veracity of a witness whom he sought to impeach for any time for 12 years immediately preceding trial, offered testimony as to her reputation 12 years before was properly excluded as too remote. *Hampton v. State* (Cr. App.) 183 S. W. 887.

**75. — Particular acts or facts.**—Mere accusations or evidence of a particular misconduct are not admissible to affect the credibility of a witness. *Ballard v. State*, 71 Cr. R. 587, 160 S. W. 716.

In an action for breach of a lease, evidence that one of the defendants prior to such suit had transferred his property through another to his wife held inadmissible to impeach such defendant as a witness, in the absence of proof that it had been done to defeat the liability sued on. *Taber v. Eyster* (Civ. App.) 162 S. W. 490.

Evidence that a woman has been raped is not admissible to affect her credibility as a witness. *Carter v. State*, 75 Cr. R. 110, 170 S. W. 739.

Where accused's witnesses were allowed to testify that the reputation of the prosecutrix for virtue was bad, they cannot give specific facts showing the reputation to be deserved. *Hart v. State*, 76 Cr. R. 339, 175 S. W. 436.

Refusal of the question of defendant in homicide to state's witness, if her husband had not shot her for a certain transaction, with which it was not proposed to connect deceased, was not error. *White v. State*, 76 Cr. R. 612, 177 S. W. 93.

A witness in a civil action cannot be impeached by requiring him to testify to discreditable acts on his part having no material bearing on the issues involved in the case. *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

In a civil case the veracity of a witness cannot be impeached by proof of specific immoral conduct, but such impeaching testimony is confined to general reputation. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 184 S. W. 566.

Cross-examination as to plaintiff's poor character held objectionable as attempts to prove general reputation by specific acts. *Yeatts v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 184 S. W. 636.

Evidence of misconduct of witness for the state was irrelevant. *Marion v. State* (Cr. App.) 190 S. W. 499.

76. — **Accusation or conviction of crime.**—See C. C. P. art. 788, and notes.

A witness cannot be impeached by proof of his guilt of crimes of which he has never been indicted nor convicted. *Kaufman v. State*, 70 Cr. R. 438, 159 S. W. 58.

In a prosecution for robbery by threats with a pistol, evidence that a certain witness had been convicted of carrying a pistol shortly after the date of the alleged robbery, offered to impeach him and to connect him with the offense charged, was inadmissible for any purpose; accused having testified that he got the pistol used by him from such witness. *Coker v. State*, 71 Cr. R. 504, 160 S. W. 366.

As to other offenses a witness can be impeached only by showing that he has been legally charged with a felony or with a misdemeanor or imputing moral and legal turpitude. *Ballard v. State*, 71 Cr. R. 587, 160 S. W. 716.

On trial for keeping disorderly house, statement by accused to grand jury that she had paid two fines for being "vag" held not admissible to impeach her testimony. *Bowman v. State*, 73 Cr. R. 194, 164 S. W. 846.

A misdemeanor conviction for selling intoxicants in prohibition territory does not involve moral turpitude, so that it cannot be shown for impeachment purposes, that a witness was convicted of such offense. *Hightower v. State*, 73 Cr. R. 258, 165 S. W. 184.

A conviction 11 years ago was too remote to be shown to impeach a witness' credibility. *Waddle v. State*, 73 Cr. R. 501, 165 S. W. 591.

A question on cross-examination of a state's witness as to whether he had not run away with another man's wife was properly excluded, in the absence of any showing that the witness had been indicted, or that any complaint had been filed against him. *Willis v. State*, 167 S. W. 352, 74 Cr. R. 98.

It is not competent to impeach a witness by proving that he has been indicted for a felony or other crime, but the inquiry should be confined to proof of general reputation for truth. *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

It is proper for the state to impeach a witness offered by accused by showing that he was convicted of a felony within the last three years. *Hamilton v. State*, 168 S. W. 536, 74 Cr. R. 219.

It is improper to attempt to impeach a witness by asking him on cross-examination if he had been arrested in a city named on a charge of misdemeanor. *Houston Chronicle Pub. Co. v. Tiernan* (Civ. App.) 171 S. W. 542.

A witness cannot be cross-examined as to the details of the offense for which he was convicted. *Henderson v. State*, 76 Cr. R. 66, 172 S. W. 793.

Accused's witness may be impeached by questions on cross-examination as to his prior conviction of crime. *Sanford v. State* (Cr. App.) 185 S. W. 22.

In murder trial, held not error to exclude proof to impeach witness that he had been arrested for vagrancy the night before testifying. *Neyland v. State* (Cr. App.) 187 S. W. 196.

The court properly refused to permit defendant to ask prosecutrix if she had not been charged in justice court with theft of diamond ring, etc., no indictment having been presented against her, though several grand juries had met and adjourned subsequent to complaint. *Johnson v. State* (Cr. App.) 188 S. W. 426.

Proof by the state that a witness for accused had been indicted was admissible, though sentence upon his subsequent conviction was suspended. *Bush v. State* (Cr. App.) 189 S. W. 158.

Testimony of witness on cross-examination that he had been in penitentiary was admissible to affect his credit. *Smiley v. State* (Cr. App.) 189 S. W. 482.

Any witness can be impeached by the adverse party by proving by the witness on cross-examination that within a period not too remote he had been indicted or convicted of a felony or misdemeanor imputing moral turpitude. *Hawthorne v. State* (Cr. App.) 190 S. W. 184.

It is not permissible to impeach a witness by showing that he has committed a certain crime, but only by showing that he has been indicted or convicted for such crime. *Id.*

In prosecution for selling intoxicants in prohibition county, court properly excluded proposed impeaching testimony by defendant that state's main witness had made single sale of intoxicants; offense being merely misdemeanor, and witness having been neither indicted nor prosecuted therefor. *Waggoner v. State* (Cr. App.) 190 S. W. 493.

The state can properly ask a witness for the defense whether he had ever been indicted. *Deisher v. State* (Cr. App.) 190 S. W. 729.

A witness in accused's behalf cannot be impeached by proof of indictment or conviction of a crime not imputing moral turpitude. *Johnson v. State* (Cr. App.) 191 S. W. 1165.

It is not error to exclude a judgment of conviction for theft as impeaching a witness where such judgment was for a fine of \$10, since Pen. Code 1911, art. 1341, provides that both imprisonment and fine shall be imposed or imprisonment without fine, so that the judgment was illegal. *Pope v. State* (Cr. App.) 194 S. W. 590.

80. — **Laying foundation for impeaching evidence.**—In railroad servant's action for injuries, where plaintiff testified that he had left another state looking for work

and not because he had been indicted, etc., exclusion of testimony of detective who would have said that plaintiff left pending a charge, and escaped from the officers, held proper. *Turner v. McKinney* (Civ. App.) 182 S. W. 431.

81. — **Competency of impeaching evidence in general.**—On trial for delivering an anonymous letter reflecting on a girl's integrity, chastity, etc., evidence that on the night before the delivery accused was seen hugging and kissing her held properly excluded, in the absence of any showing that this was with her consent or permission. *Bradfield v. State*, 166 S. W. 734, 73 Cr. R. 353.

Impeaching witnesses, after testifying to the bad reputation of a witness as to truth and veracity where he resided, may state that it is such that he could not be believed on oath. *Clemens v. State* (Cr. App.) 193 S. W. 1066.

82. — **Competency of impeaching witnesses as to character or reputation.**—On a trial for murder, a witness who had declined to state that he knew defendant's general reputation for truth and veracity, could not testify as to whether he had heard defendant's general reputation in that respect discussed or questioned. *Harper v. State*, 75 Cr. R. 124, 170 S. W. 721.

83. — **Examination of impeaching witnesses as to character or reputation.**—Where a witness is offered attacking the reputation of one of the parties, the party assailed is entitled, on cross-examination, to compel the witness to state the source of the reports upon which he bases his testimony. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

In a prosecution for offering to bribe a witness, where defendant, to impeach the credit of such witness, showed on cross-examination that he had signed defendant's name to checks, held, that it was proper for the state, on redirect examination, to show that he had signed the checks on defendant's instructions. *Savage v. State*, 75 Cr. R. 213, 170 S. W. 730.

Where a witness on direct examination testified that he knew a person's general reputation, and that it was good, that on cross-examination he admitted that it was also his individual opinion did not justify the exclusion of the testimony. *Hill v. State*, 76 Cr. R. 269, 173 S. W. 1022.

On redirect examination of a state witness, by whom on cross-examination defendant sought to impeach another state witness, the state could further examine him on the matter, and refresh his memory. *White v. State*, 76 Cr. R. 612, 177 S. W. 93.

An impeaching witness who was cross-examined as to incidents supporting his testimony may be re-examined as to the details of those incidents. *Yeatts v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 184 S. W. 636.

In a prosecution for illegal sale of liquor, where a witness for defendant testified that the general reputation for truth of the principal witness for the state was bad, it was proper on cross-examination for the county attorney to inquire whether such witness was a drinking man. *Matthews v. State* (Cr. App.) 189 S. W. 491.

85. — **Rebuttal of evidence impeaching character.**—Accused, who was charged with falsely testifying that the prosecutrix in a slander case permitted sexual intercourse, offered witnesses to show that prosecutrix was not a virtuous female. Held, that it was permissible to show on cross-examination of these witnesses that they attended church functions and social gatherings with the prosecutrix. *Cox v. State*, 76 Cr. R. 326, 174 S. W. 1067.

Plaintiff cannot in rebuttal testify that reports concerning him mentioned by witnesses who impeached his reputation were circulated by his enemies. *Yeatts v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 184 S. W. 636.

Where one accused of unlawful sale of liquors in prohibition territory variously attacked the state's principal witness, whose testimony made out the offense, it was proper for the court to permit the sheriff to testify that the principal witness assisted him in ferreting out violations of the local option law. *Dupree v. State* (Cr. App.) 190 S. W. 181.

Where prosecutrix disobeyed a subpoena and left on day case was first set for trial, state could show reason for her departure; accused having elicited such fact from her on cross-examination, and thus attacked her credibility. *Stockton v. State* (Cr. App.) 192 S. W. 236.

Where an accomplice witness was impeached for former theft, it was permissible for him to explain the circumstances of his alleged conviction for theft. *Pope v. State* (Cr. App.) 194 S. W. 590.

86. — **Evidence to sustain character of witness impeached.**—Where one of the defendants in her testimony several times referred to the testimony of plaintiff as untrue, evidence supporting plaintiff's reputation for truth and veracity was admissible. *Hearn v. Harless* (Civ. App.) 154 S. W. 613.

Where plaintiff's character was impeached by testimony as to his bad reputation for integrity and truth owing to his failure to pay his debts, plaintiff was entitled to testify as to the reason for his failure. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

Where defendant claimed that plaintiff was a malingerer, and introduced evidence tending to show that he had attempted to suborn witnesses, and had been guilty of acts reflecting on his personal character, plaintiff, who testified in his own behalf, may introduce witnesses to the effect that his reputation for truth and veracity in the place where he lived was good. *Texas Traction Co. v. Fearris* (Civ. App.) 163 S. W. 1060.

Evidence for defendant by physicians who had examined plaintiff that they believed that he was entirely recovered and would be all right after litigation terminated held an impeachment of plaintiff's credibility, he having testified that he still suffered from certain causes, so as to admit evidence of plaintiff's good reputation for veracity. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

Where, in a prosecution of accused as an accomplice to an abortion, prosecutrix testified for the state that defendant was the author of her condition, and he introduced evidence that she had had intercourse with others and did not know who was the father

of her child, the state was properly permitted to prove her general reputation for chastity and virtue without defendant having first introduced evidence that such reputation was bad. *Fondren v. State*, 169 S. W. 411, 74 Cr. R. 552.

In action for malicious prosecution, where plaintiff alleged his former good reputation for truth and honesty, evidence for defendant contradicting such evidence and impeaching plaintiff's reputation entitled plaintiff to put in evidence as to his reputation for truth and honesty. *Missouri, K. & T. Ry. Co. v. Craddock* (Civ. App.) 174 S. W. 965.

In lessee's action for damages from lessor's wrongful refusal to consent to a subletting, where lessee attempted to impeach lessor's credibility and integrity, testimony of witness who had known lessor for 35 years, that he had a good reputation for truth and fair dealing, was admissible. *A. Harris & Co. v. Campbell* (Civ. App.) 187 S. W. 365.

In prosecution for abandonment after seduction and marriage, held, that state was entitled to prove that prosecutrix's general reputation for truth and veracity was good; defendant having sought to impeach her. *Furr v. State* (Cr. App.) 194 S. W. 395.

**88. Interest as ground of impeachment.**—Motives which operate on the mind of a witness when he testifies are never immaterial or collateral matters which should not be brought out on cross-examination. *Curry v. State*, 72 Cr. R. 463, 162 S. W. 851.

In a prosecution for murder, the exclusion of defendant's testimony that certain of the state's witnesses had taken him from jail, carried him out of town, and sought to extort a confession from him, held error. *Durfee v. State*, 73 Cr. R. 165, 165 S. W. 180.

The motive of a witness and his interest or bias may be shown on his cross-examination. *Burge v. State*, 167 S. W. 63, 73 Cr. R. 505.

All legitimate testimony, tending to show the interest and bias of a witness for the state, should be admitted. *Carter v. State*, 75 Cr. R. 110, 170 S. W. 739.

Bias or interest of a witness is material as affecting credibility. *Edwards v. State*, 75 Cr. R. 647, 172 S. W. 227.

**90. — Interest in event of witness not party to record.**—Where the father of a co-defendant testified on behalf of the defendant, it was proper for the state to ask him if his son was not indicted for the same offense, to show his bias. *Wilson v. State*, 71 Cr. R. 330, 158 S. W. 1114.

Where defendant's brother testified to material facts on the issue of self-defense in his favor, the state was entitled to prove as original evidence that the brother prior to the trial sought to induce another witness to give similar testimony. *Burnaman v. State*, 70 Cr. R. 361, 159 S. W. 244, 46 L. R. A. (N. S.) 1001.

Where a witness testified to material circumstances in favor of accused, it was proper for the state to prove that the witness had approached a state's witness and told him that "if he testified against accused, he would get h—l beat out of him." *Brown v. State*, 72 Cr. R. 33, 160 S. W. 374.

In a prosecution for statutory rape, where accused offered a witness who testified only to the bad reputation of the prosecutrix for virtue, evidence that the witness had interested himself in the prosecution, and had attempted to get the girl's father to stop it, is admissible to show bias. *Bradley v. State*, 72 Cr. R. 287, 162 S. W. 515.

A witness for accused may be impeached by proof of his statements to another that he intended to testify to certain matter to help accused, and asked such other to also help him. *Casey v. State* (Cr. App.) 180 S. W. 673.

In a prosecution for murder, a letter addressed to a person not a witness, written by a witness adverse to defendant, tending to prove that he was suppressing and fabricating the testimony, was admissible as showing the intent and interest in the case, as well as an attempt to suppress or fabricate the testimony. *Carter v. State* (Cr. App.) 183 S. W. 881.

A witness for defendant, indicted for selling liquor in prohibition territory, having stated that he was interested in the case, it was proper to ask him on cross-examination whether he was not a barber in the same shop with C. who was under indictment for bootlegging, but questions as to whether C. kept and sold liquor were improper. *Johnson v. State* (Cr. App.) 191 S. W. 1165.

In prosecution, accused should be permitted to prove conspiracy between state's witnesses and officials, and that such witnesses to escape punishment for crimes for which they were then in jail, fabricated testimony against accused. *Jones v. State* (Cr. App.) 194 S. W. 1109.

**91. — Employment by or other contractual relation with party.**—It was proper to ask, on cross-examination of witnesses for the defendant, whether they were on his bond in that case, and also whether they had been on his bond before, in order to show the interest of the witnesses. *Ross v. State*, 71 Cr. R. 493, 159 S. W. 1063.

To impeach a witness for defendant in seduction, the state may show witness prescribed for prosecutrix to produce an abortion. *McDonald v. State* (Cr. App.) 179 S. W. 880.

**92. — Friendly or unfriendly relations with or feeling toward party.**—In an action for malicious prosecution, evidence to show a witness' animosity against plaintiff and another implicated with plaintiff held admissible. *Missouri, K. & T. Ry. Co. v. Craddock* (Civ. App.) 174 S. W. 965; *Edwards v. State*, 75 Cr. R. 647, 172 S. W. 227.

Where the prosecuting witness admitted having been indicted for assaulting defendant, it was error to refuse to permit defendant to show that the cause of the assault was that the witness purchased a chattel mortgage on defendant's property and tried to enforce it before it was due as tending to intensify the bias of the witness. *Sherley v. State*, 72 Cr. R. 665, 163 S. W. 708.

Criminal acts of a witness' stepfather in causing pregnancy, to remove which accused performed the abortion, for which he was prosecuted, and unfriendliness between him and her husband held inadmissible to affect her credibility. *Link v. State*, 73 Cr. R. 82, 164 S. W. 987.

The state's witness may be cross-examined as to whether a relative of his who was an enemy of accused had not induced him to make the complaint. *Wade v. State*, 75 Cr. R. 531, 171 S. W. 713.

Refusal to permit accused to show that a state's witness was supporting at an election a candidate opposing the candidate supported by accused held error. *Edwards v. State*, 75 Cr. R. 647, 172 S. W. 227.

In salesman's action for compensation under oral contract, letter of defendant's president showing his bias against plaintiff held admissible, as affecting the weight to be given testimony of such officer. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

The cross-examination of a witness for accused as to his friendship for, and assistance rendered to, accused, held proper to show the witness' interest. *Deisher v. State* (Cr. App.) 190 S. W. 729.

93. — **Cross-examination to show interest or bias.**—Questions to a witness to show interest and bias, which assume facts not in evidence, are properly disallowed. *Echols v. State*, 75 Cr. R. 369, 170 S. W. 786.

To show the bias of a witness, a question is too general which asks whether he had expressed his feelings, etc., but the parties, the time, and the place should be pointed out. *Id.*

94. — **Laying foundation for impeaching evidence as to interest or bias.**—Where an expert witness was not interrogated as to what he was to be paid for attending court, evidence could not be introduced, after he had testified and left the county, that he was paid in connection with his testimony. *Good v. Texas & P. Ry. Co.* (Civ. App.) 166 S. W. 670.

95. — **Competency of impeaching evidence as to interest or bias.**—While it is always permissible to show the bias and prejudice of any adverse witness, the testimony offered for such purpose must have some probative force, and it is never permissible to impeach a witness on immaterial matters. *Hall v. State*, 70 Cr. R. 590, 158 S. W. 272.

A party may prove declarations of a witness which tend to show his bias, interest, prejudice, or any other mental state or status, which, fairly construed, might tend to affect his credibility. *Burnaman v. State*, 70 Cr. R. 361, 159 S. W. 244, 46 L. R. A. (N. S.) 1001.

The court properly permitted accused to show that a difficulty had occurred between him and one of the state's witnesses, but refused to permit proof of the details thereof. *Figueroa v. State*, 71 Cr. R. 371, 159 S. W. 1188.

To show animosity of a state witness towards defendant, testimony that, while deceased had had his cotton ginned at witness' gin, defendant had not, is admissible; but the fact that defendant's father had not patronized such gin, defendant being a married man and not being with his father, is immaterial thereon. *Davis v. State*, 73 Cr. R. 49, 163 S. W. 442.

In a prosecution for illegally selling liquor, the court properly refused to permit defendant to testify that he had worked for the prosecuting witness and had been paid partly in whisky, and that this was a motive for the prosecution against him, in the absence of evidence that the prosecuting witness had reason to believe defendant was going to prosecute him. *Sherley v. State*, 72 Cr. R. 665, 163 S. W. 708.

The reason why a sheriff had discharged his deputy, the prosecuting witness, was properly excluded, as not showing animus or ill will. *McHenry v. State*, 76 Cr. R. 273, 173 S. W. 1020.

Evidence that defendant secured liquors from witness' saloon without paying therefor held admissible, as tending to show the witness was defendant's employé, and so was interested. *Rhea v. Cook* (Civ. App.) 174 S. W. 892.

Evidence that defendant owed a certain bank money held admissible, as tending to show that testimony of officers of the bank, in a suit against such defendant on a note, was interested. *Id.*

Upon trial for rape of accused's daughter, testimony, tending to show hostility of daughter, testifying for the state, against another daughter, was irrelevant. *Marion v. State* (Cr. App.) 190 S. W. 499.

96. — **Rebuttal of evidence of interest or bias.**—Where defendant sought by cross-examination to show that witness was related to the prosecuting witness, but developed the fact that the witness had been forced to tell the grand jury about buying whisky of defendant, the state was entitled to prove that such witness had not voluntarily appeared and testified before the grand jury. *Brown v. State*, 72 Cr. R. 33, 160 S. W. 374.

The state, to show interest of a witness for defendant, and that her testimony was of recent manufacture or origin, having shown employment of her by defendant subsequent to the crime, defendant may show the same statement was made by witness just after the crime and before such employment. *Kaufman v. State*, 73 Cr. R. 454, 165 S. W. 193.

Where it is attempted to be shown that a witness is testifying under corrupt motives or fabricating testimony, evidence of his good reputation is admissible. *Thompson v. State*, 74 Cr. R. 145, 167 S. W. 345.

Where accused attacked a witness by evidence of statements that he was going to volunteer to testify, though he knew nothing of the case, the witness might be corroborated by evidence that his name was furnished to the prosecution by another. *McCue v. State*, 75 Cr. R. 137, 170 S. W. 280.

Where accused sought to show that a state's witness was taking an active interest in the prosecution, the court could permit the state to show the reason of the witness' interest. *Word v. State* (Cr. App.) 179 S. W. 1175.

97. — **Evidence to show want of interest or freedom from bias.**—Where accused, in cross-examining the state's witness, endeavored to show that he was not placed under the rule merely that he might hear the other testimony before he testified, and attempted to show bias, the witness was properly permitted to testify that, while he was interested in the case, he did not feel sufficiently interested to testify falsely. *Ward v. State*, 70 Cr. R. 393, 159 S. W. 272.



Where the state on the cross-examination of a witness for accused showed that the witness was biased in favor of accused, accused should be permitted to show that the witness and decedent supported the same candidate at an election. *Edwards v. State*, 75 Cr. R. 647, 172 S. W. 227.

**98. Inconsistency of statements as ground of impeachment.**—In a prosecution for assault with intent to rape on defendant's step-daughter, her mother having testified that prosecutrix on the day of the alleged offense had not come to her and been asked by her if defendant had not ruined her and that witness had not told S. of the assault shortly thereafter, S. was properly permitted to testify to the contrary; the court having instructed that the evidence could be considered only as bearing on the mother's credibility. *Grimes v. State*, 71 Cr. R. 614, 160 S. W. 689.

In a prosecution for procuring an abortion where the mother of the girl testified for the defense, testimony as to her contradictory statements to witnesses held admissible as affecting her credibility. *Link v. State*, 73 Cr. R. 82, 164 S. W. 987.

In a prosecution for procuring an abortion, testimony of the mother of the girl that her husband, the girl's stepfather, had been arrested as an accomplice after she had made certain statements to the prosecution, and subsequent to her testimony at the trial to a different state of facts, held admissible as tending to show her interest, feeling and bias. *Id.*

A witness may be impeached by proof of statements in conflict with his testimony, by laying a proper foundation, and by calling as witnesses the persons to whom the conflicting statements were made. *Cyrus v. State*, 169 S. W. 679, 74 Cr. R. 437.

If a witness is present, and, though under no duty to speak, the facts discussed were of such a nature and the circumstances such that he would, in the natural order of things, have mentioned facts within his knowledge, his failure to do so bears sufficiently on the question of his veracity to entitle it to admission. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

A witness may be impeached on laying the proper predicate by proving statements by him in conflict with his testimony. *Longoria v. State* (Cr. App.) 188 S. W. 988.

The state may impeach defendant's witness by proving that she had made declarations prior to her testimony different from what she made along the same line at other times prior thereto. *Sapp v. State* (Cr. App.) 190 S. W. 489.

In action to rescind purchase price of land, testimony of defendant's conversation with witness held admissible as contradictory of defendant's testimony. *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

**99. — Nature of former statement in general.**—A grantee having denied assuming a debt on certain school land to the state and also any knowledge of its existence, evidence that, after the conveyance and before interest payments on the state debt had matured, he stated to witness that it would soon be time for him to "dig up" the interest money due the state was admissible. *Alston v. Pierson* (Civ. App.) 158 S. W. 1165.

Where the state's witness testified that an unlawful sale of intoxicants was made at one time, he may be cross-examined as to contradictory statements of the time of sale made out of court. *Wade v. State*, 75 Cr. R. 531, 171 S. W. 713.

In a murder trial, evidence in rebuttal of statements purporting to have been made by wife of deceased as to his character held admissible. *Barnett v. State*, 76 Cr. R. 555, 176 S. W. 580.

Where one of accused's witnesses who confessed to participating in the robbery stated that accused was not a participant, he may be contradicted by proof of contradictory statement, although such evidence is limited to the contradiction. *Collins v. State* (Cr. App.) 178 S. W. 345.

In a prosecution for violation of local option law, evidence for defendant to support his testimony that deputy sheriff had stated to third party that he had found only one whisky case when he searched defendant's house held admissible on the weight to be given the deputy's testimony. *Bryson v. State* (Cr. App.) 186 S. W. 842.

Where defendant's witness testified that she believed the deceased was unconscious when she made statement that defendant inflicted injuries on her, statements by the witness to the physician who attended deceased, prior to so testifying, were admissible to impeach her. *Thompson v. State* (Cr. App.) 187 S. W. 204.

In trial for murder, conductor's former statement that there was no doubt that deceased and one of the defendants got off his train at a certain time and place and took an automobile driven by the other defendants, was admissible to impeach the testimony to the contrary. *Sapp v. State* (Cr. App.) 190 S. W. 489.

In prosecution for murder, testimony of state's witnesses as to statements of defendants' witness at the time wife of one of defendants was lying dead, to the effect that defendant had had her killed, held admissible to impeach defendants' witness. *Id.*

Declarations by defendant subsequent to his claimed transfer of a note to his wife, held admissible to contradict his testimony showing a gift. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

**101. — Written statements or instruments.**—Where, in an action to cancel a contract for the sale of land, one of defendant's witnesses testified on cross-examination that he thought defendant's officers were good men, plaintiff could not contradict him by introducing a letter, written by the witness, in which he referred to defendant's officers as a gang of cut-throats. *South Texas Mortgage Co. v. Dozier* (Civ. App.) 158 S. W. 1051.

In an action for damages and for an injunction against breach of a contract for the sale of a livery business and its good will, in which defendant testified that a certain building was not his, statement from his answer filed in a suit by a third person that the building was to be used as a livery stable held admissible as impeaching evidence. *Kennedy v. Winfrey* (Civ. App.) 163 S. W. 1018.

Where a surveyor had introduced a map of the locus in quo in a boundary line dispute, showing the nonexistence of a set-off as claimed by plaintiff, other maps showing such jog, signed by the witness, but made by him from field notes of others in his em-

ploy. were admissible for impeachment. *National Biscuit Co. v. Block* (Civ. App.) 164 S. W. 393.

Where, on the trial of accused for the murder of his son-in-law, his daughter, decedent's wife, testified to acts of cruelty by decedent, and that prior to the homicide she had informed accused thereof, a letter written by her to decedent, two days before the homicide, in which she disclosed affection for him and a desire to live with him, was admissible to impeach her. *Roberts v. State*, 168 S. W. 100, 74 Cr. R. 150.

Declarations in a petition not made with plaintiff's knowledge, authority, or acquiescence, in suits against other persons, are not admissible to impeach plaintiff's testimony in the subsequent action. *Gulf, C. & S. F. Ry. Co. v. Battle* (Civ. App.) 169 S. W. 1048.

Census report signed by witness before motive to swear falsely arose, held admissible to impeach her testimony concerning the ages of her children. *Hopkins v. State* (Cr. App.) 180 S. W. 1094.

It was proper for the state to introduce for impeaching purposes a written statement of a witness which contradicted some of his testimony on the trial; the proper predicate having been laid. *Porter v. State* (Cr. App.) 190 S. W. 159.

File marks, excerpts, etc., of plaintiff's former pleadings, containing no admission or declaration against his interest or contradicting anything to which he has testified, are not competent for purposes of impeachment. *Texas City Transp. Co. v. Winters* (Civ. App.) 193 S. W. 366.

Written statement identified and proved to have been made by witness contrary to his testimony on trial is admissible to impeach him, though undated and unsigned. *Kampmann v. Cross* (Civ. App.) 194 S. W. 437.

102. — **Former testimony of witness.**—A witness may be impeached by proof of his statements before the grand jury in conflict with his testimony given on the trial. *Link v. State*, 73 Cr. R. 82, 164 S. W. 987; *Perrett v. State*, 72 Cr. R. 212, 162 S. W. 882.

Where a witness for plaintiff deposed that he had heard a conversation between plaintiff and defendant as to the price for which defendant would feed stock, his former deposition that he had heard "the latter part" of the conversation held not to impeach him. *Memphis Cotton Oil Co. v. Goode* (Civ. App.) 171 S. W. 284.

In prosecution for murder, impeachment of defendant's witnesses by proving their inconsistent testimony at coroner's inquest and former trial held proper, although defendant had not been present at the inquest. *Bolden v. State* (Cr. App.) 178 S. W. 533.

In an action by shippers of live stock for delay in transit, testimony of a plaintiff, on cross-examination as to his testimony in another action, tending to show that it would take a longer time to make a shipment from the shipping point to destination than was testified to by him, was admissible. *International & G. N. Ry. Co. v. Landa & Storey* (Civ. App.) 183 S. W. 384.

In trial for seduction, where testimony of witness for defendant tended to show that prosecutrix was not a virtuous and chaste female, it was proper to allow testimony showing his contrary statements on the former trial. *Gleason v. State* (Cr. App.) 183 S. W. 891.

Written statement taken at examining trial could be used to impeach witness stating what he testified to at such trial. *De Arman v. State* (Cr. App.) 189 S. W. 145.

104. — **Statements by others in presence or with the sanction of witness.**—A letter by claimant's attorney, stating the facts as different from those testified to by claimant at the trial, is inadmissible to impeach claimant's testimony. *Texas & P. Ry. Co. v. Spann* (Civ. App.) 173 S. W. 600.

105. — **Witnesses who may be impeached by inconsistent statements.**—A party cannot impeach a witness called by him by showing statements made by the witness contrary to his testimony where there is no claim that the witness misled or deceived the party. *Lane v. Herring* (Civ. App.) 190 S. W. 778.

Plaintiff did not have right to impeach his own witness by showing inconsistent statements, or to lay a predicate for his impeachment, where plaintiff was not surprised by witness' testimony. *Kirby Lumber Co. v. Youngblood* (Civ. App.) 192 S. W. 1106.

106. — **Irrelevant, collateral or immaterial matters.**—Where a witness is cross-examined on collateral matters, his answer cannot be subsequently contradicted by the examining party. *Ballard v. State*, 71 Cr. R. 587, 160 S. W. 716.

It is proper to cross-examine a witness as to collateral and immaterial matters for the purpose of contradicting him by other evidence, if such collateral matters pertain to motive, interest, or animus of a witness. *Id.*

A witness cannot be impeached on an immaterial issue. *Evans v. State*, 76 Cr. R. 56, 172 S. W. 795.

109. — **Laying foundation for proof of inconsistent statements.**—Ordinarily no witness can be impeached by showing that he has made a statement contrary to his testimony without first examining him on the subject and giving him an opportunity to deny or explain. *Curry v. State*, 72 Cr. R. 463, 162 S. W. 851.

On cross-examination of a witness for the defendant, the state could ask him, for impeachment purposes, whether, on the day following the alleged theft, he had made a written statement to the city attorney as to what occurred at the scene of the theft. *Watts v. State*, 75 Cr. R. 330, 171 S. W. 202.

Permitting the county attorney, on cross-examination to lay a predicate for impeachment, to ask a witness for defendant whether he did not make certain statements before the grand jury held not error. *Id.*

To impeach a witness by proof of a contradictory statement it is necessary to call the attention of the witness to the statement. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

Prosecutrix cannot be impeached by proof of inconsistent statements out of court unless proper foundation is laid. *Walton v. State* (Cr. App.) 178 S. W. 358.

110. — **Admission or denial by witness of making of inconsistent statements.**—A witness who admits that he had made a contradictory statement while testifying on a former trial may not be impeached by introducing the former statement. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

In a prosecution for homicide, a witness cannot be compelled to say what her testimony was at a prior trial, where she states that she does not remember. *Taylor v. State* (Cr. App.) 180 S. W. 242.

111. — **Competency of evidence of inconsistent statements in general.**—Testimony as to statements made by a witness, offered to impeach his testimony, is not objectionable as hearsay. *Texas & P. Ry. Co. v. Spann* (Civ. App.) 173 S. W. 600.

Evidence, though hearsay, showing failure of a witness to disclose facts in discussion of accident in suit, cannot be excluded as hearsay, or irrelevant or immaterial, as it goes to the credibility of the witness. *Ft. Worth & D. C. Ry. Co. v. Yantis* (Civ. App.) 185 S. W. 969.

113. — **Proof of written statements or instruments.**—Proof that witness, sought to be impeached as to ages of children, signed census blank, held to authorize its introduction though the answers therein were written by the census taker. *Hopkins v. State* (Cr. App.) 180 S. W. 1094.

The admission in evidence of the only part of a letter written by defendant's bookkeeper to its president which was contradictory of her testimony was proper. *E. Alkemyer Co. v. McCardell* (Civ. App.) 183 S. W. 416.

In prosecution for murder, where a witness for defense testified at variance with statement made on the day of the murder, it was proper for the district attorney, who elicited such statement, to testify that he wrote it as nearly in the witness' language as he could, using narrative form, and that he explained the nature of the inquest before taking the statement, which witness signed after he read it to her. *Short v. State* (Cr. App.) 187 S. W. 965.

114. — **Proof of former testimony of witness.**—A statement by a witness before the grand jury, reduced to writing, identified by the assistant county attorney and signed by the witness, was admissible to impeach the witness, where a proper predicate had been laid. *Watts v. State*, 75 Cr. R. 330, 171 S. W. 202.

Testimony of a grand juror called to show discrepancies in the testimony of a witness for defendant, that he had translated her testimony to the grand jury, held not objectionable because he was not sworn in the grand jury to make such translation. *Merkel v. State*, 75 Cr. R. 551, 171 S. W. 738.

In a prosecution for murder, it is not necessary that testimony of a witness at a former trial, and used to impeach him, be reduced to writing or sworn to, if it can be otherwise proven. *Taylor v. State* (Cr. App.) 180 S. W. 242.

115. — **Rebuttal of evidence of inconsistent statements.**—Where evidence of contradictory statements has been introduced to impeach a witness, his general good reputation may be proved, but merely laying a predicate for proof of such statements does not justify proof of good reputation. *Thompson v. State*, 167 S. W. 345, 74 Cr. R. 145.

116. — **Evidence as to statements consistent with testimony.**—Accused having sought to impeach prosecutrix by proving contradictory statements, the state was authorized to support her testimony by proving a prior similar statement to a physician. *Northcutt v. State*, 70 Cr. R. 577, 158 S. W. 1004.

Where a witness for the state was impeached by proof of contradictory statements, the state could show that he had made subsequent statements, consistent with the testimony, prior to the alleged contradictory statements. *Smith v. State*, 73 Cr. R. 521, 165 S. W. 574.

Replies of a witness to inquiries concerning the accident held admissible in corroboration, where his credibility was attacked by showing inconsistent statements. *Texas & N. O. R. Co. v. Petersilka* (Civ. App.) 176 S. W. 70.

Where the state impeaches a witness by proof of contradictory statements, he may prove statements similar to those on trial, made before the motive for falsification existed. *Blackburn v. State* (Cr. App.) 180 S. W. 268.

Where defendant sought to impeach a state's witness by showing that she had made a statement before trial different from that at the trial, the court properly permitted state to introduce her testimony at examining trial. *Cozby v. State* (Cr. App.) 189 S. W. 957.

Where on the third trial of a case one party impeached witness by showing that on a former trial he had testified to facts in conflict with his testimony on the third trial, it was error to permit for corroboration a showing that on another former trial he testified as he did on the third trial. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 190 S. W. 739.

117. — **Explanation of inconsistency.**—Evidence of plaintiff as to circumstances surrounding the giving of a statement and as to its falsity was admissible to rebut the statement given to contradict plaintiff's testimony. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

119. **Contradiction of testimony of witness.**—The testimony of a witness on cross-examination that he is not a professional gambler is conclusive and cannot be contradicted by the cross-examiner. *Mares v. State*, 71 Cr. R. 303, 153 S. W. 1130.

If a witness denies anything showing a motive for testifying against one party, those facts may be shown by other witnesses and independent facts. *Curry v. State*, 72 Cr. R. 463, 162 S. W. 851.

Certain evidence held admissible to affect a witness' credibility. *City of Comanche v. Hoff & Harris* (Civ. App.) 170 S. W. 135.

In an action for depreciation of value of real estate through railroad construction, evidence, in rebuttal of testimony by a witness who lived across the street from plain-

tiff, that he suffered no inconvenience or discomfort, held admissible. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 176 S. W. 907.

120. — **Right to contradict testimony of one's own witness.**—A party in a civil action may contradict the testimony of his own witness even though he is not surprised thereby. *Western Union Telegraph Co. v. Vickery* (Civ. App.) 158 S. W. 792.

Where a witness testified that he borrowed a quart of whisky from accused and did not buy it, the county attorney, by cross-examining the witness as to his payment of a dollar to accused when he got the whisky, did not make the witness his own, so as to prevent him from disproving the witness' statement that the dollar that he paid accused was not for the whisky, but to pay a debt for witness' brother. *Howard v. State*, 72 Cr. R. 624, 163 S. W. 429.

122. — **Disproving facts testified to by witness.**—In a prosecution for statutory rape, where accused introduced witnesses who testified that at the time the alleged act of intercourse was charged to have taken place on the banks of a branch, he was visible, and the prosecutrix was not present, it is proper for the state to introduce evidence that from the position of accused's witnesses, they could not have seen him. *Hamilton v. State*, 168 S. W. 536, 74 Cr. R. 219.

Where one of accused's witnesses testified that he did not sign a written statement concerning the crime and could not write his name, he may be impeached by contradictory evidence. *Collins v. State* (Cr. App.) 178 S. W. 345.

It is always competent for a party to contradict his adversary's witness by showing the facts to be otherwise than as testified to by him, and so discredit the witness. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

In a homicide case, where accused's witness testified to communicating statements by deceased's wife and daughter, the state may prove by deceased's wife and daughter that they made no such statements to the witness. *Sanford v. State* (Cr. App.) 185 S. W. 22.

123. — **Testimony subject to contradiction in general.**—Where a physician testified by deposition as to the cause of plaintiff's injuries, held, that he could not be impeached by proof that his statement that he was unable to leave his residence on account of illness was false. *Texas Traction Co. v. Fearris* (Civ. App.) 163 S. W. 1060.

In murder case, where court adjourned for witness who testified she was ill, her cross-examination not seriously assailing or questioning her testimony, refusal to permit defendant to introduce evidence to prove she was really sick was proper. *De Arman v. State* (Cr. App.) 189 S. W. 145.

Where a state's witness was asked on cross-examination by defendants' attorney whether or not she was a common prostitute, and she denied that, none of the officers could testify that her reputation was that of a common prostitute. *Sapp v. State* (Cr. App.) 190 S. W. 489.

If witness should deny alleged conspiracy between state's witnesses and officials, whereby such witnesses fabricated testimony against accused, it would form a subject of impeachment. *Jones v. State* (Cr. App.) 194 S. W. 1109.

124. — **Irrelevant, collateral or immaterial matters.**—In an action for personal injuries, plaintiff's denial on cross-examination that he was allowed to resign from a third party's employ on account of his drinking related to a collateral matter, and could not be contradicted. *Paris & G. N. R. Co. v. Flanders* (Civ. App.) 165 S. W. 98.

Evidence held inadmissible to contradict a witness, her testimony not being pertinent to the issue involved. *Houston B. & T. Ry. Co. v. Lewis* (Civ. App.) 176 S. W. 68.

A state's witness in a murder case could not be impeached by disproof of the reason she gave for her admittedly bitter feeling toward defendant. *Herrera v. State* (Cr. App.) 180 S. W. 1097.

It is not permissible to impeach a witness by contradicting him upon an immaterial matter. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

125. — **Competency of contradictory evidence.**—Where, in a homicide case, a witness had testified that deceased had made a threat against defendant, and stating that he then had in his pocket a marriage license to marry defendant's divorced wife, evidence of the date of the issuance of the license was admissible as tending to discredit the witness. *Kirklin v. State*, 73 Cr. R. 251, 164 S. W. 1016.

In a prosecution for perjury, evidence of statements by a man with whom it was claimed the prosecutrix admitted improper relations, offered to contradict one of accused's witnesses, held inadmissible. *Cox v. State*, 76 Cr. R. 326, 174 S. W. 1067.

Where mother of prosecutrix, whose age was contested, testified concerning age of younger daughter, testimony that all of the girls went to school and were within the scholastic age at a certain time, held admissible to impeach the mother. *Hopkins v. State* (Cr. App.) 180 S. W. 1094.

In suit by the buyer of lands for false representations of the seller's agent as to the quantity, a map furnished the buyer by the agent was admissible to contradict the agent's testimony. *Vaden v. Buck* (Civ. App.) 184 S. W. 318.

Predicate for contradiction of witness based on statement from deposition of one who also testified orally held proper and sufficient. *Briggs-Weaver Machinery Co. v. Pratt* (Civ. App.) 184 S. W. 732.

In impeaching a witness by contradiction he should be asked the direct question and not one seeking to draw an inference from an inference. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

127. **Corroboration of impeached or contradicted witness.**—Where a state's witness testified that she saw accused strike at decedent, and accused offered evidence that there was a hill between such witness' vision and the place of the difficulty, evidence was admissible for the state that witnesses were familiar with the location, and that one standing where witness was could plainly see decedent at the time. *Ward v. State*, 70 Cr. R. 393, 159 S. W. 272.

Where plaintiff's witness denied the authenticity of a written statement purporting to have been made by him, and contradictory to his testimony, plaintiff could testify that he was present, and that such witness did not make the purported statement. *T. B. Allen & Co. v. Shook* (Civ. App.) 160 S. W. 1091.

Where a physician, who testified to examining plaintiff at the time of an injury while working for another railroad company, was contradicted by plaintiff, the contradiction was not such an impeachment as to authorize the introduction of the report by the physician as corroborative evidence. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

That two witnesses contradicted each other, in that one testified that he was in an office at the time of the shooting, which another witness denied, would not entitle the witness stating the affirmative to show that he had made statements which corroborated his evidence, though he could show by other evidence that he was at the office at the time testified. *Bain v. State*, 166 S. W. 505, 73 Cr. R. 528.

In an action for fraudulent misrepresentations, where a witness for the plaintiff testified that defendant kept a false account book as to the receipts of the property which he leased to plaintiff, testimony that others had seen and examined a similar book, which contained false entries of the amounts, was admissible to corroborate the witness. *Loftus v. Sturgis* (Civ. App.) 167 S. W. 14.

Where one accused of the unlawful sale of intoxicating liquor contended that the prosecuting witness was so intoxicated as to have no recollection of the transaction, the prosecution may show that the witness, although somewhat under the influence of intoxicating liquor, was not drunk. *Clark v. State*, 169 S. W. 895, 74 Cr. R. 464.

Where accused's witnesses were contradicted, but not in any other way attacked, they could not be corroborated by proof of their general reputation for veracity. *McCue v. State*, 75 Cr. R. 137, 170 S. W. 230.

Where a witness is a stranger, and discrediting facts have been developed in his cross-examination, he may be corroborated by proof that his general reputation for truth and veracity is good. *Id.*

Where the age of prosecutrix was in question, held, that a school certificate signed by the girl's mother long before prosecution was admissible to corroborate the mother's testimony as to her age. *Walton v. State* (Cr. App.) 178 S. W. 358.

Where defendant cross-examined state's only material witness to lay the predicate to impeach him, the state could support the witness by corroborating the testimony. *Leach v. State* (Cr. App.) 150 S. W. 122.

Where the defendant in a prosecution for murder attempted to impeach one of the state's witnesses it was not error to permit the state to support its witness by other testimony. *Satterwhite v. State* (Cr. App.) 181 S. W. 462.

In an action for damages for conversion of cotton, where defendant introduced witnesses to impeach plaintiff's testimony, testimony of witnesses in corroboration of plaintiff's statement that he did intend to return and gather the cotton held admissible. *Grayson v. Boyd* (Civ. App.) 185 S. W. 651.

In lessee's action for damages for lessor's wrongful refusal to consent to subletting, where plaintiff attempted to discredit defendant's testimony as to his offer to release the lessee, corroborating testimony thereof was admissible. *A. Harris & Co. v. Campbell* (Civ. App.) 187 S. W. 365.

**128. — Testimony subject to corroboration.**—Admission of testimony of foreman of the grand jury which indicted accused relative to the giving of testimony before the grand jury by the state's impeaching witness held error; it not being permissible to corroborate the impeaching witness in this manner. *Venn v. State* (Cr. App.) 182 S. W. 315.

**129. — Competency of corroborative evidence in general.**—In a prosecution for robbery occurring at the time of an assault, certain evidence as to prosecutor's actions after the assault held admissible, in view of cross-examination on the theory of fabricated testimony. *Phillips v. State*, 73 Cr. R. 317, 164 S. W. 1004.

That a witness testifying that a person was her own daughter, and that she had given her to another, was impeached, did not render evidence of general reputation that the person was the daughter of the witness admissible. *Gibson v. Dickson* (Civ. App.) 178 S. W. 44.

Report of defendant railway's investigator on condition of a car coupling in operating which plaintiff was injured is not admissible to corroborate the testimony of the investigator, unless made before motive for concealing defects arose. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

State held improperly permitted to support testimony of witness as to ages of her children by census blank signed by her after the return of the indictment. *Hopkins v. State* (Cr. App.) 180 S. W. 1094.

In bank's suit on note for \$150, passbook showing deposit as of date of loan of \$125, held admissible in corroboration of defendants' testimony that only \$125 was borrowed, by one of them, from the bank. *Farmers' & Citizens' Sav. Bank v. Smith* (Civ. App.) 188 S. W. 1026.

**130. — Former statements corresponding with testimony.**—Admission of evidence that the state's witness, after he had seen defendant and deceased's wife in flagrante delicto, had told a certain named person, where the state offered no other witnesses to bolster up his testimony, held not error. *Lane v. State*, 73 Cr. R. 266, 164 S. W. 378.

Where the defendant introduced evidence that plaintiff's wife made no complaint of the injuries for which recovery was sought, to show that her claim was a recent fabrication, plaintiff can introduce statements by his wife at the same time as to the occurrence of the accident and the injury. *Houston & T. C. Ry. Co. v. Fox*, 166 S. W. 693, 106 Tex. 317, reversing judgment (Civ. App.) 156 S. W. 922.

Statements by the injured person in rebuttal of defendant's contention that plaintiff's claim is a recent fabrication should be confined to statements as to the occurrence of the accident and the resulting injuries. *Id.*

In a prosecution for statutory rape, where accused attempted to impeach prosecutrix by her statements to others as to having intercourse with him, evidence that immediately after the act of intercourse prosecutrix admitted it to her sister is admissible in corroboration. *Hamilton v. State*, 168 S. W. 536, 74 Cr. R. 219.

Where an effort is made to show that the testimony of a witness is fabricated, proof that the witness made other statements at other times similar to his testimony is admissible. *Richard Cocke & Co. v. New Era Gravel & Development Co.* (Civ. App.) 168 S. W. 988.

Where accused attacked the credibility of a state's witness, the witness might be corroborated by evidence that, shortly after the killing, he made statements identical with those given at trial. *McCue v. State*, 75 Cr. R. 137, 170 S. W. 280.

Where defendant sought to impeach a state's witness the state could support the witness' testimony by proof that before the trial he made statements similar to his testimony to others. *Gonzales v. State*, 171 S. W. 1149, 74 Cr. R. 468.

Evidence of prior statements consistent with plaintiff's claim, corroborative of his testimony, held admissible to rebut an inference of fabrication. *Bailey v. Look* (Civ. App.) 174 S. W. 1010.

In action by employé of lumber company for personal injuries, testimony that witness had on prior occasion made statement to certain person was inadmissible; it being improper to permit plaintiff to bolster up testimony of witness by showing by witness prior statements consistent with testimony. *Kirby Lumber Co. v. Youngblood* (Civ. App.) 192 S. W. 1106.

#### RULE 5. EVIDENCE MUST RELATE TO FACTS IN ISSUE AND TO RELEVANT FACTS

1. **Relevancy and importance in general.**—In habeas corpus by a father for the custody of his child, evidence that the father was willing to abide by the decision of the arbitrators to make certain payments to his wife for the child's benefit would have been but of slight, if any, aid in determining the issues, and there was no error in excluding it. *Long v. Smith* (Civ. App.) 162 S. W. 25.

In an action for injury to a brakeman struck by a switch stand while mounting a switch engine to ride home after completing his run, evidence of a bulletin of the company, which recited that engines would pick up crews, was admissible on the issue of his right to board the engine. *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400.

Where a bank loaned plaintiff money to purchase a mortgaged printing plant and paid off such mortgages with the proceeds of the loan, the mortgages were immaterial as evidence in an action by the bank to recover its loan. *Power v. First State Bank of Crowell* (Civ. App.) 162 S. W. 416.

Where defendant pleaded that plaintiff was negligent in not having an operation performed, testimony of physician that an ordinary man was inclined to shrink from operation, and that nearly every man knew he was running some risk therefrom, held properly admitted. *St. Louis S. W. Ry. Co. of Texas v. Brown* (Civ. App.) 163 S. W. 383.

Where defendant pleaded that plaintiff aggravated his injuries by heavy work, testimony that he worked, though it hurt him to do so, because that was the only way he had to make a living held properly admitted. *Id.*

In an action on a note, evidence that the cashier of plaintiff bank the day before the note was due told the maker he could not find the note held admissible on the question whether the note was acquired before maturity. *First Nat. Bank v. Chapman* (Civ. App.) 164 S. W. 900.

In a suit to enjoin enforcement of a justice's judgment on the ground that it was satisfied by the satisfaction of certain other judgments, the pleadings in such other suits were admissible to determine whether the justice's judgment was involved in the issues therein. *Ferguson v. Fain* (Civ. App.) 164 S. W. 1040.

In an action upon a note, certain evidence of one of the defendants relating to a release pleaded by the other held properly excluded as immaterial, and in no manner affecting plaintiff. *Senter v. Teague* (Civ. App.) 164 S. W. 1045.

In action for injuries to wife run over by auto driven by boy, evidence held proper as sustaining plaintiff's contention that boy was too small to see over front of car. *Allen v. Bland* (Civ. App.) 168 S. W. 35.

Where, in an action by the original buyer of an automobile against a subsequent buyer from the same seller, who remained in possession after the first sale, there was no evidence that the original buyer's title was questioned in a suit in which he was not a party, or that he was liable to the subsequent buyer for any money he might pay in settlement of the action, evidence of payments by the subsequent buyer was inadmissible. *Trimble v. Tucker* (Civ. App.) 168 S. W. 1021.

In an action on an account, a written order addressed to defendant's agent held admissible. *Melado Land Co. v. Field* (Civ. App.) 172 S. W. 1136.

Evidence having no probative force on the issue held properly excluded. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

In an action for poisoning stock, evidence was admissible that defendant called plaintiff a ——— Jew, and a ——— rascal, when first informed that plaintiff charged him with committing the act. *Sands v. Sedwick* (Civ. App.) 174 S. W. 894.

In an action on a destroyed note bought by defendant from Y., to whom the plaintiff's agent had delivered it, held not error to admit evidence to show the nature of Y.'s dealings with such agent. *Allen v. Rettig* (Civ. App.) 177 S. W. 215.

Where plaintiff was entitled to recover expenses incurred in the repair of his automobile, receipts showing what he had paid different parties, while admissible to show what he had paid for repairs, were not evidence as to the reasonableness of the charges. *Galveston-Houston Electric Ry. Co. v. English* (Civ. App.) 178 S. W. 666.

Evidence which conduces, in any reasonable degree, to establish the probability or improbability of the fact in controversy is relevant. *Bell v. Swim* (Civ. App.) 178 S. W. 850.

In an action on a policy insuring a mule alleged to have died of overheat, it was not error to permit witness to testify that he had treated the mule kindly. *National Live Stock Ins. Co. v. Gomillion* (Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671.

In trover and conversion, testimony as to market value of certain grass seed held inadmissible as being too weak to be considered. *First Nat. Bank of Plainview v. McWhorter* (Civ. App.) 179 S. W. 1147.

In a suit to enforce claim for materials, supplemental contract, between defendant company's lessee or agent and the company, changing terms of original lease, and evidence that defendant's president had expressed his pleasure with the improvements held inadmissible. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

The exclusion from evidence of parts of a letter from defendant's bookkeeper to its president, relating to matters foreign to the issues, and not contradictory of the bookkeeper's testimony, was proper. *E. Alkemeyer Co. v. McCardell* (Civ. App.) 183 S. W. 416.

Where parol evidence showing a verbal gift of a right of way is not admissible to establish an easement, it is admissible to show that one using such easement did so adversely. *Heard v. Bowen* (Civ. App.) 184 S. W. 234.

In action for death of plaintiffs' minor intestate employed by defendant, where it was alleged that defendant was not insured in accordance with the Employers' Liability Act, allowance of question whether defendant posted notices that it carried such insurance held not error. *Southwestern Portland Cement Co. v. Presbitero* (Civ. App.) 190 S. W. 776.

Evidence which is incapable of affording any reasonable presumption or inference as to the principal matter in dispute should be excluded. *Graham v. Kesseler* (Civ. App.) 192 S. W. 299.

In action for wrongful death, evidence that railway company did not produce conductor and brakeman who were present at accident, is not subject to objection that it is immaterial. *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

In attorney's suit against administrator to cancel notes because decedent promised to cancel them in consideration of rendition of legal services, whether decedent promised to embody his agreement in his will was immaterial. *Bright v. Briscoe* (Civ. App.) 193 S. W. 156.

**2. Certainty.**—Admission of testimony of witness in trespass to try title that, to the best of his recollection, the vendor's lien notes on which title depended had been transferred by the former owners of the property before it made an assignment for the benefit of creditors, held not error, in view of the lapse of time and other circumstances. *Etheridge v. Campbell* (Civ. App.) 179 S. W. 1144.

**3. Remoteness.**—Evidence for contestant of her father's will on the ground of undue influence, forming a part of a chain of circumstances tending to show a long-standing and continuously pursued purpose by contestee to induce testator to exclude contestant from a share in his estate, held not objectionable for remoteness. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

Declarations of contestee previous to the execution of the will, showing a hostile intention toward contestant, testator's daughter, were not objectionable for remoteness, in view of other evidence tending to show a continuation of the same feelings and intentions up to and after the execution of the will. *Id.*

In an action for injuries to an expert saw filer, it was not error to permit plaintiff to testify, as against an objection of remoteness, that for the last 20 or 25 years, "taking it right through," he had earned about \$8 a day. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

The admission of testimony by a witness for the defendant on cross-examination that it was conceivable that plaintiff's wife had received the injuries of which she complained, although he found no such injuries when he examined her for life insurance after the accident, was erroneous as permitting plaintiff to show a possibility of injury as a basis for recovery. *Houston & T. C. Ry. Co. v. Fox*, 166 S. W. 693, 106 Tex. 317, reversing judgment (Civ. App.) 156 S. W. 922.

In action against testamentary trustee to recover for services rendered as part of the expenses of a devisee's last illness, evidence as to the condition of the devisee's health, etc., though remote, held admissible. *McLean v. Breen* (Civ. App.) 183 S. W. 394.

In an action for personal injuries to a railroad's lineman riding in an engine cab to inspect wires and struck in the forehead while passing bridge, testimony that there was swinging scaffolds in the bridge for purposes of painting a day before the accident was not too remote from the time of his injury for submission to the jury as to what caused such injury. *Detro v. Gulf, C. & S. F. R. Co.* (Civ. App.) 188 S. W. 517.

In action for breach of timber-sawing contract, testimony of plaintiff that he was compelled to sell his mule was inadmissible as too remote. *McKinnon v. Porter* (Civ. App.) 192 S. W. 1112.

**4. Tendency to mislead or confuse.**—In action to recover plaintiff's compensation as editor of a paper under a contract with defendant, plaintiff's testimony that defendant took money out of the business to buy beer should have been excluded; there being no allegation of defendant's mismanagement, and such testimony being calculated to prejudice the jury. *Graham v. Kesseler* (Civ. App.) 192 S. W. 299.

**5. Negative evidence.**—Evidence that, from the time of the fire until plaintiff found large coal cinders along the track, no other trains than the ones alleged to have caused the fire had passed there was admissible. *Arey v. St. Louis Southwestern Ry. Co.* of

Texas (Civ. App.) 170 S. W. 802, judgment affirmed St. Louis Southwestern R. Co. of Texas v. Arey (Sup.) 179 S. W. 860.

**6. Circumstantial evidence of facts in issue.**—In trespass to try title, a certified copy of a notary's record held admissible as a circumstance to show the existence of a lost deed, though the record misdescribed the original grantee and gave no description of the land. *Hutcheson v. Massie* (Civ. App.) 159 S. W. 315.

Fraud may be proved by circumstances. *McIndoo v. Wood* (Civ. App.) 162 S. W. 488.

A lost deed may be shown to have existed by circumstantial and other evidence other than that specified by statute. *Wilmot v. Fore* (Civ. App.) 163 S. W. 1014.

Where an alleged administrator's deed in plaintiff's chain of title was lost, a certificate of the administrator, reciting a sale and conveyance of the land as property belonging to the intestate to the alleged grantee in the deed, was admissible as a circumstance to show a conveyance from the patentee to the intestate. *Houston Oil Co. of Texas v. Sudduth* (Civ. App.) 171 S. W. 556.

In an action for poisoning stock, evidence that a tin bucket was found on defendant's premises containing a mixture of sulphur and white powder, similar to that found in plaintiff's pasture, held admissible. *Sands v. Sedwick* (Civ. App.) 174 S. W. 894.

In an action for poisoning stock, evidence that tracks were seen leading from defendant's premises to plaintiff's pasture, where stock was found dead, and returning, held admissible. *Id.*

The execution and delivery of a lost deed may be established by the entry of acknowledgment, coupled with the grantor's nonclaim for many years and failure to deny execution. *Pipkin v. Ware* (Civ. App.) 175 S. W. 808.

Proximate cause may be shown by circumstantial evidence, but cannot be presumed. *Galveston, H. & S. A. Ry. Co. v. Fred* (Civ. App.) 185 S. W. 896.

The fact or extent of agency may be established by circumstantial evidence. *Jackson v. Walls* (Civ. App.) 187 S. W. 676.

The existence and execution of a deed may be proved by circumstances where proper predicate is made or where no objection is made that such predicate is lacking. *Vann v. George* (Civ. App.) 191 S. W. 585.

In a suit by heirs to obtain recognition as stockholders in a corporation in which their ancestors had purchased stock, the corporation was entitled to show by circumstantial evidence that the certificate was not then owned by the plaintiffs without showing that it is now held and claimed by some one else, although there is no record of transfer upon the books of company. *League v. Galveston City Co.* (Civ. App.) 192 S. W. 350.

**8. Matters explanatory of facts in evidence or of inferences therefrom.**—In an action against a bank for amount claimed by depositor, evidence was admissible to explain charges against depositor's account. *Owens v. First State Bank of Bronte* (Civ. App.) 167 S. W. 798.

Proof by defendant of circumstance explaining why its witness had not testified on former trial, such failure to testify being shown by cross-examination of the witness, held improperly excluded. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 178 S. W. 615.

Where the failure of witness to testify on a former trial was for reasons unknown to him, explanatory evidence to rebut the unfavorable inference therefrom could be supplied by evidence other than his own testimony. *Id.*

In suit for compensation by a store's department manager, plaintiff's testimony that while he was engaged with defendant it was worth from \$125,000 to \$175,000 was admissible, where defendant claimed plaintiff had delayed making any demand for accounting, while plaintiff testified he did not because he thought defendant was good. *E. Alkemeyer Co. v. McCardell* (Civ. App.) 183 S. W. 416.

In suit to rescind a land contract on ground of fraudulent representations, exclusion of evidence to explain why plaintiff continued his payments thereon after discovering that defendant was not complying with its promises held, not error. *Jackson v. Houston Hot Well Co.* (Civ. App.) 186 S. W. 247.

In servant's action for injury, where reply of defendant's superintendent that he intended to use hoisting engine through the job could not be understood without proof of employé's request to repair, such proof was admissible to explain meaning of reply. *Burrell Engineering & Construction Co. v. Grisier* (Civ. App.) 189 S. W. 102.

Carrier, having introduced testimony that its train customarily stopped several minutes, where passenger was injured, could not complain of his rebuttal that it customarily stopped for so short a time as to require passengers to be on platform ready to alight before actual stop. *Chicago, R. I. & G. Ry. Co. v. Comstock* (Civ. App.) 189 S. W. 109.

In a boundary case, where a witness had made a map on which alternate surveys were marked "state" which was introduced in evidence by defendant, plaintiff could ask witness to explain lines on his map to show that land in question was blanketed by state surveys. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**9. Evidence irrelevant unless preceded or followed by other evidence.**—In a personal injury action, where the only evidence of the value of medicines used was the testimony of plaintiff that he paid a lump sum for the medicine, there can be no recovery therefor; it not appearing that the charge was reasonable. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678, judgment reversed 106 Tex. 190, 163 S. W. 13.

Where, in a suit upon notes, the answer averred that the notes had been paid off and discharged by contracts entered into with agents of the owner of the notes, defendant was properly permitted to testify as to contracts with the alleged agent; there being some proof tending to show that they were the agents of the owner with authority to make the contracts. *Holderman v. Reynolds* (Civ. App.) 159 S. W. 67.

Where the evidence was not sufficient to show that the railroad company has mis-



routed a shipment of cattle, evidence as to damages occasioned thereby was inadmissible. *St. Louis, B. & M. Ry. Co. v. True Bros.* (Civ. App.) 159 S. W. 152.

Evidence as to finding a bottle of whisky in the débris of the wagon after the accident was properly excluded for lack of sufficient evidence that the driver was intoxicated or addicted to drink within a reasonable time before the accident. *Texas Midland R. R. v. Nelson* (Civ. App.) 161 S. W. 1088 and testimony that when witness reached the place of the accident he found a pint whisky bottle one-third full in the débris of plaintiff's wagon is not competent, standing alone, to show intoxication. *Texas Midland R. R. v. Wiggins* (Civ. App.) 161 S. W. 445.

In an action for an elevator operator's death by the negligence of another operator in suddenly starting the machine down and crushing decedent, who was in the door, in which it appeared that the elevator bell rang about the time decedent entered the elevator, evidence whether decedent knew what the ringing of the bell meant was admissible upon showing that he could have heard the bell. *Modern Order of Prætorians v. Nelson* (Civ. App.) 162 S. W. 17.

Where there was no evidence of market value, either in the injured condition of cattle when delivered, or in the condition in which they should have arrived, evidence that the cattle were worth \$5 less per head than they would have been had they been transported without negligence held inadmissible. *Ft. Worth & D. C. Ry. Co. v. Shank & Dean* (Civ. App.) 167 S. W. 1093.

In an action for damages for the destruction of property by fire from defendant's alleged negligence held that before its actual value could be shown it must be shown that there was no market value. *Continental Oil & Cotton Co. v. Wristen & Johnson* (Civ. App.) 168 S. W. 395.

In an action for the breach of a contract to sell a portion of a house to plaintiff, evidence that the receiver offered to complete the sale held inadmissible to mitigate the damages, in the absence of proof that the plaintiff could then complete the purchase, and that his buyer was still willing to accept delivery from him. *Ramsey v. Bird* (Civ. App.) 170 S. W. 1075.

Testimony concerning an operation performed on plaintiff is inadmissible in the absence of evidence that it was made necessary by the injuries. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 171 S. W. 1091.

Where an explosion was, not shown to have been caused by a crack in the dome cap of a locomotive, whether plaintiff had equal or superior opportunity to know of such crack with defendant's other officers, etc., was immaterial. *National Ry. of Mexico v. Ligarde* (Civ. App.) 172 S. W. 1140.

In action against railroad for killing stock, evidence tending to show that stock was killed by passing trains held admissible, without proof of negligence on part of those operating train. *St. Louis, B. & M. Ry. Co. v. Dawson* (Civ. App.) 174 S. W. 850.

Evidence of what the market value of live stock, injured in transit, would have been if uninjured at destination, held admissible, without proof as to what their condition would have been if transported with proper care. *Kansas City, M. & O. Ry. Co. v. Cave* (Civ. App.) 174 S. W. 872.

Where a piano was insured against fire, evidence in an action on the policy as to the cost of repolishing the piano which was damaged and repairing its internal mechanism was improperly received, where there was no showing of that sort of damage. *Occident Fire Ins. Co. v. Linn* (Civ. App.) 179 S. W. 523.

In trespass to try title, where the court properly excluded a certified copy of the deed under which plaintiffs claimed, and without which they would fail in the suit, their testimony to prove their heirship under the grantee and their other evidence was properly excluded as being immaterial. *Emory v. Bailey* (Civ. App.) 181 S. W. 831.

In suit on note executed by defendant to own order and indorsed in blank, the note was admissible, though evidence failed to show to whom it was to have been delivered or to whom made payable. *Kanaman v. Gahagan* (Civ. App.) 185 S. W. 619.

In an action for the death of plaintiff's child while surgeons were operating on her, where there was no evidence that plaintiff had consented to the operation, and no emergency was pleaded or proved, expert testimony as to condition of the child's health and the advisability of the operation is inadmissible. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

In trespass to try title, a sheriff's deed whose description was insufficient without aid of extrinsic evidence should have been excluded, where such extrinsic evidence was not offered. *Leal v. Moglia* (Civ. App.) 192 S. W. 1121.

10. *Identity.*—In suit for recognition as stockholders, instruments, admitted for defendants, tending to show that after plaintiff's ancestor purchased he had sold a share of the stock, having disposed of the rest, held admissible as sufficiently identifying stock referred to as being certificate in controversy. *Condit v. Galveston City Co.* (Civ. App.) 186 S. W. 395.

13. *Character or reputation.*—Where, in an action for injuries, defendant claimed that plaintiff was malingering, evidence that plaintiff's general reputation in the community was good was admissible, though his character had not been otherwise impeached. *Quannah, A. & P. Ry. Co. v. Johnson* (Civ. App.) 159 S. W. 406.

Where the regularity of a notary's acts in taking the acknowledgment of a deed is attacked, evidence concerning the notary's reputation is admissible. *Irvin v. Johnson* (Civ. App.) 170 S. W. 1059.

Plaintiff, in a libel action, may introduce proof of good character, if the libelous publication attacks his character, or such attack is made in defendant's pleadings, or the nature of the action involves his character. *Houston Chronicle Pub. Co. v. Tiernan* (Civ. App.) 171 S. W. 542.

In an action for damages for the breach of a promise of marriage, where there was no attack upon the character of the defendant's present wife, evidence for defendant

that her general character was above suspicion was inadmissible. *Kaker v. Parrish* (Civ. App.) 187 S. W. 517.

14. — **Honesty and integrity.**—The court did not err in rejecting evidence of the reputations of certain persons for honesty, where there had been no effort to impeach their reputations for veracity or honesty. *Wilmot v. Fore* (Civ. App.) 163 S. W. 1014.

Where defendant claimed that he had executed the note in reliance upon the fraudulent misrepresentations of the payee, and that plaintiff had not acquired it in good faith, evidence of the payee's general reputation is admissible on the question of plaintiff's purchase in good faith. *First Nat. Bank v. Chapman* (Civ. App.) 164 S. W. 900.

Where the issue of fraudulent representations made by a vendor to a purchaser could only be determined by virtue of the credit to be given to the testimony of the parties as to whether representations were made, and whether they were true or false, evidence of the general reputation of the vendor for truth and veracity was inadmissible. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

In an action for damages for unlawful arrest and incarceration on a charge of larceny, evidence as to plaintiff's reputation for honesty is properly admitted; the injury to reputation being the principal one. *Missouri, K. & T. Ry. Co. of Texas v. Thompson* (Civ. App.) 183 S. W. 8.

15. — **Chastity and temperance.**—In a suit by a wife for divorce on the ground of cruelty consisting of the husband making charges against the wife, evidence of the wife's bad reputation for chastity was admissible on the issue whether the charges made by the husband so wounded her feelings as to render further living with him insupportable. *Fitzgerald v. Fitzgerald* (Civ. App.) 168 S. W. 452.

In an action on a note, evidence was properly excluded that plaintiff drank considerably, and sometimes got drunk while working for the maker of the note. *Rhea v. Cook* (Civ. App.) 174 S. W. 892.

16. — **Right to prove specific facts.**—In an action for damages caused by defendant's automobile driven by employé, testimony that driver had appeared intoxicated once held incompetent. *Gordon v. Texas & Pacific Mercantile & Mfg. Co.* (Civ. App.) 190 S. W. 748.

17. **Pecuniary condition.**—Whether plaintiff was rich or poor was not material to right of action or measure of damages. *Southwestern Telegraph & Telephone Co. v. Long* (Civ. App.) 183 S. W. 421.

18. **Motive, intent and good faith.**—Where, in a suit to restrain enforcement of the Railroad Commission's order requiring the installation of a spur track, complainant alleged that the people of the town were actuated by spite in building it, evidence as to why it was built, and that complainant's manager said he would spend a million dollars to destroy the town, was admissible. *Crosbyton-Southplains R. Co. v. Railroad Commission of Texas* (Civ. App.) 169 S. W. 1038.

Plaintiff held properly permitted to testify that money taken from a cash drawer in plaintiffs' store immediately before the attachment was used to pay bills owing when the attachment was levied for the purpose of showing that there was no intent to defraud creditors. *Brady-Neely Grocer Co. v. De Foe* (Civ. App.) 169 S. W. 1135.

Evidence as to the particulars of the trade between the parties and as to the agreement showing how payments had been made and in what way the balance due was to have been paid held properly admitted. *Id.*

Acts are admissible to show intention to establish a domicile. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

On the question of intention by a deed to convey 810 acres only of a survey, or all the grantor's father had owned in it, a deed by his grandfather held competent evidence. *Holman v. Houston Oil Co.* (Civ. App.) 174 S. W. 886.

In buyer's action for seller's false representations, evidence that buyer had written and mailed letter complaining of defects held admissible to show his good faith and diligence. *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084.

In a broker's action for compensation, evidence of the purchaser's statement that the broker had abandoned any effort to sell to him and proposal to negotiate directly with the owner, held inadmissible to show the owner's good faith. *White v. Holman* (Civ. App.) 180 S. W. 286.

Evidence that a landowner, after some negotiations with purchaser first interested by a broker engaged to sell, sold the property directly to the purchaser making a deduction for defect in title, is inadmissible to show the owner's good faith. *Id.*

In an action by attorneys on a contract of employment, evidence of their expression of opinion as to probability of reversal of judgment secured by them is admissible upon the issue of their good faith in making contract increasing compensation. *Laybourne v. Bray & Shifflett* (Civ. App.) 190 S. W. 1159.

19. **Knowledge or notice.**—In a broker's action for commissions, a telegram sent by the broker to a joint owner who had listed the land asserting the broker's claims for commissions was properly admitted upon the issue of knowledge of the other joint owners of the broker's claims; there being further evidence that all the owners knew of the telegram. *Webb v. Harding* (Civ. App.) 159 S. W. 1029.

Evidence that the manager had stated that the machine at which plaintiff was injured was warped because of having been in another mill which was burned, and that he had also been struck with a knot from the machine, held admissible to show defendant's knowledge of the defects. *T. B. Allen & Co. v. Shook* (Civ. App.) 160 S. W. 1091.

In an action for wrongful garnishment arising out of plaintiff's signing certain notes of A. executed in a deal for the purchase of corporate stock, evidence held admissible as tending to show knowledge on the part of the defendant that L. was acting as their agent in the sale of the stock. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

In a personal injury action prosecuted by attorneys, assignees of one-half thereof, after compromise by their client, the client was properly permitted to testify to a conversation with defendant's agent at the time of the compromise, in which he informed him of the attorney's interest; it tending to show defendant's knowledge of the assignment. *St. Louis, S. F. & T. Ry. Co. v. Thomas* (Civ. App.) 167 S. W. 784.

On an issue as to whether a tram company, when it purchased the land in controversy, had knowledge of an outstanding title, evidence that its manager expressed a fear of litigation, and ordered a removal of the timber as quickly as possible, and that there was talk among its employes that the company's title was defective, was inadmissible. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 171 S. W. 520.

In action for land claimed by defendants, as heirs of a grantee of a purchaser in an executory contract, evidence held admissible to show that the grantee knew that the purchaser could not convey good title. *Dicken v. Cruse* (Civ. App.) 176 S. W. 655.

In servant's action for injury, where there was other evidence of defects in engine, statement of defendant's employe that engine was defective and his request to superintendent to repair it, was admissible to show that defect was brought to knowledge of superintendent. *Burrell Engineering & Construction Co. v. Grisier* (Civ. App.) 189 S. W. 102.

**22. Statements and conduct of parties.**—Where plaintiff sued defendants for interfering with his contractor in the construction of a residence, evidence that one of the defendants told the contractor not to permit his material to remain on the ground until night was admissible. *Day v. Hunnicutt* (Civ. App.) 160 S. W. 134.

In an action for commission for securing a purchaser for land, the broker is not entitled to show that he offered to arbitrate the controversy, but defendant refused; such testimony tending to prejudice defendant before the jury. *Britain v. Rice* (Civ. App.) 183 S. W. 84.

**23. Customs and course of business.**—Custom among lumbermen, when lumber delivered was not up to grade, to make out a claim and forward it to the shipper and pending settlement hold the lumber subject to the shipper's order, held not inadmissible in evidence as in contravention of law. *Continental Lumber & Tie Co. v. Miller* (Civ. App.) 161 S. W. 927.

**24. Value of services.**—In determining the right of a real estate broker to compensation on the quantum meruit, the value of the property involved is material, for the compensation depends not only on the labor and time expended by the broker, but on the benefit to defendant. *Bond v. Hancock* (Civ. App.) 163 S. W. 660.

In suit by superintendent against insurance company for wrongful discharge, testimony of plaintiff as to amount he would have made under his contract of employment, held admissible. *American Nat. Ins. Co. v. Van Dusen* (Civ. App.) 185 S. W. 634.

In broker's action for commission for effecting lease for term, fact that such services had procured a lessee who had paid seven months' rent might be considered by jury in estimating reasonable value of the services of plaintiff's employe. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

In action for death of a 15 year old boy, his father's testimony, showing the boy's capability for work and his earning capacity, was admissible. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

**25. Value or market price of property.**—In a suit for the value of converted property, plaintiff held entitled to testify as to what the property was worth to her. *McCarthy v. Blackwell* (Civ. App.) 162 S. W. 1163.

In an action by a vendee, upon his vendor's warranty, for an alleged deficiency in a lot, the amount deducted by the vendee on a resale was not admissible to prove either the alleged shortage or the value of the land. *Kelley v. Fain* (Civ. App.) 163 S. W. 869.

The owner, in an action for loss of his personal clothing and household goods, may testify to their value, the loss to him in money; market value of secondhand goods not being the measure of damages. *Pecos & N. T. Ry. Co. v. Grundy* (Civ. App.) 171 S. W. 318.

Where the evidence was conflicting whether any definite oral agreement to exchange properties was made, evidence of the market values of the properties was properly admitted. *Williams v. Phelps* (Civ. App.) 171 S. W. 1100.

Where personal property covered by a fire policy had no market value at the time of a loss, the intrinsic value could be shown. *State Mut. Fire Ins. Co. of Texas v. Cathey* (Civ. App.) 172 S. W. 187.

Where plaintiff valued his property higher than the other witnesses, evidence of the amount at which he listed the property for taxation is admissible in a suit to condemn. *Trinity & B. V. Ry. Co. v. Orenbaum* (Civ. App.) 173 S. W. 531.

Evidence that a turf fire damaged land to a specified amount held admissible to show depreciation. *Ft. Worth & D. C. Ry. Co. v. Firestone* (Civ. App.) 173 S. W. 919.

Plaintiff held entitled to testify as to the market price of his nursery trees destroyed by the overflowing of his land. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

Relative to damages for conversion of secondhand goods, evidence of value held sufficient to sustain the judgment. *Wright Bros. v. Leonard* (Civ. App.) 183 S. W. 780.

To show market value of land after water seeping through defendants' embankment had soaked into it, defendants should be allowed to show that the land had regained its normal state. *Indiana Co-op. Canal Co. v. Gray* (Civ. App.) 184 S. W. 242.

Where the real value of plaintiff's property was proper to be determined, there was no error in submitting testimony of facts and conditions tending to prove its intrinsic value. *San Antonio & A. P. Ry. Co. v. Schwethelm* (Civ. App.) 186 S. W. 414.

In an action for price of a silo, where defendant offered evidence that the silo was of no value, evidence of cost of repairing all defects in silo held admissible. *Ames Portable Silo & Lumber Co. v. Gill* (Civ. App.) 190 S. W. 1130.

26. — **Time and place of valuation.**—In an action for conversion of a rice mixer, evidence as to the market value of such machine after two years' use torn down held admissible. *Texas Warehouse Co. v. Imperial Rice Co.* (Civ. App.) 164 S. W. 396.

Testimony of the value of land in 1902 was admissible on the question of its value in 1905, where the witness testified that there was no material change during such time. *Norton v. Lea* (Civ. App.) 170 S. W. 267.

Where horses, when converted, were worth only \$10 a head, plaintiff was limited to such value, and could not recover at the rate of \$15 a head, on evidence that such was their value some two years after the conversion. *Hancock v. Haile* (Civ. App.) 171 S. W. 1053.

Where the only evidence as to the value of bonds given for the difference on the exchange for real estate was the amount agreed upon by the parties at the time of the exchange and their value some months after the exchange, no damages for decrease in value could be allowed, the value at a subsequent date not being a proper measure of damages. *Moore v. Beakley* (Civ. App.) 183 S. W. 380.

In an action for injuries to a shipment of horses, evidence of their actual value at the point of destination is admissible, where they had no market value at such point. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

In an action for damages for depreciation of real estate, evidence of the cost of a house three years before held admissible for the jury to consider in connection with other testimony to establish market value. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 183 S. W. 829.

Where the pleadings sought recovery of the cost of repairs to automobile damaged, evidence of the market value of the automobile just before and after the accident held inadmissible. *Pecos & N. T. Ry. Co. v. McMeans* (Civ. App.) 188 S. W. 692.

In action for injuring cattle shipped, to be placed on pasture in ranches near the point of destination, testimony as to their market value in that section of the country held proper. *Hovey v. Kirby* (Civ. App.) 189 S. W. 794.

In determining the value of land actually taken as well as damages to the remainder, the evidence should be confined to the market value of the land as it existed when possession was taken by plaintiff. *Jefferson County Traction Co. v. Wilhelm* (Civ. App.) 194 S. W. 448.

27. — **Appraisal of property.**—In action against contractor for value of lumber, estimate by superintendent of building showing amount and value of the lumber used, held admissible upon the issue of value. *Dean v. A. G. McAdams Lumber Co.* (Civ. App.) 172 S. W. 762.

30. — **Crops.**—In an action for damages to crops, including the destruction of rose bushes, held that plaintiff could testify as to the number of roses raised per bush and the value per blossom. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

31. — **Cost of property and amount received in general.**—In an action for injuries to secondhand personal property, evidence of the original cost of the property in the market, the manner, time, and place of its use, its appearance before and after the injury, and its relative usefulness and physical condition is competent. *Galveston, H. & S. A. Ry. Co. v. Wallraven* (Civ. App.) 160 S. W. 116.

In trover for the conversion of a machine, whether it had a market value being for the jury, evidence as to the cost thereof to plaintiff was admissible. *Texas Warehouse Co. v. Imperial Rice Co.* (Civ. App.) 164 S. W. 396.

In determining the value of a railroad passenger's wearing apparel at the time of its loss, its cost and the extent of its use and its condition at the time of its loss should all be considered. *Missouri, K. & T. Ry. Co. v. Kirkpatrick* (Civ. App.) 165 S. W. 500.

Where the market value of an animal injured in shipment at the place of delivery is not shown, the intrinsic value of the animal is the measure of damages, and may be shown by the price paid therefor, but otherwise if market value is shown. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.) 173 S. W. 273.

In suit to enjoin collection of taxes after assessment had been raised, evidence of what owner paid for the land was admissible. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

32. — **Cost of production.**—In a suit for damages for breach of warranty of a hollow clay tile silo not to crack or bulge if erected on a suitable foundation, defendant having sold the material for the silo which was constructed by plaintiff, the value of the silo could be predicated upon its cost, including the cost of material as well as of labor entering into its construction. *Texas Kalamazoo Silo Co. v. Alley* (Civ. App.) 191 S. W. 774.

33. — **Rental value.**—In an action for depreciation in value of real estate through railroad construction, evidence of depreciation in rental value after the construction of the railroad was admissible. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 176 S. W. 907.

37. — **Amount for which property will sell.**—In broker's action involving dispute as to value at which land was taken as payment, evidence as to amount defendant had been offered therefor held improperly admitted. *Crass v. Adams* (Civ. App.) 175 S. W. 510.

Evidence as to selling price of wood delivered in cars and cost of so delivering it, held admissible to prove its market value at place where it was destroyed by fire. *Galveston, H. & S. A. Ry. Co. v. Brune* (Civ. App.) 181 S. W. 547.

In suit to enjoin collection of taxes after assessment had been raised, evidence of standing offer of a certain amount per acre for land was admissible. *Brundrett v. Lucas* (Civ. App.) 194 S. W. 613.

40. — **Animals.**—In an action against a carrier for injuries to a shipment of cattle, evidence held to show that there was a market value for the animals at the place of destination. *Missouri, K. & T. Ry. Co. of Texas v. Mulkey & Allen* (Civ. App.) 159 S. W. 111.

The intrinsic value of stock killed on a railroad right of way is provable where there is no market value. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

52. **Residence.**—On an issue concerning the residence of an entryman on school land, and his transferee, evidence as to where they resided during the time in question was inadmissible. *Chambers v. Rawls* (Civ. App.) 158 S. W. 208.

56. **Partnership and partnership transactions.**—In an action for an accounting between partners upon breach of the agreement by defendants, evidence of the amount lost by defendants in a purchase of live stock from the partnership at a fixed price held admissible. *Fuller v. El Paso Live Stock Commission Co.* (Civ. App.) 174 S. W. 930.

Testimony of attorney who had acted for both parties and was familiar with their dealings with each other that he did not know or hear of plaintiff's ownership of the land in controversy held admissible in a partnership accounting. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

Where, in action for partnership accounting, defendant denied existence of the general partnership, and claimed that he and plaintiff had been interested in several land trade contracts, held, that defendant's testimony relative to such trades and division of profits was admissible. *Id.*

60. **Boundaries.**—In a suit to establish a boundary, evidence that no two surveyors could run a line and reach the same point was properly excluded, since it would not have tended to prove a consideration for the agreed boundary. *Ware v. Perkins* (Civ. App.) 178 S. W. 846.

In a boundary case, in which defendant claimed under a Mexican grant, and plaintiff under a grant from state, evidence that other land had been taken up in that vicinity by settlers under the state since the litigation arose held irrelevant. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

61. **Indebtedness.**—Where an unlocated balance of a headright certificate was ordered sold by an administrator de bonis non, evidence by the county clerk that no claims were filed against the estate during his term of office, while inadmissible to impeach the appointment of an administrator de bonis non, was competent to show there were no community obligations at the time of the appointment. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

64. **Loan or sale.**—Evidence of the value of the land when the deed was executed held admissible on the issue whether the deed was intended as a mortgage. *Norton v. Lea* (Civ. App.) 170 S. W. 267.

Evidence of an agreement between one grantor and the grantee before execution of the security deed was admissible as a circumstance to prove that the deed was executed in accordance therewith, but was not conclusive evidence thereof. *Id.*

65. **Payment.**—In a suit upon promissory notes, where the defense pleaded was payment, it was error to admit evidence of the volume of business of the owner of the notes. *Holderman v. Reynolds* (Civ. App.) 159 S. W. 67.

In an executrix's action on a note in which defendants pleaded payment, evidence that testatrix made no considerable deposits in any of the banks where she did business about the time of the alleged payment was properly admitted. *Richards v. Osborne* (Civ. App.) 164 S. W. 392.

In an action on a note, with an allegation of an agreement that certain collateral should be divided between the note and another, evidence of a defendant's objection at the time of making such agreement to any switching of the collateral to protect the other note was admissible. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

69. **Lien and waiver thereof.**—In an action for the price of brick, in which defendant filed a cross-action against the surety of his contractor, claiming that mechanics' liens exceeded the unpaid part of the contract price, evidence was admissible to support such claim as to the amount and value of labor and material furnished by certain witnesses for the building. *Harlan v. Texas Fuel & Supply Co.* (Civ. App.) 160 S. W. 1142.

70. **Liabilities on bonds.**—In an action on a bond to indemnify against the default of a contractor and to indemnify plaintiff, who made a deposit to assist the contractor, evidence that plaintiff was not an owner of the house, but merely advanced the money, was admissible to establish plaintiff's interest. *Fidelity & Deposit Co. v. Bankers' Trust Co.* (Civ. App.) 161 S. W. 45.

73. **Validity of notes.**—A deposit slip, given by the plaintiff bank when the draft sued on was delivered to it, held admissible to show that a consideration was paid for the draft, and that the transaction was a bona fide transfer. *Crowell Independent School Dist. v. First Nat. Bank of Benjamin* (Civ. App.) 174 S. W. 878.

79. **Employment in general.**—Where, in an action for broker's services in selling lots during 1910, defendant claimed termination of the contract for plaintiff's lack of diligence, evidence of notice to plaintiff by defendant's president or another at his direction that the contract was terminated was admissible. *Putnam Land & Development Co. v. Elser* (Civ. App.) 159 S. W. 190.

Where a broker had testified that he had been appointed as agent to sell certain land, proof that he had put up a sign advertising the land was admissible to show that he had acted as agent. *McFarland v. Lynch* (Civ. App.) 159 S. W. 303.

On the issue of the consideration for an exclusive agency for the sale of land, evidence that the agent painted and put up a sign advertising the land is relevant. *Id.*

In an action for the purchase price of coal furnished an alleged agent, certain evidence held admissible to show the relation of principal and agent. *Kohlberg v. Awbrey & Semple* (Civ. App.) 167 S. W. 828.

In action for commission by party employed to sell realty, testimony of the plaintiff that she had been offered by a third person 5 per cent. to sell the land, and that defendant said "he would be as good as" the third person and would give the 5 per cent., was not improper. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

**80. Authority of agent.**—In an action for the purchase price of an automobile, where the plaintiff claimed delivery to the children of defendant as her agents, testimony as to the anxiety of the children to obtain possession of the car had no probative value and was improperly admitted. *Lange v. Interstate Sales Co.* (Civ. App.) 166 S. W. 900.

In an action by a depositor who claimed that a bank had converted funds belonging to him, the bank may show the depositor's connection with the partnership, in whose behalf it paid out the funds, to corroborate its contention that the payments were authorized. *Owens v. First State Bank of Bronte* (Civ. App.) 167 S. W. 798.

A power of attorney held admissible to show the authority of insured's agent to make proof of loss. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

In a principal's action against an agent for losses sustained by alleged fraudulent reports and as to purchasers' credit, evidence of transactions similar to those sued upon was inadmissible, but the agent's evidence that he followed principal's directions was admissible. *Cooper v. Golding* (Civ. App.) 176 S. W. 92.

Evidence that alleged agent told tenant, relative to repairs, that he had better do the work and that such agent would O. K. the bill, held admissible on question of whether he authorized the repairs. *Texas Mfg. Co. v. Fitzgerald* (Civ. App.) 176 S. W. 891.

In suit by purchasers at sale to satisfy lien claimants to recover land reconveyed by original purchasers' trustee to original grantor, who had reserved right to have three acres upon repayment of part of purchase money, testimony touching the agreement, though not admissible as proof of the grantor's title, was admissible as a relevant circumstance to show authority of plaintiff's trustee to reconvey, etc., and that the reconveyance was in recognition of the previous oral arrangement when the original grantor conveyed. *King v. Lane* (Civ. App.) 186 S. W. 392.

**81. Contract in general.**—Where a partnership operating a bank transferred its assets to a new firm consisting of one of its members and others, representations of such continuing member as to the collectibility of the paper of the bank, made to one of the retiring partners, held admissible on the issue of his guaranty of the assets of the bank. *Young v. Bank of Miami* (Civ. App.) 161 S. W. 436.

In a suit by stockholders to cancel a note given by plaintiffs to defendant to secure a debt of the corporation, on the ground that defendant breached an agreement to remain with the corporation and conduct its business, evidence of the breach of such agreement is admissible to establish a failure of consideration for the note. *Martin v. Daniel* (Civ. App.) 164 S. W. 17.

In an action on a life policy, claimed by the company not to have become effectual because of failure to pay the premium while insured was in good health, evidence that insured was a man of considerable wealth was material on the question whether the agent extended credit to him for the premium, as claimed by plaintiff. *Amarillo Nat. Life Ins. Co. v. Brown* (Civ. App.) 166 S. W. 658.

Evidence that defendant had expressly promised plaintiff to pay the debt sued on, which was owing to plaintiff by defendant, held admissible. *Bell v. Swim* (Civ. App.) 178 S. W. 850.

In a suit to determine a boundary, where it was agreed that the only issue was whether the parties' predecessors had made an agreement as to the boundary line, the exclusion of evidence that plaintiff's predecessor, when he sold to plaintiff's grantor, pointed out the fence on the line contended for by plaintiff as the boundary, was proper. *Talley v. Bailey* (Civ. App.) 181 S. W. 230.

In an action on a note for the amount paid by plaintiff as premiums on defendant's policy and to enforce collateral security, testimony as to defendant's promise to pay in any event held admissible on the issue of his promise to pay made after his discharge in bankruptcy. *Underwood v. First Nat. Bank of Galveston* (Civ. App.) 185 S. W. 395.

**82. Execution of contract.**—In purchaser's action for damages for vendor's failure to perform contract of sale, vendor's deed executed for purpose of performance held admissible to establish contract. *Longinotti v. McShane* (Civ. App.) 184 S. W. 598.

**83. Mistake in contract.**—In an action for the price of a preparation to kill grass and weeds, where the buyer's general manager knew the number of applications necessary, but did not inform his subordinate, evidence that the subordinate would not have purchased it had he had such information held immaterial. *Missouri, K. & T. Ry. Co. of Texas v. Interstate Chemical Co.* (Civ. App.) 169 S. W. 1120.

Testimony regarding the grantee's conversations with attorneys who drew a deed to her, held admissible on the issue of mutual mistake regarding the grantor's source of title. *Smith v. Jones* (Civ. App.) 192 S. W. 795.

On an issue of mutual mistake in a deed, the grantors' power of attorney giving authority to dispose of their entire interest in the property was admissible. *Id.*

Evidence that the grantee had inventoried certain property as her deceased's husband's separate estate was admissible to show that she had concurred in a mutual mistake regarding the source of title to such property. *Id.*

**85. Construction of terms of contract.**—Whether a maker signing the name of a comaker knew at the time that the parties were equally liable held immaterial in determining the liability of the comarker to the payee. *Connor v. Uvalde Nat. Bank* (Civ. App.) 172 S. W. 175.

Where the issue was whether a maker whose name was signed by a comaker was liable as maker or as surety, a question asked comaker as to the difference between the liability of a principal and surety was immaterial. *Id.*

Evidence held admissible, as tending to show that plaintiff might have made the loan which the note in suit was alleged to have been given to secure. *Rhea v. Cook* (Civ. App.) 174 S. W. 892.

In action on account for goods sold, the defense being that buyers of the business assumed it, a telegram from defendant's attorney, authorizing plaintiff to accept the buyers' notes for the account, was admissible as showing that plaintiff's giving the buyers such additional time was an accommodation to the debtor and not a novation. *Wilson v. J. W. Crowdus Drug Co.* (Civ. App.) 190 S. W. 194.

**86. Performance or breach of contract.**—As a circumstance to be considered with others on the issue of defectiveness of the work on fixtures, manufactured and installed by plaintiff for defendant, plaintiff may show that while they were being installed, under defendant's constant observation, he made no complaint with respect to them. *Banner v. Thomas* (Civ. App.) 159 S. W. 102.

In an action to recover under a contract for the furnishing of a municipality with water, evidence held admissible to show that the city had not complied with the contract, and so plaintiff's partial default should be excused. *City of Comanche v. Hoff & Harris* (Civ. App.) 170 S. W. 135.

Where a contract failed to make a reservation covering impossibility of performance through act of God, evidence that it was impossible of performance on that ground was inadmissible; that being no defense. *Northern Irr. Co. v. Watkins* (Civ. App.) 183 S. W. 431.

In action for breach of timber sawing contract, defense being that plaintiff sawed dead timber which would not make merchantable lumber, it was competent to show what effect deadening of timber would have after standing some time, and relative value of lumber sawed from such timber. *McKinnon v. Porter* (Civ. App.) 192 S. W. 1112.

**87. — Contract of employment.**—Where a contract of employment authorized defendant to cancel orders at its discretion in case it believed the buyers were irresponsible, evidence that plaintiff always made diligent inquiries as to the responsibility of buyers and never sent in orders unless he thought the parties good was immaterial. *Iowa Mfg. Co. v. Taylor* (Civ. App.) 157 S. W. 171.

In an action by brokers for a commission, on the theory that under their contract they were entitled to it, though the sale was made by the owner, evidence of efforts made by them to sell and expenses incurred by them in so doing is inadmissible. *Bomar v. Munn* (Civ. App.) 158 S. W. 1186.

In action for commissions under contract for sale of land, purchaser's testimony that he had a contract with plaintiff and that he claimed a commission of a certain sale which defendant had not paid, held irrelevant. *Wick v. McLennan* (Civ. App.) 186 S. W. 847.

In a broker's action for commission for procuring a lessee for a term, evidence that lessee was able to carry the lease contract held irrelevant. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

**88. — Contract of insurance.**—In action on accident policy to recover stipulated amount in case of death, evidence as to sending of draft for disability claim held admissible as tending to show a refusal to pay the death claim. *Commonwealth Bonding & Casualty Co. v. Hendricks* (Civ. App.) 168 S. W. 1007.

In an action on an accident certificate for death due to apoplexy claimed to have been caused by excitement, evidence that decedent suffered great pain in his head, and that he talked about the exciting cause, would get very much excited, would gesticulate with his arms, and on one occasion tried to get out of bed, held relevant. *International Travelers' Ass'n v. Branum* (Civ. App.) 169 S. W. 389.

Evidence in an action on a life policy that several years before a brother of insured met a violent death, and another brother charged with his murder fled, has no bearing on the issue of insured having committed suicide. *De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.* (Civ. App.) 180 S. W. 153.

**89. — Contract of sale.**—In an action for the purchase price of a preparation sold to kill grass and weeds, defended on the ground of an implied warranty that one application would be sufficient, photographs shown to the buyer before the sale showing that more than one application was necessary held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Interstate Chemical Co.* (Civ. App.) 169 S. W. 1120.

In an action to rescind a contract for the sale of a traction engine for breach of guaranty as to material, etc., evidence that the seller, on sending a magneto to the buyer, had not told its agent to refuse to deliver it, unless the buyer should sign purchase money notes, held inadmissible. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

In an action for breach of warranty of a roof, evidence that defendant's salesman formerly attempted to sell roof paint to plaintiff held inadmissible. *Phillip-Carey Co. v. Manes* (Civ. App.) 177 S. W. 158.

Evidence that the person in charge of a rice crop was a good farmer held admissible, where the purchaser of machinery to irrigate such crop claimed that the seller's failure to properly install it prevented irrigation and resulted in crop failure. *Southern Gas & Gasoline Engine Co. v. Richolson* (Civ. App.) 181 S. W. 529.

Where purchasers of irrigating machinery claimed that it was never properly installed and for that reason their crops failed, and the seller pleaded that the plant was properly installed, but through the purchaser's negligence it was not put in operation successfully, evidence of improper installation was admissible. *Id.*

Where a seller agreed to deliver to the buyer in a certain county oil of a certain grade, which it failed to do, it is immaterial what grade it delivered to the carrier in another county. *People's Ice & Mfg. Co. v. Interstate Cotton Oil Refining Co.* (Civ. App.) 182 S. W. 1163.

In action upon notes given for an engine for a cotton gin plant, wherein defendants set up its failure to develop the guaranteed speed, testimony of customer that the turnout

from bales ginned by defendant was poor held inadmissible. *Feagins v. Texas Machinery & Supply Co.* (Civ. App.) 185 S. W. 961.

90. — **Contract of carrier.**—Evidence that cotton ginner had purchased 65,000 pounds of cotton seed in excess of that shipped out and sold, excluding a shipment for the conversion of which he was suing, held admissible to support his claim that such shipment of 63,478 pounds was delivered to the carrier. *Elias v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 166 S. W. 417.

Testimony that delay in transportation and rough handling of cattle complained of was all along the route held admissible. *Texas Midland R. R. v. Becker & Cole* (Civ. App.) 171 S. W. 1024.

Admission of evidence over plaintiff's objection that stock had been shipped to Ft. Worth before delivery to defendant railroad for transit from that place held error; the stock being conclusively shown to be in good condition at Ft. Worth. *Rodgers v. Texas & P. Ry. Co.* (Civ. App.) 172 S. W. 1117.

In an action against a carrier for delay in transporting cattle, some of which were sold at Ft. Worth, and the balance at Kansas City, evidence of the condition of the cattle at Ft. Worth, if properly handled, held admissible. *Texas & P. Ry. Co. v. Graham & Price* (Civ. App.) 174 S. W. 297.

In action against initial carrier for nondelivery to connecting carrier, evidence of dispute between the two carriers, causing initial carrier to hold freight for charges, held properly excluded. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co.* (Civ. App.) 178 S. W. 858.

In an action against railroad for loss of household goods by flood, evidence for plaintiff that according to the history of the stream the flood in question was not unprecedented was admissible. *International & G. N. Ry. Co. v. Penney* (Civ. App.) 178 S. W. 970.

In an action against an interstate carrier on an alleged oral agreement to furnish cars, evidence that defendants' dispatcher immediately advised the agent with whom plaintiff talked that the cars could not be furnished on the day required by plaintiff, held admissible. *Atchison, T. & S. F. Ry. Co. v. Smyth* (Civ. App.) 189 S. W. 70.

In an action against a carrier for damages to shipment of live stock, a paragraph of shipping contract, releasing carrier from loss by delay in transportation by storms or flood, held properly excluded as immaterial. *Ft. Worth & D. C. Ry. Co. v. Atterberry* (Civ. App.) 190 S. W. 1133.

92. **Conveyance.**—While mere nonclaim and nonpayment of taxes will not result in a loss of title save by limitations, such facts are evidence of a grant. *Pipkin v. Ware* (Civ. App.) 175 S. W. 808.

The terms of the deed, the adequacy of the price or other circumstances, are admissible to show whether the purchaser bought the land or merely the chance of title. *Pridgen v. Cook* (Civ. App.) 184 S. W. 713.

93. **Establishment and execution of lost deeds.**—On an issue as to the execution of an alleged lost deed to land by the patentee to F., under whom plaintiffs claimed deeds from F. and from the patentee to other portions of the same survey, which had been of record for many years, all of the parties having been long since dead, were admissible. *Houston Oil Co. of Texas v. Sudduth* (Civ. App.) 171 S. W. 556.

99. **Stockholder's liability.**—In an action on stock subscriptions, evidence held admissible on the question of the value of property transferred in payment of subscriptions. *Rich v. Park* (Civ. App.) 177 S. W. 184.

In an action against subscribers to corporate stock, it is improper to exclude evidence of the property delivered by the subscribers to the corporation. *Id.*

101. **Title and possession.**—Evidence that the husband was in possession of certain lands before marriage was admissible as tending to show that he had a legal or equitable claim thereto at that time, so that the property remained his separate property. *Gameson v. Gameson* (Civ. App.) 162 S. W. 1169.

In an action to recover an interest in land, where plaintiff relied upon her intestate's possession, evidence that defendant had borrowed money thereon to pay off his notes to prevent suit by intestate held admissible. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

Evidence that land allotted in partition to plaintiff was absorbed in conflict with a league grant held admissible. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

An agreement of the maker of a note with B., after B. acquired the note, held admissible on the question of whether B. acquired it for himself or for the maker, relative to the maker's right to recover of the payee the penalty for usury paid. *Braly v. Connally* (Civ. App.) 180 S. W. 916.

103. **Conversion.**—In an action by a corporation against its former president to recover the proceeds of shingles which it alleged he had converted to his own use, evidence that a check given by him to a third person was in payment of shingles which the third person owned and which the corporation had disposed of with its property was admissible. *Pitts v. Cypress Shingle & Lumber Co.* (Civ. App.) 158 S. W. 799.

In an action by a bank for the conversion of chattels upon one-half interest in which it held a second mortgage, testimony of the bank officers that they demanded the entire amount of the excess of the first mortgage as a condition of releasing their mortgage was immaterial. *First Nat. Bank v. Dunlap* (Civ. App.) 159 S. W. 502.

In an action against a carrier for converting freight, testimony of the freight claim agent as to tracing the freight and as to net proceeds on a sale held admissible. *St. Louis, I. M. & S. Ry. Co. v. Wallace* (Civ. App.) 176 S. W. 764.

106. **Negligence.**—Evidence that a witness about the time of the fire in question saw two chunks of fire on defendant's right of way about 40 feet from the tracks was admissible. *St. Louis Southwestern Ry. Co. of Texas v. McGrath* (Civ. App.) 160 S. W. 444.

Plaintiff's evidence that he was informed by a third person that a message for him



had been received, and a reply message had been sent, held admissible on the issue of his contributory negligence. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 164 S. W. 903.

In an action for damages for mental anguish from negligence in delivering a telegram, evidence as to directions for delivery held admissible on the issue of negligence. *Id.*

In an action for injuries in a collision, evidence as to what a witness would have done if he had been back from the street a certain distance and heard the gong and seen the car was irrelevant, throwing no light on the issue of contributory negligence under consideration. *Texas Traction Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

In an action for injuries to a section hand by falling from a hand car by the breaking of a handle bar, the testimony of a witness that, if he was going to make a handle bar, he would not make it out of wood like that out of which the handle which broke was made, was not admissible on the issue of whether the employer used ordinary care in furnishing a suitable handle bar. *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514.

In action for value of cattle killed on railroad tracks where they had gone through an open gate, evidence as to the condition of the fastening of the gate held material. *Ft. Worth & D. C. Ry. Co. v. Scheer* (Civ. App.) 169 S. W. 1069.

Evidence that the morning after the fire plaintiff found large coal cinders held admissible to show that the locomotives were not properly equipped with spark arresters. *Arey v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 170 S. W. 802, judgment affirmed *St. Louis Southwestern Ry. Co. of Texas v. Arey* (Sup.) 179 S. W. 860.

Condition of a shaft, while not admissible to show negligence in that respect, because not pleaded, held, in a servant's action for injury from a belt coming off a pulley, admissible on the pleaded negligence of the belt being too short. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

In action for injuries caused by violent kicking of cars in switching, testimony of engineer that in kicking cars he always used his judgment held admissible. *St. Louis Southwestern Ry. Co. of Texas v. Moore* (Civ. App.) 173 S. W. 904.

Excluded evidence of plaintiff, in a passenger's action for injury in alighting, that the depot lights would not light the car steps, held immaterial, in view of defendant's only contention, that the light from the cars was sufficient. *Franklin v. International & G. N. Ry. Co.* (Civ. App.) 174 S. W. 333.

The erection and maintenance of buildings near a railroad track may be shown on the questions of negligence in the operation of train and of contributory negligence. *Texas & P. Ry. Co. v. Eddleman* (Civ. App.) 175 S. W. 775.

Evidence that plaintiff, whose automobile was struck at a crossing, deviated from the direct route, held admissible on the issue of contributory negligence. *Id.*

Though employé merely alleged that board was furnished for particular use, without charging negligence of foreman in directing its use, evidence of such direction held admissible; the direction to use it constituting a furnishing. *Decatur Cotton Seed Oil Co. v. Taylor* (Civ. App.) 182 S. W. 401.

In an action for death of an employé, a question asked witnesses held erroneous as calling for evidence as to the absolute safety of the place of work, not its reasonable safety. *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369.

In action against street railway for injuries to wagon driver, evidence that motorman was violating the company's rules in not running slowly was admissible as tending to show absence of negligence by plaintiff. *Southern Traction Co. v. Wilson* (Civ. App.) 187 S. W. 536.

When plaintiff's mule was frightened by a train on an overhead crossing, based on failure to give signals in approaching the crossing, it was error to admit testimony that, had signals been sounded while the train was on the crossing, it would have increased plaintiff's danger. *Terrell v. Houston & T. C. Ry. Co.* (Civ. App.) 189 S. W. 575.

In an action by the survivors of a locomotive engineer killed when struck by a switch engine while he was inspecting a locomotive, his survivors should have been allowed to show that he had driven the locomotive he was inspecting and that his mission was to see that it had been rendered safe. *Hovey v. See* (Civ. App.) 191 S. W. 606.

On issue whether railway company was negligent in not discovering position and condition of tree before it fell onto its track, evidence that track was straight for a distance of 200 yards north of where tree stood is admissible. *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

In action by employé of lumber company for injuries received in service, testimony that plaintiff, just before doing work in which he was injured, had drunk a pint of whisky, was admissible on issue of his negligence, also as bearing on weight of plaintiff's testimony as to his conduct. *Kirby Lumber Co. v. Youngblood* (Civ. App.) 192 S. W. 1106.

Refusal to permit conductor to testify that he warned engineer at certain stations not to run at high speed was proper, the issue being as to speed at time of accident. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

107. **Place of accident.**—In an action for the killing of cattle on railroad tracks, evidence as to where they were struck, based on the evidences found on the ground, is admissible. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 179 S. W. 1104.

108. **Independent contractor.**—A contract by a firm with a county to do work, providing against the firm subletting without the written consent of the county, in connection with evidence that there was no such consent, is admissible on the issue of one doing part of the work for the firm, being an independent contractor. *Corrigan, Lee & Halpin v. Heubler* (Civ. App.) 167 S. W. 159.

111. **Failure to send or deliver message.**—Evidence, that the half-sister was dearer to plaintiff than his full sisters, held improper. *Southwestern Telegraph & Telephone Co. v. Andrews* (Civ. App.) 169 S. W. 218.

Testimony of plaintiff as to his calling up the company's operator and asking as to whether she had received a call for him held admissible, over objection of incompetency, irrelevancy, and immateriality. *Id.*

114. **Malicious prosecution.**—In an action for malicious prosecution for breaking into defendant's freight cars and stealing therefrom, evidence as to extent of thefts by unknown persons held irrelevant. *Missouri, K. & T. Ry. Co. v. Craddock* (Civ. App.) 174 S. W. 965.

In an action for malicious prosecution based on alleged theft of bale of cotton, issue as to whether plaintiff had landlord's lien, to satisfy which he sold the bale, was collateral, and could be considered by the jury only on question of defendant's probable cause in making criminal complaint. *Rainey v. Old* (Civ. App.) 180 S. W. 923.

117. **Libel and slander.**—Plaintiff, in a libel suit, may call as witnesses those acquainted with the circumstances to state that, on reading the libel, they concluded that it was aimed at plaintiff. *Chapa v. Abernethy* (Civ. App.) 175 S. W. 166.

In an action for libel by publication including what took place in plaintiff's room when he was arrested on suspicion that he might be guilty of murder in another state, it was permissible for plaintiff to show untruth of the publication by testimony as to what actually occurred then. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

In action for slander, where defendant's manager had said that plaintiff and another had had men in their room at night, and plaintiff stated to the manager that she was as pure as the manager's wife, the manager's statement in reply that if plaintiff were a man he would slap her downstairs was competent. *Southwestern Telegraph & Telephone Co. v. Wilkins* (Civ. App.) 183 S. W. 429.

Malice, as an essential ingredient of libel, may be proven directly, or by inference from the character of the libelous document, or by circumstantial evidence. *International & G. N. Ry. Co. v. Edmundson* (Civ. App.) 185 S. W. 402.

120. **Fraud and fraudulent conveyances.**—A large latitude is permitted in the admission of evidence of fraud, and evidence of facts not themselves directly in issue is admissible where they are relevant to the issues made by the pleadings. *Foix v. Moeller* (Civ. App.) 159 S. W. 1048.

In an action for fraud inducing a purchase of stock of a mining corporation, evidence that, after the termination of the rights of the corporation to the mine, an officer procured another option, which he could not avail himself of because of a revolution in the foreign country in which the mine was located, held inadmissible. *Id.*

In an action for fraud inducing a purchase of stock of a mining corporation, evidence as to how much money some of the defendants had put into the enterprise before or after the incorporation, for which they were never paid, was inadmissible. *Id.*

In an action on a fraternal insurance certificate, evidence of statements made by insured to the order's medical examiner held admissible on issue of misrepresentation. *National Council of the Knights and Ladies of Security v. Sealey* (Civ. App.) 162 S. W. 455.

On an issue as to the fraud of plaintiffs' agent in obtaining defendants' signature to a lease on misrepresentation that it contained a prohibition defeasance clause, evidence that he agreed to insert such clause, and that defendants thought from his representations that it was in the contract, held admissible. *Taber v. Eyler* (Civ. App.) 162 S. W. 490.

Where in an action for breach of a lease of premises to be used as a saloon, defendants alleged fraud in that plaintiffs' agent procured their signatures on false representations that the lease contained a prohibition defeasance clause, evidence as to the rental value of the premises for other than saloon purposes held admissible. *Id.*

In a suit on a note where the maker set up the payee's fraud, evidence that the payee agreed to keep the note and not to transfer it was admissible on the issue of fraud. *First Nat. Bank v. Chapman* (Civ. App.) 164 S. W. 900.

Where defendant claimed that he had been induced to execute the note in suit in reliance upon the fraudulent misrepresentations of the payee, evidence that the payee had offered to sell the note for a ridiculously low figure is admissible only on the question of his fraud, and could not affect any one except him or his coconspirator. *Id.*

In an action for fraudulent misrepresentations as to the receipts from theaters which plaintiffs leased from defendants, testimony by plaintiffs' manager that he had quit plaintiffs' employ because of the improper management by plaintiffs held material on the issue of the truth of the representations. *Loftus v. Sturgis* (Civ. App.) 167 S. W. 14.

Evidence that a witness, who testified as to the truth of representations made by the defendant which were alleged by the plaintiff to be fraudulent, which tended to show that the witness did not and could not know what the statements were, affects the weight of the testimony, but not its admissibility. *Id.*

Testimony of such witness that the statements of defendant as to the expenses were true held to refer to the statements made by defendant before the execution of the lease. *Id.*

Testimony by a witness for defendant that the statements by defendant as to the expense of conducting such theaters were correct held material. *Id.*

In an action upon a benefit certificate, defended on the ground that the insured falsely stated in her application that she had never had malaria, evidence that insured completely recovered from the attack within a few days was admissible upon the issue whether the false statement was material to the risk. *Modern Brotherhood of America v. Jordan* (Civ. App.) 167 S. W. 794.

In action to recover amount paid for note purporting to be secured by a vendor's lien, evidence as to peaceable possession by parties other than the pretended vendor held admissible. *Young v. Barcroft* (Civ. App.) 168 S. W. 392.

In an action against a bank for fraudulent representations inducing a purchase of negotiable paper, the status of the account of the president of the bank making the sale for the bank, and the condition of the maker's account, was immaterial, though the pres-

ident diverted the proceeds of the draft given for the price. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 168 S. W. 456.

Great latitude should properly be allowed by the trial court on the issue of fraud in making a conveyance. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

Evidence of the finding of a dead mule, held inadmissible to show misrepresentations as to the soundness of the mules sold, because it did not clearly appear that the dead mule was one of those sold, or that its condition when sold was the cause of its death. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

Where, in an action on instruments given for the price of an automobile, the defense was that the sale was procured by false representations as to statements made by defendant's wife to plaintiff's agents, defendant's wife was properly permitted to detail the conversation between herself and such agents when they showed her the car with a view of selling it to defendant. *J. I. Case Threshing Mach. Co. v. Webb* (Civ. App.) 181 S. W. 853.

In an action for damages for alleged misrepresentations in the sale of land for bonds, testimony of the plaintiff that he relied on the fact that the bonds were issued by a Baptist university and purported to be secured by a first mortgage, was immaterial. *Moore v. Beakley* (Civ. App.) 183 S. W. 380.

In suit on note representing loan procured by maker by false representations that he owned insurance policy worth \$500, evidence of officer of insurer held admissible to show maker's fraud and to contradict his statements to lender. *Ehlinger v. Speckels* (Civ. App.) 189 S. W. 348.

In suit by grantee of land to restrain sale on execution against the grantor, evidence that plaintiff had undervalued residence property held relevant on issue of good faith in him and grantee in exchanging properties. *Citizens' Nat. Bank of Plainview v. Slaton* (Civ. App.) 189 S. W. 742.

In suit by the grantee of land to restrain sale on execution against the grantor, defendants held entitled to prove plaintiff had undervalued residence property as tending to prove he had overvalued barn given in exchange for the property involved. *Id.*

In suit based on consent judgment appointing trustee to sell lands, in which judgment creditors alleged fraud by trustee in making sale, evidence as to value of land sold was admissible on issue of fraud. *Evans v. Williams* (Civ. App.) 194 S. W. 181.

In action to recover money deposited with defendant bank for credit of proposed bank, evidence that six days after deposit depositor applied for bank charter is admissible on question of good faith in representing that deposit was for proposed bank. *Cozart v. Western Nat. Bank of Ft. Worth* (Civ. App.) 194 S. W. 644.

**121. Undue influence and mental incapacity.**—In a suit for the probate of a will disinheriting an insane son of testatrix, on the ground of undue influence, evidence that about five years before the making of the will the husband gave directions for the disposition of the property showing that he did not wish to disinherit the son was admissible. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

In a suit for probate of a will disinheriting an insane son of testatrix, on the ground of mental incapacity, evidence that some years before the making of the will the husband gave directions for the disposition of the property showing that he did not wish to disinherit the son, was admissible. *Id.*

The fact that a will was never revoked, although testator lived two years after its execution, was admissible as a circumstance tending to refute the claim of contestant, a daughter, that its execution was the result of undue influence. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

In an action to set aside a will for undue influence by the contestee, testator's wife, whereby the contestant, a daughter, had been excluded from a fair participation in the estate, evidence of efforts by the contestee to have the testator make a will excluding contestant, her discussion of the will a short time before it was made, and her remark that she did not think contestant should have anything held admissible. *Id.*

Evidence tending to show contestee's hostile feelings toward the contestant held admissible. *Id.*

In a will contest on the ground of the undue influence of contestee, the wife of testator, to the exclusion of contestant, a step-daughter, evidence that contestee was urging the execution of some important paper by the testator, which he was reluctant to execute, though such paper was not identified as his will, and that she had several times threatened to take their minor son from him unless he signed such paper, held admissible. *Scott v. Townsend*, 166 S. W. 1138, 106 Tex. 322, reversing judgment (Civ. App.) 159 S. W. 342.

In a will contest on the ground of undue influence by the contestee, testator's wife, to the exclusion of a daughter, held that the fact of the contestee's hostility toward the daughter, and her design to exclude her from benefits under the will, was admissible. *Id.*

In a will contest on the ground of undue influence whereby the contestee, testator's wife, sought to obtain benefits for herself and her son, innocent of any collusion, to the exclusion of her stepdaughter, held that the contestee's declarations of hostility toward the stepdaughter were admissible, even though they would inevitably affect the interest of the son. *Id.*

In a will contest, where the issue was whether the proponent procured it by fraud and deception, a letter written by proponent to his uncle, seeking to borrow money, and stating, "if you could know what I know which is coming to you and your family through my work I think you would remember me," was properly admitted. *Sockwell v. Sockwell* (Civ. App.) 166 S. W. 1188.

In a will contest by a disinherited son on the grounds of undue influence exerted by another son, evidence that the latter had unlawfully deprived contestant of property was inadmissible. *Kell v. Ross* (Civ. App.) 175 S. W. 752.

Evidence that plaintiff was in great pain, out of his head, and did not know anything

or anybody when signing release was evidence of mental incapacity. *Turner v. Ontiberos* (Civ. App.) 193 S. W. 1089.

123. **Damages.**—In an action for damages to cattle, where they were fed for three or four months after the injury and then were sold, testimony as to whether the owner received the full market value should be excluded, because tending to carry the inquiry into collateral and speculative issues. *Missouri, K. & T. Ry. Co. of Texas v. Mulkey & Allen* (Civ. App.) 159 S. W. 111.

In an action against a carrier for negligent injuries to a shipment of live stock, where it appeared that they were fed for three or four months after the shipment, and then were put upon the market, evidence as to whether the owners received full market value for them was not admissible as tending to lessen the damages because not furnishing a correct basis for determining the injury. *Id.*

In action for value of land appropriated for railroad and damages to adjoining land, where owner testified that property was damaged \$1,500, admission of further testimony that the land taken was worth \$500 and the other damaged \$1,000 held not erroneous. *St. Louis, B. & M. Ry. Co. v. Barnes* (Civ. App.) 162 S. W. 373.

In an action for setting fire to barn containing corn, evidence as to the time it took certain corncribs to burn held not admissible to show that there was not as much corn in the barn as claimed. *Marshall & E. T. Ry. Co. v. Killingsworth* (Civ. App.) 162 S. W. 1181.

Where a landlord was charged with unlawful entry, and a subsequent groundless suit of ouster, evidence that the landlord had been shown receipts for the rent, and notwithstanding brought the suit for ouster, was relevant to an issue of exemplary damages for unlawful entry, although the petition did not authorize a recovery on the ground of the wrongful ouster suit. *Higby v. Kirksey* (Civ. App.) 163 S. W. 315.

In an action on a note, plaintiff's evidence as to the solvency of one of the defendants, that, if he had anything, plaintiff had never heard of it or seen it, was material, as showing that the other defendants sustained no loss by plaintiff releasing an account which he held against his codefendant. *Senter v. Teague* (Civ. App.) 164 S. W. 1045.

Where a landlord converted hay belonging to his tenant, the measure of damages is the market value of the hay, and so evidence that the tenant had agreed to sell the hay at an agreed price is inadmissible, where the landlord had no notice of such contract. *Jackson v. Taylor* (Civ. App.) 166 S. W. 413.

In an action for slander, the character of the plaintiff and business transactions between him and the defendant and other parties affecting the rights of the defendant may be considered by the jury in mitigation of damages, even though they did not justify the accusation. *Burkhisser v. Lyons* (Civ. App.) 167 S. W. 244.

A broker who handled plaintiff's shipment alleged to have been damaged en route, held properly permitted to testify as to what efforts he made to sell the goods in their damaged state, and that he obtained the best price possible for them. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 172 S. W. 1116.

Contracts between various railroad and express companies held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

In action for railroad company's refusal to grant facilities to express company equal to those afforded another express company, contracts which the express company had offered to execute held properly admitted. *Id.*

In determining whether a stipulation for payment of \$10 per day for delay by contractor was liquidated damages or penalty, testimony that the builder sustained no damage, held irrelevant. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

In an action for damages for a turf fire, evidence that the grass burned was thick, and was from four to ten inches high, is admissible. *Ft. Worth & D. C. Ry. Co. v. Firestone* (Civ. App.) 173 S. W. 919.

In an action for injury to cattle by dipping in crude oil, general evidence as to tendency of such action to injure stock held admissible, as tending to show the amount of damage. *Missouri, K. & T. Ry. Co. of Texas v. Cauble* (Civ. App.) 174 S. W. 880.

Where a landlord replevied hay claimed by his tenant, evidence of the price at which the tenant had contracted to sell the hay held admissible on the question of his special damages on his plea in reconvention. *Taylor v. Jackson* (Civ. App.) 180 S. W. 1142.

A tenant suing for damages for the wrongful issuance and levy of a distress warrant by the landlord could not testify over objection that after service of the distress warrant he could not rent another place in the county, and that he and the members of his family were in bad health, that being evidence of damages too remote and speculative. *Streetman v. Lasater* (Civ. App.) 185 S. W. 930.

The carrier when sued for injuries to cattle in transit may offer evidence of improvement of such cattle or recovery from their injuries, to show the extent of the injury at the time of their arrival and the resulting damages. *Panhandle & S. F. Ry. Co. v. Norton* (Civ. App.) 188 S. W. 1011.

In action for damages to shipment of cattle, evidence as to temporary damages and the degree to which they would have recovered with proper care and handling by shipper was admissible upon the real injury and as affecting question of damages. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

In action by consignee for damages to goods, his testimony that firms refused to buy the goods held admissible to show his efforts to minimize damages. *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804.

124. — **Personal injuries.**—In an action against a railroad company for injuries to a female plaintiff, evidence that the injury might have continued latent for a long time held admissible. *Houston & T. C. Ry. Co. v. Fox* (Civ. App.) 156 S. W. 922, judgment reversed 106 Tex. 317, 166 S. W. 693.

Where the railroad company claimed that a brakeman's failure to jump from wild cars was contributory negligence, evidence that it would have been dangerous to have

jumped, under the circumstances, was admissible. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

Evidence that deceased was industrious and energetic, had purchased a home for his mother, the plaintiff, and her grandchildren, and that he was their sole support, was admissible on the issue of reasonable expectancy of pecuniary benefits which plaintiff would have received had he lived. *Ft. Worth & R. G. Ry. Co. v. Keith* (Civ. App.) 163 S. W. 142.

Evidence that a hernia produced by traumatism could have been, and that the witness expected it was, caused by the injury was properly admitted over objection that it was remote and immaterial. *St. Louis S. W. Ry. Co. of Texas v. Brown* (Civ. App.) 163 S. W. 333.

It is competent to show the probable occurrence of future ill effects that may arise from an injury. *Id.*

In railroad switchman's action for injuries, evidence that physical test was required of railroad employes held admissible as bearing on the consequences of plaintiff's impaired efficiency for railway service, though it was not shown that defendant required such test. *Paris & G. N. R. Co. v. Flanders* (Civ. App.) 165 S. W. 98.

In an action for a brakeman's death, testimony of the widow that his habits were good; that he had no bad habits at all that she knew anything about—held admissible on the issues of damages and the amount contributed to the support of the family and the probable duration of his life. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

In an action for a brakeman's death, evidence that deceased was a brakeman and extra conductor, and stood in line for promotion to be a conductor, when he would receive \$45 or \$50 per month more held admissible as bearing upon his future expectations. *Id.*

In an action for a brakeman's death, brought by his representative for the benefit of his widow, etc., testimony of his widow that at the time of his death they owned no property, that they were renting a house in which to live, and that he was a good provider out of his wages held admissible. *Id.*

Where, in a personal injury action, the petition alleged diminished earning capacity and future pain and suffering, and the evidence was sufficient to warrant the conclusion that plaintiff was permanently injured, it was permissible for plaintiff to show his life expectancy. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Civ. App.) 168 S. W. 55.

Testimony as to the number of operations made necessary by the accident and the details thereof, and that plaintiff suffered from gangrene following the operation, was admissible as a part of the history of the case, the nature and extent of the injury, and the probable suffering of plaintiff. *Gulf, C. & S. F. Ry. Co. v. Sullivan* (Civ. App.) 168 S. W. 473.

As bearing on the earning capacity and loss thereof of plaintiff, evidence of his profits from the boarding of the section crew, a prerequisite of his position of section foreman, is admissible. *Trinity & B. V. Ry. Co. v. Geary* (Civ. App.) 169 S. W. 201, judgment reversed (Sup.) 172 S. W. 545.

The wages received by plaintiff and his ability to fire on an engine, though not expressly pleaded, may be shown in a servant's action for injury while employed about an engine. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

Plaintiff's testimony held sufficient to authorize the admission of testimony by others that plaintiff limped after an accident. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 171 S. W. 1091.

Plaintiff's testimony as to what he was earning held inadmissible to show the value of the time lost while he was nursing his injured boy. *Gulf, T. & W. Ry. Co. v. Dickey* (Civ. App.) 171 S. W. 1097.

Evidence that plaintiff, suing for a personal injury, limped after the accident, held admissible, in view of evidence of injuries. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 173 S. W. 937.

In an action for the wrongful death of plaintiff's husband, manager of small country newspaper, evidence of the reasonable value of deceased's services to the newspaper held admissible. *Southern Traction Co. v. Hulbert* (Civ. App.) 177 S. W. 551.

In a railroad employe's action for personal injuries received in a derailment, where he was pinioned under the engine and scalded, evidence of mental suffering at that time is admissible on the question of damages. *Texas & P. Ry. Co. v. Rasmussen* (Civ. App.) 181 S. W. 212.

In a personal injury action, evidence that after the accident plaintiff was no longer able to run a switch engine, as he had been able to before, is admissible, notwithstanding that he was not an engineer at the time of the accident. *Id.*

In an action by parents for damages for the wrongful killing of their minor son, the exclusion of testimony that the son bore the reputation of being a bad and unruly boy is error. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

A brakeman suing for injuries in coupling cars could show the amount he was capable of earning, and had earned with other companies in the past. *San Antonio, U. & G. R. Co. v. Green* (Civ. App.) 182 S. W. 392.

In a brakeman's suit for injuries in coupling cars, evidence as to what was done to his injured leg after the accident was admissible to show his pain and anguish. *Id.*

In action for wrongful death of plaintiff's husband, evidence as to his earnings in the past, and his earnings from time to time is admissible. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

In servant's action for injury, his testimony that he had a wife and two children was inadmissible. *Burrell Engineering & Construction Co. v. Grisler* (Civ. App.) 189 S. W. 102.

In a passenger's action for personal injury, evidence that he had no other means of making a living except by hard manual labor was irrelevant. *St. Louis Southwestern Ry. Co. of Texas v. Kimmey* (Civ. App.) 189 S. W. 550.

In action for death of plaintiffs' minor intestate employed by defendant, evidence as to plaintiffs' property held admissible to show reasonable expectation of pecuniary assistance from deceased, but not to increase amount of damages. *Southwestern Portland Cement Co. v. Presbitero* (Civ. App.) 190 S. W. 776.

**RULE 6. FACTS ARE RELEVANT WHEN SO CONNECTED WITH A FACT IN ISSUE AS TO FORM PART OF THE SAME TRANSACTION OR SUBJECT-MATTER**

**Relation to issues in general.**—In an action for damages to secondhand household goods and wearing apparel, evidence as to the difference in the market value of similar goods is inadmissible, unless it be shown that the difference in the market value and the difference in the actual value is the same. *Galveston, H. & S. A. Ry. Co. v. Wallraven* (Civ. App.) 160 S. W. 116.

In an action for preventing a contractor from constructing a residence for plaintiff, a negro, in which he testified that he had told defendants he would not rent the house to any one objectionable to them, evidence as to the character of another house owned by plaintiff in another part of town held irrelevant. *Day v. Hunnicutt* (Civ. App.) 160 S. W. 134.

Where plaintiff's bruises were slight and he was apparently well, evidence as to a very slight bruise causing cancerous wound, and that a person died from a pin scratch, was not admissible. *St. Louis Southwestern Ry. Co. v. Moore* (Civ. App.) 161 S. W. 378.

In an action by a vendee for fraud in the sale of land, evidence for plaintiff that before or at the time of the purchase, plaintiff negotiated with defendant for the purchase of an additional 40 acres and in the original petition sued for damages for defendant's refusal to permit him to purchase the additional land, but when the water failed would not take it at any price, was inadmissible. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28.

In an action for injuries claimed to have affected plaintiff's mind, evidence as to the abilities of patients in an insane asylum held improperly admitted, as it furnished no guide for determining plaintiff's mental capacity. *Tweed v. Western Union Telegraph Co.* (Sup.) 166 S. W. 696, affirming judgment *Western Union Telegraph Co. v. Tweed* (Civ. App.) 138 S. W. 1155, and rehearing denied *Tweed v. Western Union Telegraph Co.* (Sup.) 177 S. W. 957.

Plaintiff's testimony that he had never heard of the railway company objecting to people walking upon the track should not be admitted. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 168 S. W. 403.

Where the petition alleged that it could not be determined which engine emitted the spark which caused the fire, but that all of defendant's engines were defective, evidence that all of defendant's engines were defective was admissible. *Texas Midland R. R. v. Ray* (Civ. App.) 168 S. W. 1013.

Price paid by other buyers of cattle on resale held immaterial in action against sellers for breach of contract. *Terrell, Atkins & Harvin v. Proctor* (Civ. App.) 172 S. W. 996.

In a suit to set aside a sale of school land, evidence that the interest charged on the deferred purchase money was less than usual is admissible to show adequacy of price. *King County v. Martin* (Civ. App.) 173 S. W. 960, judgment affirmed on rehearing 173 S. W. 1200.

Evidence that another insurance company had paid its policy held inadmissible. *Glens Falls Ins. Co. of Glens Falls, N. Y., v. Melott* (Civ. App.) 174 S. W. 700.

In an action for damages for failure to deliver telegram addressed to plaintiff, evidence as to market value of cattle at Ft. Worth held admissible on issue of plaintiff's damages in market of S. county. *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925.

In an action for the death of the driver of a service automobile, evidence of the use of the house track of defendant railroad near which deceased's car was standing, by the public, held admissible. *Turner v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 177 S. W. 204.

In an action for the death of animals in transit, evidence of their weight, together with evidence of their value at a point where removed as compared with their value at the point of destination, which was greater, is admissible. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

Testimony as to the condition of bananas before they were delivered was admissible against the carrier, sued for damage thereto. *Illinois Cent. R. Co. v. Freeman* (Civ. App.) 182 S. W. 369.

Where plaintiff claimed a set of tools under a contract with defendant corporation, testimony by one who was subsequently manager that plaintiff entered into a different contract with him for the acquisition of the tools is admissible. *West Texas Supply Co. v. Dunivan* (Civ. App.) 182 S. W. 425.

In an action against a railroad company which carried horses only part of the way, held, that evidence of their condition at the point of destination was admissible. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

It is improper, in a suit for damages to grass, to allow a witness to testify that the grass "was above an average for Clay county," over the objection that it is improper to describe the grass by comparison with other grass, the quality of which is foreign to any issue in the suit. *Ft. Worth & D. C. Ry. Co. v. Haggood* (Civ. App.) 184 S. W. 1075.

In action for death of brakeman killed while between two cars to make coupling, evidence as to how brakeman would open knuckle in adjusting it to make coupling is admissible. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

In a servant's action for injuries, evidence that plaintiff had gone between cars at other times to uncouple them and that such acts were not unusual, was admissible to rebut defendant's reliance upon an application of employment in which it was agreed that plaintiff was not required to use defective cars and machinery. *Pecos & N. T. Ry. Co. v. Chatten* (Civ. App.) 185 S. W. 911.

In action for commissions for sale of realty, evidence that plaintiff's wife, in his absence, was asked to identify one of defendants' checks to enable him to draw money from bank, was inadmissible to prove that defendants' checks to plaintiff were given under same circumstances. *Wick v. McLennan* (Civ. App.) 186 S. W. 847.

In an action involving the boundaries of a survey, junior surveys were admissible to show their general location on the ground. *Maddox v. Dayton Lumber Co.* (Civ. App.) 188 S. W. 958.

In an action for price of silo, evidence that similar silos, when properly constructed, filled, and taken care of, would make and keep good ensilage, held not admissible. *Ames Portable Silo & Lumber Co. v. Gill* (Civ. App.) 190 S. W. 1130.

— **Difference in time.**—In a suit to set aside a deed, executed by testatrix and her husband, conveying all their property to the exclusion of a son, on the ground of undue influence and mental incapacity, evidence that about five years before the making of the deed the husband gave directions for the disposition of the property showing that he did not wish to disinherit the son was admissible. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

Where the defense was that the loss on a tornado policy was occasioned by hail and not by wind, evidence of the surrounding circumstances held insufficient to render admissible testimony of the weather observer that six months prior to the storm causing the loss there had been a windstorm of equal velocity. *Fidelity Phenix Fire Ins. Co. of New York v. Abilene Dry Goods Co.* (Civ. App.) 159 S. W. 172.

Where defendant, in settlement of a suit by plaintiffs to rescind a purchase of corporate stock, agreed to handle the corporation's business in such a manner as to make its financial standing as good as it was on the date of the sale of the stock, evidence of an appraisal of the property of the corporation made a year or more after the sale is inadmissible to show the value of the stock at the time of the purchase. *Martin v. Daniel* (Civ. App.) 164 S. W. 17.

In action for death of engineer from the explosion of a boiler, evidence as to defective condition of water glass three months before the accident held admissible, in view of the other evidence on the question of notice; it not appearing that it had subsequently been repaired. *Southern Pac. Co. v. Vaughn* (Civ. App.) 165 S. W. 885.

In an action to recover an overcharge on an interstate shipment, evidence that plaintiff, about three years prior to such shipment, had secured a lower rate held irrelevant to the correct rate at the time of shipment. *Texas & P. Ry. Co. v. Dickson Bros.* (Civ. App.) 167 S. W. 33.

In an elevator company's action to recover for a shortage in cars delivered by a carrier, where the testimony indicated that certain scales were often tested with plaintiff's wagon scales, and that the two were always balanced, evidence that such wagon scales were correct in 1910 held admissible to show that the other scales were correct early in February, 1911. *Gulf, C. & S. F. Ry. Co. v. Justin Mill & Elevator Co.* (Civ. App.) 168 S. W. 411.

Evidence of other fires is inadmissible, unless on or about the same time as the fire in question. *Arey v. St. Louis Southwestern Ry. Co. of Texas*, 170 S. W. 802 (Civ. App.) judgment affirmed *St. Louis Southwestern Ry. Co. of Texas v. Arey* (Sup.) 179 S. W. 860.

In an action for injuries in attempting to board a train, evidence held properly excluded that in October during a fair people boarded trains at the particular station from both sides, when the accident happened in July. *Reed v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 174 S. W. 956.

In action on indemnity policy conversations years before the date of the policy which were the basis of the renewal policies, held admissible on the issue of misrepresentation and concealment. *Liverpool & London & Globe Ins. Co. v. Lester* (Civ. App.) 176 S. W. 602.

In an action by a county against others to locate school lands, a junior survey held inadmissible in evidence to locate an earlier one locating such lands. *Colorado County v. Travis County* (Civ. App.) 176 S. W. 845.

Testimony as to the condition of the insured property more than 8½ months after the fire is inadmissible, in an action on a fire policy, without a showing that the condition was the same then as immediately after the fire. *Occident Fire Ins. Co. v. Linn* (Civ. App.) 179 S. W. 523.

In a servant's action for injury when his hand was caught in the exposed cog-wheels of a hull conveyor, evidence that nine days after he was injured he found the bolts loose, and that it was in apparently the same condition as when he was injured, was admissible to show its condition at the time of his injury. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

In action against railway company for fire loss, testimony that witnesses had seen other of defendant's engines emitting sparks at different times and places was inadmissible as too remote. *Nussbaum & Scharff v. Trinity & B. V. Ry. Co.* (Sup.) 194 S. W. 1099.

— **Associated or explanatory transactions.**—In an action for injuries to a female passenger, who claimed to have had a miscarriage as a result thereof, evidence of statements showing a resolution by her, prior to former miscarriage, to resort, in case of pregnancy, to means to produce abortion held admissible. *Missouri, K. & T. Ry. Co. of Texas v. Killet* (Civ. App.) 168 S. W. 979.

In an action to recover money paid for an alleged defective engine, where plaintiff's evidence tended to show that the engine was constructed on a wrong mechanical

principle, so that it was worthless, defendant's evidence that other buyers of like engines found them satisfactory was admissible. *Wilson v. Avery Co. of Texas* (Civ. App.) 182 S. W. 884.

— **Similar wrongful acts.**—Where there was nothing to show a settled system on the part of plaintiff of maintaining fictitious claims, an isolated instance of a fictitious claim by him for damages for personal injury is inadmissible to show that plaintiff was simulating his present injuries. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

Evidence, in an action for the killing of a horse by a train, that animals of a third person had been killed by the train near there, and the company had always paid him therefor, is irrelevant and prejudicial. *International & G. N. Ry. Co. v. Bandy* (Civ. App.) 163 S. W. 341.

In an action for a railroad engineer's death claimed to have been caused by bad track and a defective engine, evidence that the day before the wreck decedent was running his engine at a high rate of speed some 12 or 14 miles from the place of the accident was inadmissible. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 163 S. W. 621.

In an action for an injury to plaintiff's wife caused by being run over on a city street by defendant's automobile driven by his 11 year old son, the issue of the boy's carelessness and incompetency being raised, the court properly permitted a witness to testify that he had on two occasions met the boy with the automobile on the public road and he had on each occasion refused to give him any part of the road. *Allen v. Bland* (Civ. App.) 168 S. W. 35.

In an action for the destruction of plaintiff's house by fire from defendant's locomotive evidence that said locomotive had set fire on the right of way the day before held properly excluded. *Moose v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 179 S. W. 75. Writ of error granted (Sup.) 180 S. W. 225.

In action for damages from fire, evidence as to fire started by sparks from different engine, held admissible to contradict testimony that sparks could not be thrown through spark arrester. *Galveston, H. & S. A. Ry. Co. v. Brune* (Civ. App.) 181 S. W. 547.

In action for damages from fire, evidence as to fire set by another railway engine, held admissible to show negligent operation or negligence in permitting combustible material to remain on the track. *Id.*

In action against railroad company for damages from fire, evidence as to fire set by another engine, held admissible to contradict testimony that sparks would go out before reaching the ground. *Id.*

In action on note claimed to have been forged by G., evidence as to G.'s forgery of checks held inadmissible without further evidence to show that it was part of a system or design. *Lockney State Bank v. Bolin* (Civ. App.) 184 S. W. 553.

Evidence of other fires set on defendant's right of way was admissible to rebut testimony of defendant's master mechanic that all defendant's locomotives were properly constructed with proper appliances to prevent escape of fire, and that as so equipped fire could not escape. *St. Louis Southwestern Ry. Co. of Texas v. Wood* (Civ. App.) 192 S. W. 812.

Evidence that a day or two before fire occurred a live cinder from one of defendant's locomotives then passing plaintiff's sawmill fell on floor thereof held admissible. *Id.*

— **Similar transactions.**—In a principal's action against an agent for losses sustained by alleged fraudulent reports as to purchasers' credit, evidence of transactions similar to those sued upon was inadmissible, but the agent's evidence that he followed principal's directions was admissible. *Cooper v. Golding* (Civ. App.) 176 S. W. 92.

In suit to enforce mechanic's lien against a corporation, refusal to allow defendant to prove that its president had never made an important contract such as the one in suit, without the consent of the directors held erroneous. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

**Exclusion as res inter alios acta.**—Where the question was whether insured had received timely notice of assessments, evidence that other members had received notices mailed at the time plaintiff's notice was alleged to have been mailed held inadmissible. *State Division, Lone Star Ins. Union, v. Blassengame* (Civ. App.) 162 S. W. 6.

In an action for work done, defended on the ground that the charges were excessive and the work inefficient, evidence that similar work done by plaintiff for others was inefficient and the charges excessive, is inadmissible. *Randle v. Barden* (Civ. App.) 164 S. W. 1063.

Where a deed was executed to carry out a written contract to convey land of the same date as the deed, the contract merged in the deed, and, being neither acknowledged nor recorded, was res inter alios acta, and inadmissible as between third persons. *First State Bank & Trust Co. v. Southwestern Engineering & Construction Co.* (Civ. App.) 170 S. W. 860.

In an action against a landlord on a promise to pay for goods furnished his tenant, that the landlord had given checks to the tenant to buy groceries with is res inter alios acta. *Chilson v. Oheim* (Civ. App.) 171 S. W. 1074.

In suit to set aside a deed for fraudulent representations, a witness' testimony as to statements made to him similar to the alleged misrepresentations relied on held inadmissible, where such statements were not made in plaintiff's presence or communicated to her. *Orient Land Co. v. Reeder* (Civ. App.) 173 S. W. 939.

In broker's action involving dispute as to value at which land was taken in payment, conversation between attorney and purchaser held hearsay and res inter alios acta. *Crass v. Adams* (Civ. App.) 175 S. W. 510.

It is not error to exclude from evidence a letter written to defendant by its agent in regard to plaintiff's claim for damages, for the letter is res inter alios acta. *Missouri, K. & T. Ry. Co. of Texas v. A. E. Want & Co.* (Civ. App.) 179 S. W. 903.



In an action for damage to a shipment of bananas which a carrier had agreed to place in its roundhouse on request of the messenger who traveled with them, testimony as to roundhouse on other roads than those of the contracting carriers was inadmissible. *Illinois Cent. R. Co. v. Freeman* (Civ. App.) 182 S. W. 369.

In action for breach of timber-sawing contract, defense being that plaintiff sawed nonmerchantable timber, evidence as to character of lumber made for other parties by plaintiff was inadmissible. *McKinnon v. Porter* (Civ. App.) 192 S. W. 1112.

**Similarity of conditions.**—Upon the issue of the value of lands in condemnation proceedings, the court properly permitted a witness to testify as to the gross receipts from tracts of land which, though located at different points, was similar to the land in controversy. *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387.

Where carriers claimed damages to shipment of cattle were due to plaintiff's negligence in unloading and dipping them under quarantine regulations, evidence that the same treatment was accorded other cattle which were not injured held properly excluded, in the absence of a showing that they were in the same physical condition. *Good v. Texas & P. Ry. Co.* (Civ. App.) 166 S. W. 670.

In an action to recover freight overcharges on an interstate shipment of live stock, evidence as to the rate on a shipment based upon two local rates and not upon a through shipment at a through rate held inadmissible. *Texas & P. Ry. Co. v. Dickson Bros.* (Civ. App.) 167 S. W. 33.

Evidence that train of 16 cars took a siding to wait for a through freight of only 13 cars offered to show that carrier was negligent in not handling plaintiff's shipment of cattle as a through shipment held improperly admitted for failure to show similar conditions. *Texas & P. Ry. Co. v. Cauble* (Civ. App.) 168 S. W. 369.

In an action for delay in transporting cattle, evidence as to the time consumed by former shipments by plaintiff over defendant's road should not have been admitted where the conditions were not shown to be the same. *Id.*

In an action to rescind the sale of a traction engine, evidence that another engine of a different horse power and make, with a different driver and at a different place, pulled a greater number of plows held inadmissible. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

Evidence that the interest charged on the deferred purchase money for school land was less than the usual rate held inadmissible, in a suit to vacate a sale, unless conditions were the same. *King County v. Martin* (Civ. App.) 173 S. W. 960, judgment affirmed on rehearing 173 S. W. 1200.

In an action for damages for injury to plaintiff's crop through defendant irrigation company's failure to supply water, evidence based on damage caused to an adjoining crop, conditions being shown to have been similar, held admissible. *Lone Star Canal Co. v. Broussard* (Civ. App.) 176 S. W. 649.

Upon proper predicate that the situation, improvements, etc., of the lands are similar, the value of one parcel may be given in evidence on the value of the other. *Foster v. Atkir* (Civ. App.) 181 S. W. 520.

In an action for damages to land, it is not error to exclude evidence of the leasing value of adjoining land where it is not proved that the grass on such land is of as good quality as the grass on plaintiff's land. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 184 S. W. 1075.

In an action against a carrier for damage to cattle by delay, in the absence of evidence that other shipments by the plaintiff were subjected to the same conditions, evidence of the result to those shipments was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

Where defendants claimed that the engine bought of plaintiff failed to develop the power guaranteed, evidence as to the power furnished by plaintiff's engine in another gin plant, the same in all essential particulars, held admissible, subject to the court's discretion. *Feagins v. Texas Machinery & Supply Co.* (Civ. App.) 185 S. W. 961.

In servant's action for injury, testimony of a witness who examined the machinery three months before plaintiff's injury was admissible if it appeared that there had been no change in its condition since the accident, subject to the trial court's discretion with respect to the lapse of time. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

In action for damages to shipment of live stock from delay, etc., evidence as to time in which witness had made a shipment over the same roads to a certain point was admissible where the testimony showed that the conditions connected with the shipments were similar. *Panhandle & S. F. Ry. Co. v. Vaughn* (Civ. App.) 191 S. W. 142.

Similar conditions not being shown to exist in streams, evidence of strength of a bridge spanning one was not admissible in an action by a county for damages to its bridge across the other caused by failure of railway company's bridge to withstand flood. *San Antonio & A. P. Ry. Co. v. Milam County* (Civ. App.) 191 S. W. 571.

Evidence that bridges spanning the same stream below and above the one in question withstood floods, where conditions of bridge and water are not shown to be similar, is inadmissible to show strength of the bridge in question. *Id.*

**Showing physical or mental condition.**—Testatrix's state of mind at times other than that at which the will was executed has no probative force, except to show her state of mind at that time. *Navarro v. Garcia* (Civ. App.) 172 S. W. 723.

**Showing intent or malice or motive.**—**Fraud.**—In an action for fraudulent misrepresentations, by which the plaintiffs were induced to enter into a lease, evidence that similar representations were made by the defendant to other parties before and after the time they were made to plaintiff was admissible. *Loftus v. Sturgis* (Civ. App.) 167 S. W. 14.

Evidence that defendant made other fraudulent conveyances and was being sued at the time he made the conveyance under which intervener claimed is admissible to show fraudulent intent. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

**Custom or course of business and part of series showing system or habit.**—On plea of contributory negligence in that the deceased did not awake and get off, evidence of a custom with the carrier to awake passengers was admissible as explaining deceased's subsequent status on the train and as tending to show that he was not necessarily in fault in having failed to alight. *Ft. Worth & R. G. Ry. Co. v. Keith* (Civ. App.) 163 S. W. 142.

Where provision of contract requiring plaintiff riding on freight train with cattle to stay in the caboose while the train was moving was not pleaded, evidence as to his custom to ride in the cattle car if the train started while he was therein held properly admitted. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

Where a lessee of a farm on shares claimed part of the hay grown after the failure of a specified crop, evidence that landlords in the vicinity allowed their tenants to harvest hay, grown after the failure of usual crops, is admissible on the question whether the landlord agreed to allow the lessee to harvest such hay. *Jackson v. Taylor* (Civ. App.) 166 S. W. 413.

In an action for injuries to a street car passenger falling from the car running on a curve, testimony of plaintiff that she never at any time got off the car at the place of the accident held admissible to contradict the testimony of the conductor that plaintiff deliberately walked to the car door and stepped off and fell. *Dallas Consol. Electric St. Ry. Co. v. Stone* (Civ. App.) 166 S. W. 708.

In an action for the price of sound and healthy orange trees which however were frozen before delivery, evidence that the term "sound and healthy" meant, among nursery men, such condition as was certified to by inspectors from the department of agriculture held inadmissible. *Alsworth v. Reppert* (Civ. App.) 167 S. W. 1698.

In action for damages from seller's delivery of inferior goods, evidence of a custom of the buyer to furnish shipping directions held inadmissible, since a violation of such custom did not induce the seller's breach of contract. *Rhomb Milling Co. v. Cunningham* (Civ. App.) 171 S. W. 1081.

Where a contract of sale provided that no conditions, except those mentioned therein, should be claimed, evidence that it was customary for a buyer to give directions held inadmissible. *Id.*

Customs of trades and provisions not repugnant to express statutes or rules of law have the force of law. *Missouri, K. & T. Ry. Co. of Texas v. Ryon* (Civ. App.) 177 S. W. 525.

Evidence held to justify a finding that custom of trade required parties to contract made by telephone conversations to make memoranda of contract completed by conversations. *Walker Grain Co. v. Denison Mill & Grain Co.* (Civ. App.) 178 S. W. 555.

In the absence of a specific rule forbidding employes to make couplings by going between the cars, evidence of the custom of employes in that regard is admissible to rebut contributory negligence. *Pecos & N. T. Ry. Co. v. Winkler* (Civ. App.) 179 S. W. 691.

Customs and usages applicable to the letting of farms which are certain, uniform, and uninterrupted, and long continued in the locality, are binding on parties to a lease of farm lands, and they are presumed to know them. *Taylor v. Jackson* (Civ. App.) 180 S. W. 1142.

Caution should be used in enforcing special customs and usages varying a contract. *Id.*

Where a tenant, by virtue of a custom, claimed part of a crop of Colorado grass hay grown on the land evidence of the custom in the locality, though not in the immediate vicinity, is admissible. *Id.*

Where a farm tenant showed a custom of tenants to retain part of the Colorado grass hay grown on the land, rebutting testimony that there was no such custom, and that the landlord's other tenants did not claim the hay is admissible. *Id.*

A water company's practice of notifying its patrons of defects in their lines did not read into a contract a custom which would require the company to notify a patron of a break in his private line which he was obliged to keep in repair. *Josey v. Beaumont Waterworks Co.* (Civ. App.) 183 S. W. 26.

In an engineer's action for injuries received when he attempted to replace sand pipe with his foot while the engine was in motion, it is not error to permit him to testify that such was the custom. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

In action for delay in transporting cattle, testimony, to rebut imputation of road's negligence in failing to have employes ready to make heavy repairs, that other roads operating where delay occurred kept no such employes on hand at night, was admissible. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

Agency may be proved by acquiescence of the principal in other similar acts of the agent, so connected with that in question as to constitute a course of dealing. *Jackson v. Walls* (Civ. App.) 187 S. W. 676.

In action for damages to shipment of live stock, evidence of carrier's former custom to unload stock on arrival at certain place was incompetent as against carrier on issue of its negligence in not unloading stock upon arrival there. *Chicago, R. I. & G. Ry. Co. v. Pavillard* (Civ. App.) 187 S. W. 998.

Testimony of custom of carrier to unload live stock at certain point held incompetent to abrogate the express terms of a shipping contract requiring the shipper to unload the stock on its arrival. *Id.*

In a railroad servant's action for injuries, where there was a written rule requiring a flag to be stationed when making repairs, evidence of custom in defendant's yards of doing light repair work without flags, held admissible on the question of contributory negligence. *Texas & Pac. Ry. Co. v. Elliott* (Civ. App.) 189 S. W. 737.

In such action, where pleadings raised issue whether rule had been abandoned, evidence that a custom prevailed of doing light repair work without flags, held admissible. *Id.*

In a railroad servant's action for injuries, evidence that it was customary for defendant's car inspector to exercise control over repairers and ordered plaintiff to go between cars, held admissible. *Id.*

In action by railroad servant for injuries, where on cross-examination plaintiff was questioned as to having stated his age incorrectly in application for employment it was proper to exclude his testimony as to what other men customarily did in such circumstances. *Kennedy v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 192 S. W. 1114.

**Showing methods of preventing injury.**—The admission of testimony that a witness was familiar with compresses, and that he had never seen one in which a specified part of the machinery was guarded by railing, held erroneous. *Lawson v. Hamilton Compress Co.* (Civ. App.) 162 S. W. 1023.

**Other injuries or accidents from same or similar causes.**—In a passenger's action for the loss of an eye, due to a particle of metal coming through the opening of an open toilet and embedding itself in his eye, the testimony of railroad workmen that they had never heard of such accident before did not show that the accident should not have been anticipated by defendant. *Trinity & B. V. Ry. Co. v. McDonald* (Civ. App.) 160 S. W. 984.

In an action for burning plaintiff's goods, where defendant's witnesses testified that the engines were equipped with the best spark arresters, plaintiff can show that the engines threw sparks and started fires. *St. Louis Southwestern Ry. Co. of Texas v. Benjamin* (Civ. App.) 161 S. W. 379.

As bearing on the alleged negligence, in a servant's action for injury from the coming off of a belt while he was putting it on, that it was too short, evidence that on a subsequent attempt to put it on the same pulley it came off is admissible. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

In an action for injuries to plaintiff's mule at a cattle guard, evidence that stock frequently passed over cattle guards like the one in question was admissible. *Stephenville N. & S. T. Ry. Co. v. Schrank* (Civ. App.) 175 S. W. 471.

In an action for injuries to a shipment of live stock in several cars, evidence of the condition of animals in a car as to which no notice of damage was filed held admissible to show the condition of animals in other cars; all animals being commingled at destination. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

In an action for injuries to peanuts which plaintiff claimed resulted from unventilated car, evidence that green peanuts, if confined before sufficiently dry, would necessarily be damaged is admissible. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070.

**Showing value—Sales of other property in general.**—In an action against a carrier for damages to rough rice delayed in transportation, evidence of the consignee's account sales of the rice after it had been milled and more than three months after delivery was insufficient proof of the market value of the rice in its condition when it reached its destination. *Gulf Coast Transp. Co. v. Dillard* (Civ. App.) 163 S. W. 635.

Testimony as to what plaintiff and other witnesses with property similarly situated would take for their property was inadmissible upon the issue of market value. *Stanley v. Sumrell* (Civ. App.) 163 S. W. 697.

In an action for fraud in the sale of certain land, testimony of one of plaintiff's witnesses on cross-examination that witness had sold a 40-acre tract similar to plaintiff's, and situated near it for \$100 an acre should have been permitted on the question of damages. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28.

While it is permissible, on the issue of the value of lands sought to be condemned, to show sales of similar lands in the vicinity at about the time of the condemnation, the court properly rejected testimony of a witness that he had sold 139 acres for \$40 per acre, where no similarity of condition was shown. *City of Ft. Worth v. Charbonneau* (Civ. App.) 166 S. W. 387.

In an action for breach of contract to deliver corn at points in Texas, published market reports of the Kansas City market held admissible. *Walker Grain Co. v. Denison Mill & Grain Co.* (Civ. App.) 178 S. W. 555.

— **Difference in location of other property.**—As evidence of the value of land, held, that court properly excluded testimony as to previous sales of land several miles distant and varying from the lands in controversy in different respects. *Citizens' Nat. Bank of Plainview v. Slaton* (Civ. App.) 189 S. W. 742.

— **Value of other property.**—In an action for damages from construction of a railroad, evidence of the price paid and of a price subsequently offered for other property in the same block is properly excluded, where the matters entering into the values of the two properties are very dissimilar. *Houston Belt & Terminal Ry. Co. v. Dooley* (Civ. App.) 160 S. W. 594.

Newspaper market quotations could not be rejected as evidence of the market value of the cattle in controversy because referring to a different class, there being evidence that the class of cattle in controversy were as valuable as the class referred to in the newspapers. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

In an action for value of steers killed by a locomotive, evidence of what plaintiff paid for a yoke of steers not so good as those killed was admissible. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 175 S. W. 486.

In an action for depreciation of value of real estate by the construction of railroad tracks, exclusion of evidence as to value of adjoining property was not erroneous, where such property was dissimilar to that of plaintiff. *Houston Belt & Terminal Ry. Co. v. Wilson* (Civ. App.) 176 S. W. 907.

**RULE 9. THE BEST EVIDENCE IS TO BE PRODUCED**

**1. Necessity and admissibility of best evidence—Existence of better evidence as ground of exclusion.**—In a suit to recover money furnished to take up a note executed by a bank in liquidation, the rule that a written instrument is the best evidence of its contents was not available to exclude testimony that the debt evidenced by the note was created before the liquidation, and that it was the last of several renewals. *First Nat. Bank of Merkel v. Armstrong* (Civ. App.) 168 S. W. 873.

Where the authority of an agent has been conferred in writing, testimony as to statements by the agent as to his authority held inadmissible. *White Sewing Mach. Co. v. Sneed* (Civ. App.) 174 S. W. 950.

**2. — Admissibility of best evidence.**—In a suit to enjoin execution on judgment of the county court, held that, where the pleadings presented two phases, the judgment of the justice before whom the action was begun could be received to show the theory of action. *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

**5. — Exclusion of documentary evidence as inferior to oral evidence.**—In a proceeding to enforce a landlord's lien for supplies, oral testimony that supplies were furnished the tenant's employé upon his written orders is admissible; the orders themselves not constituting any better evidence than the positive testimony of a witness having knowledge of the facts. *Neblett v. Barron* (Civ. App.) 160 S. W. 1167.

A promise to execute a written lease which was drawn and delivered to the lessor, who promised to sign it, but who did not do so, held not the best evidence of the terms of a previous verbal lease. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

In an action for wrongful death, a witness who had sufficient acquaintance with deceased to estimate his earning capacity may testify as to his estimates, where they were not based upon any books, and it did not appear that deceased kept any books showing his earnings. *Galveston, H. & S. A. Ry. Co. v. Pennington* (Civ. App.) 166 S. W. 464.

**7. Contents of writing, and facts or transactions described in or evidenced thereby—Payment or release.**—While payment of taxes may be shown by the tax receipts or by evidence of the payor or payee or any one knowing of the payment, the tax collector cannot testify or show by certificate facts which are shown by the tax rolls; the rolls or certified copies thereof being the best evidence of their contents. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

**8. — Ownership, possession or control.**—Testimony of defendant, sued for amount paid for note purporting to be secured by vendor's lien, that the first information he had of the defect in the vendor's title was from plaintiff held not incompetent as parol testimony to prove title to real estate. *Young v. Barcroft* (Civ. App.) 168 S. W. 392.

Defendant's ownership of the premises, in a suit to enjoin use therefor for a bawdy-house, need not be proved by a deed, but direct testimony, admissions, or an act like rendering it for taxation, is competent. *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

**9. — Judicial acts, proceedings and records.**—To make a witness incompetent on the ground that she had been convicted of a felony, and not pardoned, such facts should have been shown by the court records; but it could be shown by other evidence, if it was sought to be shown for impeachment only. *Daly v. State*, 72 Cr. R. 531, 162 S. W. 1152.

Oral proof that a witness has been convicted of a felony and not pardoned, so as to make him incompetent, is competent to prove that fact, in the absence of timely objection that it be proved only by the judgment of conviction. *Matthews v. State*, 72 Cr. R. 654, 163 S. W. 723.

Where a judgment foreclosing a vendor's lien did not authorize a writ of possession and no such writ is found with papers in suit or on clerk's record, admission of testimony of sheriff, in suit to try title to the land, that he had dispossessed party in possession under writ of possession and order of sale was error. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

In action to enjoin illegal sale of intoxicating liquors, district attorney's testimony that temporary injunction against defendant was in force is inadmissible. *Ætna Club v. State* (Civ. App.) 193 S. W. 1106.

**11. — Corporate acts, proceedings and records.**—The active officers of a corporation in charge of its affairs may testify as to the acts, purposes, and intentions of the corporation and conduct of its business personally known to them, proof of such facts not being confined to the resolutions of its board of directors. *Lawson v. Port Arthur Canal & Dock Co.* (Civ. App.) 185 S. W. 600.

**12. — Conveyances, contracts and other instruments.**—When the terms of an agreement are reduced to writing and signed by the parties, the writing is merely the evidence by which the contract can be proved, and, in the absence of fraud, accident, or mistake, is the best evidence. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

In an action for broker's commission, where plaintiff knew whether she had sold to a particular party, and whether defendant had authorized her to sell, he admitting that he had employed her to sell, she was properly allowed to testify to such facts. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

**13. — Books of account, private memoranda, statements and correspondence.**—In an action for broker's commissions for sales for defendants, their ex-agent with whom the transactions were had held properly permitted to testify that he sent letters confirming sales to the purchasers on receipt of plaintiff's telegrams that sales had been made to them. *E. R. & D. C. Kolp v. Brazer* (Civ. App.) 161 S. W. 899.

Testimony of expert who had examined voluminous books and accounts as to the net result, held admissible. *Clopton v. Flowers* (Civ. App.) 183 S. W. 68.

15. **Fact of making or existence of writing.**—The issuance of the stock of the corporation to its subscriber should be established by the stock itself, which should be produced as the best evidence, and parol evidence as to the issuance of such stock is inadmissible. *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

16. **Writings collateral to issues.**—A conveyance not forming the basis of plaintiff's cause of action, but which is merely a collateral matter, may be proved by parol notwithstanding the best evidence rule. *Larrabee v. Porter* (Civ. App.) 166 S. W. 395.

Where a bulletin prescribing speed of railway train was merely collateral to the main issue, the rule that the paper itself is the best evidence did not apply. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

21. **Original writing as best evidence—Copies in general—Public records or documents.**—A copy of a copy of the "expediente" issued to the original grantee of land by the Spanish Crown was not admissible in evidence. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

A vellum tracing of a map of a city addition was an original, and not a copy. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

Where, in a suit to foreclose a judgment lien, no reason was assigned for not producing the original execution claimed to have been issued within the statutory time, the entries on the justice court docket were not admissible to establish the fact. *Spaulding Mfg. Co. v. Blankenship* (Civ. App.) 191 S. W. 1167.

22. **Grounds for admission of secondary evidence.**—That admission of parol evidence gives opportunity for perjury which might be avoided if the documents testified to were introduced, affords no ground for departing from the rule that if the document is destroyed parol evidence is admissible. *Doss v. Chambers* (Civ. App.) 188 S. W. 260.

23. — **Possession or control of primary evidence.**—Court did not err in admitting parol testimony to show contents of note which was shown not to be within jurisdiction of court. *T. W. Marse & Co. v. Flockinger* (Civ. App.) 189 S. W. 1017.

Where court found note was placed beyond its jurisdiction by acts of defendants, they could not be heard to demand its production before resort to secondary evidence to prove its contents. *Id.*

25. **Preliminaries to admission of secondary evidence—Proof as to existence of primary evidence.**—Before secondary evidence of contents of alleged deed is competent, proof must be made of its existence, execution, delivery, and acceptance. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

In trespass to try title, recording of deed and an original receipt for it by clerk of county court held sufficient evidence of its existence as preliminary to admission by secondary evidence. *Id.*

26. — **Proof as to destruction or loss of and search for primary evidence.**—Before secondary evidence of contents of deed is competent, its loss or absence must be satisfactorily explained. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

In suit to quiet title, proof of the destruction by fire of justice court records of a precinct in a county laid a proper predicate for the introduction of secondary evidence to prove the existence of such a judgment and execution issued thereon under which the land was sold. *Brady v. Cope* (Civ. App.) 187 S. W. 678.

#### RULE 10. SECONDARY EVIDENCE OF THE CONTENTS OF A WRITING IS ADMISSIBLE WHEN THE PAPER IS IN THE HANDS OF THE OPPOSITE PARTY AND NOTICE TO PRODUCE IT HAS BEEN GIVEN

**Proof as to possession or control of primary evidence.**—In an action on an assigned insurance policy, evidence as to the mailing of a letter by the assignee to the insurer's agent, telling him of the assignment, held sufficient to justify the admission in evidence of a copy of the letter. *Northern Assur. Co., Limited, of London v. Morrison* (Civ. App.) 162 S. W. 411.

Where, in suit to foreclose vendor's lien, plaintiff alleged the original deed was in defendant's possession, and that the latter had been duly notified to produce it and had failed, there was a proper predicate for secondary evidence of its contents. *Stewart v. Thomas* (Civ. App.) 179 S. W. 886.

**Notice to produce primary evidence—Necessity in general.**—Where a purchaser of land kept no copy of a letter which he wrote to the agent of vendors rescinding the contract on account of the fraud of their agent and had given the vendors notice to produce the letter, he had a right thereafter to testify as to its contents. *Sargent v. Barnes* (Civ. App.) 159 S. W. 366.

Plaintiff having given defendants notice to produce correspondence and papers, and they having failed to do so, plaintiff was entitled to introduce carbon copies of letters written by him to defendants as secondary evidence. *E. R. & D. C. Kolp v. Brazer* (Civ. App.) 161 S. W. 899.

In an action for commissions for the sale of cattle, evidence held to show that the possession of a letter evidencing the contract was wrongfully obtained by defendant, thus rendering secondary evidence of the contents thereof admissible without notice to defendant to produce the original. *Prieto v. Hunt* (Civ. App.) 167 S. W. 4.

Admission of carbon copies of letters written by plaintiff to one of the defendants held erroneous; no notice to produce the originals being given. *Walsh v. Methodist Episcopal Church South, of Paducah* (Civ. App.) 173 S. W. 241.

Where the bill of sale, the terms of which were in controversy, was in possession of appellant's counsel, and it was not produced pursuant to notice, parol evidence of its terms is admissible. *Denman v. James* (Civ. App.) 180 S. W. 1157.

**RULE 11. WHEN A WRITTEN INSTRUMENT IS LOST, DESTROYED OR MUTILATED, OR IS OUT OF REACH OF A SUBPŒNA DUCES TECUM, SECONDARY EVIDENCE IS ADMISSIBLE**

**Mutilation, destruction or loss of primary evidence.—**By party offering secondary evidence.—Secondary evidence of a suit wherein defendants' predecessor in title, since deceased, was adjudged to have no title held properly admitted in trespass to try title, where the records of the suit had been burned. *Martin v. Reid* (Civ. App.) 160 S. W. 1094.

The loss of letters must be shown before a witness can testify as to their contents. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

**Writings in general.—**If a reasonable effort has been made to obtain an original document, and there is no suspicion that the copy offered might differ from the original, the copy should be admitted. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

In an action by the buyer of a piano induced to purchase by misrepresentations of the seller's agent, parol testimony as to the catalogue of the manufacturer and the seller's claimed written warranty embodying the manufacturer's warranty, held properly excluded, in absence of proper predicate. *Jesse French Piano & Organ Co. v. Gibbon* (Civ. App.) 180 S. W. 1185.

**Judicial papers.—**Where a probate order was attacked for want of jurisdiction over the subject-matter, and the records of the proceedings had been destroyed, parol evidence was admissible to show the contents of the destroyed record, but not to show the proceedings taken in the administration of the estate. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

Where an original attachment and a return thereon was lost, secondary evidence of the contents of the attachment and return was admissible. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

If the pleadings in county court, being written, were lost or destroyed, their contents in a suit to enjoin execution may be established by judgment of the justice from whom the cause was appealed. *James McCord Co. v. Rea* (Civ. App.) 173 S. W. 649.

**Orders, warrants and negotiable instruments.—**Secondary evidence of contents of note held admissible on proof having been made of its destruction, though such destruction was not pleaded. *Allen v. Rettig* (Civ. App.) 177 S. W. 215.

**Proof as to destruction or loss of and search for primary evidence.—**Method of proof.—In an action to recover an interest in land, where the addressee of a letter from plaintiff's intestate gave evidence that he thought that the letter read to him was a copy of the original which he thought he had and which if found he would attach to his deposition, but which was not done, did not lay a proper predicate for the introduction of the copy. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

**Contracts and assignments.—**Where a carrier did not contend that it did not issue contracts for return transportation of a shipper who lost them, he could testify to their contents. *San Antonio & A. P. Ry. Co. v. Grady* (Civ. App.) 171 S. W. 1019.

**Letters and telegrams.—**A telegram received in response to a letter mailed to the adverse party is properly received in evidence as against the adverse party who purported to have signed the telegram, where the original telegram had been destroyed. *Menefee v. Bering Mfg. Co.* (Civ. App.) 166 S. W. 365.

**Primary evidence beyond the court's jurisdiction.—**Testimony as to the contents of certain letters and telegrams was admissible where they were shown to be without the jurisdiction of the court. *Texas, G. & N. Ry. Co. v. Berlin* (Civ. App.) 165 S. W. 62.

Where an original telegram was outside the court's jurisdiction, a copy was admissible. *Spaulding v. Smith* (Civ. App.) 169 S. W. 627.

**Determination of question of admissibility of secondary evidence.—**Evidence held to warrant the court, in the exercise of discretion, in permitting the introduction of a map of a city addition as secondary evidence. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

**RULE 12. THE BURDEN OF PROOF LIES ON THE PARTY ASSERTING A FACT ESSENTIAL TO HIS RIGHT OF ACTION OR DEFENSE AND PUT IN ISSUE BY THE PLEADINGS OF THE ADVERSE PARTY**

*I. Presumptions in General*

1. **Inference from facts proved.—**Where, in trespass to try title, the evidence showed that any title acquired by plaintiff for S., who was then trustee for defendant, inured to defendant's benefit, and that the land was recovered by defendant in an action against S., when an accounting of the trust estate was had, it is presumed plaintiff, who was a party to the other action, was then reimbursed for the amount paid for the land so that defendant herein was not bound to show a tender of the sum paid by plaintiff for the land. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

Circumstances establishing that a person was killed by a train at a public crossing through the negligence of the railroad's servants must be shown by direct evidence and cannot be inferred from other circumstances. *Luten v. Missouri, K. & T. Ry. Co.* of Texas (Civ. App.) 184 S. W. 798.

A "presumption of fact" is a probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and circumstances with each other, being always to be drawn by the jury. *Id.*

4. **Presumption on presumption.—**On the issue whether a person bought a piano, testimony that about the time of the alleged transaction a third person hauled to the house of the person a piano held inadmissible under the rule against grounding one inference on another. *J. W. Carter Music Co. v. Evans* (Civ. App.) 177 S. W. 1014.

The basis of the county court's decision could not be established by the judgment of the justice before whom suit originated. *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

Presumption cannot be based on presumption to make out a case. *Clampitt v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 185 S. W. 342.

**5. Identity of persons and things.**—In the absence of evidence casting suspicion upon the identity of a party to a conveyance in a chain of title, a similar deed or identity of name held prima facie evidence of identity of persons. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

**7. Nature and condition of property or other subject-matter.**—When the word "dollars," is used in testimony in an American court, the presumption is that American money is meant. *Mendiola v. Gonzales* (Civ. App.) 185 S. W. 389.

**8. Health and physical condition.**—In ascertaining when children of a class not otherwise determined shall be ascertained, it is presumed, under the common law, that a man or woman is capable of having issue until death. *Reeves v. Simpson* (Civ. App.) 182 S. W. 68.

**9. Love of life and avoidance of danger.**—A freight brakeman is presumed by law to have acted with ordinary care in switching to protect himself from being thrown from the car by the usual and ordinary force incident to such work, and which he should have reasonably anticipated. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

In an action on a fraternal benefit certificate, it is not presumed that insured committed suicide, but presumption is that he did not. *Sovereign Camp of Woodmen of the World v. McCulloch* (Civ. App.) 192 S. W. 1154.

**12. Mental capacity in general.**—A child over 14 years old is presumptively competent to testify. *Douglas v. State*, 73 Cr. R. 385, 165 S. W. 933.

**14. Intent.**—Knowledge of vendor and purchaser that the lien of a purchase-money note could not be removed might well raise the presumption that it was not contemplated that it should be removed, rebuttable, however, by proof to the contrary. *Riggins v. Post* (Civ. App.) 172 S. W. 210.

Where an act of conversion is unauthorized by the owner, the intent to convert will be conclusively presumed. *Gulf, C. & S. F. R. Co. v. Pratt* (Civ. App.) 183 S. W. 103.

**15. Knowledge of law.**—A person is presumed to know the law. *Riggins v. Post* (Civ. App.) 172 S. W. 210.

It must be presumed that testator knew the legal effect of the provisions of his will when he executed it. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

The shipper of an interstate shipment is charged with knowledge of the law, that a written bill of lading will be issued, which will include all terms and conditions of the transportation, that there were tariff rates fixed, and that they must include the rate for the entire transportation, and that there was a lower and a higher rate. *Atchison, T. & S. F. Ry. Co. v. Smyth* (Civ. App.) 189 S. W. 70.

**17. Continuance of fact or condition.**—There is no presumption that property, when delivered to a carrier for carriage, was in the same condition as when delivered to the consignee, where there was evidence that it was in good condition when delivered to the company and was damaged when delivered to the consignee. *Missouri, K. & T. Ry. Co. of Texas v. Western Automatic Music Co.* (Civ. App.) 161 S. W. 380.

Under the rule that the continued existence of a status is presumed, it will be presumed that one who was unmarried when he left home when between 17 and 21 years of age, and who was not afterwards heard of, remained unmarried until he died. *Wells v. Margraves* (Civ. App.) 164 S. W. 881.

When seisin of land is shown to exist, the presumption is that it continues to exist until the contrary is shown. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

A domicile once acquired is presumptively retained until otherwise shown. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 174 S. W. 305.

Where a person was insane on a certain date, there is a presumption, in the absence of proof, that the condition continues. *Rowan v. Hodges* (Civ. App.) 175 S. W. 847.

Where a power is shown to have existed, it will be presumed that it continues, and that third parties, without notice of a revocation thereof, are justified in so presuming. *Quanah, A. & P. Ry. Co. v. Dickey* (Civ. App.) 179 S. W. 69.

Evidence that carrier waived rule requiring advance payment of freight held to raise presumption that value of goods was the same at conversion as at time of storage eight months previously. *Whitley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 183 S. W. 36.

Ordinarily a custom once shown to exist is, in the absence of testimony showing its abrogation, presumed to continue. *Chicago, R. I. & G. Ry. Co. v. Pavillard* (Civ. App.) 187 S. W. 998.

Where plaintiff's business has existed for more than a year, and has steadily increased and was profitable the court will presume that plaintiff would continue in business. *Grand Prairie Gravel Co. v. Joe B. Wills Co.* (Civ. App.) 188 S. W. 680.

Evidence in death action that parents of deceased were living in 1913 did not show that they were living in 1915. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 191 S. W. 599.

**19. Regularity of course of business or conduct of affairs.**—In action for damages to shipment which carriers claimed was illegal, because shipped at a lower rate than that specified in its tariff sheets, held that, in the absence of evidence, it would be presumed that the carriers' agent at destination collected the scheduled rate. *Houston & T. C. R. Co. v. Commons* (Civ. App.) 160 S. W. 1107.

Where the deed of a trustee was an ancient document, held, that it would be presumed that he complied with the provisions of the trust deed. *Wacaser v. Rockland Savings Bank* (Civ. App.) 172 S. W. 737.

In seller's action for conversion of cotton by compress company, which was to weigh it, held that it would be presumed that draft attached to bill of lading was promptly presented by seller's bank and paid by buyer before delivery to compress company. *Shippers' Compress & Warehouse Co. v. Cumby Mercantile & Lumber Co.* (Civ. App.) 172 S. W. 744.

Lapse of 30 years since the execution of a deed by a county judge without record evidence of its authorization held insufficient to create a presumption that he was given authority. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

Under art. 2904o compliance with the requirement of article 2904n cannot be presumed in a suit on a school building contract. *Kerbow v. Wooldridge* (Civ. App.) 184 S. W. 746.

At the trial of condemnation proceedings after plaintiff had taken possession and constructed its road, it will be presumed that the road was properly and skillfully constructed and that whatever was done was necessary and proper. *Jefferson County Traction Co. v. Wilhelm* (Civ. App.) 194 S. W. 448.

**20. Making, validity, and genuineness of writings.**—The execution of a deed may be proved by circumstances, or by the presumption from the existence of such muniments of title as are necessary to give lawful origin to a title long openly asserted on one side, with acquiescence in such claim on the other. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

Where it appears more probable that a deed or other muniment of title in question had been executed than that it had not been, the jury would be authorized to presume that it had been so executed. *Id.*

The rule that parol evidence cannot be offered over objection to prove a sale of land in this state has no application to a case where circumstances are relied on to support a presumption of a deed. *Id.*

The presumption of the execution or existence of a deed from the facts and circumstances shown is a presumption of fact. *Id.*

The execution of a deed or other muniment of title may be presumed from mere silence or failure to object to another's known assertion of title, without any corroborating act evidencing such acquiescence. *Id.*

**21. Mailing and delivery of mail matter.**—Notices of assessments, if mailed, would be presumed to have been received. *State Division, Lone Star Ins. Union, v. Blassengame* (Civ. App.) 162 S. W. 6.

An indorsement on a letter, sent by an insurer's state agent to its home office, of the words, "Received June 11, 1906," was not of itself evidence of the receipt of the letter, in the absence of connecting proof that the party making the indorsement represented the insurance company, and had authority to make it. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 163 S. W. 396.

In suit against buyers of stallion by contract stipulating for return by certain date, evidence of defendants' counsel held presumptive evidence that letter offering to return horse had been received by sellers. *First Nat. Bank of La Fayette, Ind., v. Fuller* (Civ. App.) 191 S. W. 830.

**22. Corporate acts and records.**—In a suit to enjoin a telephone company from using the streets for its line, it will be presumed that it had attempted in good faith to incorporate under the law, and actually exercised its franchise thereunder; these elements of a de facto corporation being presumed. *Roaring Springs Townsite Co. v. Paducah Telephone Co.* (Civ. App.) 164 S. W. 50.

Where a deed from a corporation to its president recited that it was authorized by resolution of the board of directors, and it was signed by the president and attested by the secretary under the seal of the corporation, it will be presumed that the officers were acting under the authority of the corporation. *Coleman v. Luetcke* (Civ. App.) 164 S. W. 1117.

It must be presumed that one member of board of trustees of church, who with the others, was plaintiff in garnishment suit, had full authority to make application on behalf of all of them for writs of garnishment and to make statutory affidavit. *Queen Ins. Co. v. Keller* (Civ. App.) 186 S. W. 359.

If church trustees are joint, it will be presumed that one of them who made application and affidavit for writ of garnishment was authorized by all jointly to do so, since, if they were corporation trustees, they had power of corporation management, and, if they were trustees of an unincorporated church, they will be presumed to have the same powers as corporation directors. *Id.*

On allegation in suit to recover of railway sum paid by plaintiff as switching charges from his gravel pit to another railway, which defendant failed to absorb, it would not be presumed that defendant absorbed a greater amount of charges for competing gravel pits. *White Rock Gravel & Sand Co. v. International & G. N. Ry. Co.* (Civ. App.) 188 S. W. 280.

It will be presumed that the sale of property of a public service corporation was made under the statute authorizing such sale until the contrary affirmatively appears. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

In determining whether a power has been granted to a municipality, the presumption is against grant, but in determining whether it is properly exercising power, presumption is in favor of propriety, and to enjoin such exercise it must appear that corporation is abusing its discretion. *Waldschmit v. City of New Braunfels* (Civ. App.) 193 S. W. 1077.

**23. Evidence withheld or falsified.**—The failure of a party to produce evidence within his control raises the presumption that if produced it would operate against him. *Landon v. Halcomb* (Civ. App.) 184 S. W. 1098; *Hazelrigg v. Naranjo* (Civ. App.) 184 S. W. 316; *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

The failure of a defendant to produce evidence particularly within his knowledge raises a presumption against him only when a plaintiff, having the burden of proof on



the point, has produced evidence sufficient to raise an issue as to the truth of his claim. *Texas Co. v. Charles Clarke & Co.* (Civ. App.) 182 S. W. 351.

Where a plaintiff did not seek to contradict defendant's testimony denying the whole basis of his cause of action, the presumption arose that he had no testimony to controvert it. *Miller v. Poulter* (Civ. App.) 189 S. W. 105.

In action on policy of fraternal insurance by beneficiary named, failure of defendant to produce at trial certificate of and application for insurance, delivered to it with proofs of death, held circumstance against it tending to weaken its defense that the insured had in her application falsely represented her age to be under 45 years. *Collins v. United Brothers of Friendship and Sisters of the Mysterious Ten* (Civ. App.) 192 S. W. 800.

24. — **Failure of party to testify or giving evasive answers.**—Failure of plaintiff, suing for personal injury to wife, to testify as to material facts directly under his observation, allows a presumption against him. *Texas & N. O. R. Co. v. Jones* (Civ. App.) 187 S. W. 717.

In action on policy of fraternal benefit insurance in which defendant alleged that insured committed suicide, and it appeared that insured was killed by "pistol shot, self-inflicted," failure of plaintiff, who saw alleged suicidal act, to testify warrants inference that she knew truth would not help her case. *Knights of Maccabees of the World v. Hair* (Civ. App.) 192 S. W. 801.

A party's failure to testify on a point as to which he must have knowledge raises a strong presumption against him. *Day v. Williams* (Civ. App.) 193 S. W. 239.

25. — **Failure to call witness.**—In the absence of some prima facie showing of defendant's discovery of decedent's peril, no inference in his favor could be drawn from defendant's failure to introduce its trainmen as witnesses. *St. Louis, S. F. & T. Ry. Co. v. West* (Civ. App.) 174 S. W. 287.

Where the defendant master had in its employ at the time of trial servants who witnessed the fatal accident, but failed to produce them, it will be presumed that their evidence was not favorable to the master. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 184 S. W. 566.

Evidence of claim under deed and subsequent transfers making claim of title depending on it sufficiently show its acceptance as preliminary to admission of secondary evidence of deed. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

In a foreman's action for injury from fall of hoisting elevator, defendant's failure to introduce its engineer as a witness created no presumption that his testimony on that issue, if produced would be unfavorable to the defendant. *Burrell Engineering & Construction Co. v. Grisier* (Civ. App.) 189 S. W. 102.

26. — **Suppression or spoliation of evidence.**—Where the evidence in an action for the death of a railroad engineer showed that he was ordered to pass another train, and defendant possessed evidence which might have rebutted the presumption that the order was written in a certain way, arising from the fact that both the conductor and the engineer read it in that way, its failure to produce it strengthened the presumption. *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 158 S. W. 1171.

27. **Laws of other states.**—In the absence of allegations and proof to the contrary, it will be assumed that the laws of another state are the same as the laws of the forum. *Ogg v. Osgood* (Civ. App.) 165 S. W. 912; *Western Union Tel. Co. v. Schoonmaker* (Civ. App.) 181 S. W. 263; *Western Union Telegraph Co. v. Bailey* (Civ. App.) 184 S. W. 519.

Where, in an action against a telegraph company for mental anguish for delay in the delivery of a message and for the price paid for transmission, the company proved that where an action was for mental anguish alone the law of the forum controlled, the court correctly indulged in the presumption that the law of New Mexico was the same as the law of the forum. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

A contract which is valid in Texas is presumably valid in a sister state. *Whited v. Johnson* (Civ. App.) 167 S. W. 812.

In the absence of proof of the laws of another state, it will be presumed they are the same as those of Texas, and so prohibit issuance of stock, except for money paid, labor done, or property actually received. *Farmers' & Merchants' State Bank v. Falvey* (Civ. App.) 175 S. W. 833.

In the absence of proof of the laws of another state, it will be presumed that they also forbid the issuance of stock of corporation except for money paid, labor done, or property actually received. *Sturdevant v. Falvey* (Civ. App.) 176 S. W. 908.

Right of action for loss of personal property passes to the father and mother of one dying unmarried without issue, within the state, and, in absence of evidence to the contrary, it will be presumed that the same law applies in New Mexico. *Pecos & N. T. Ry. Co. v. Porter* (Civ. App.) 183 S. W. 98.

The law of another state as to interest is presumed the same as the law of the forum. *Crews & Williams v. Gullett Gin Co.* (Civ. App.) 189 S. W. 793.

In an action for mental suffering caused by delay in the delivery of an interstate telegram, it will be presumed that the law of the state in which the message was to be delivered was the same as the law of the forum. *Western Union Telegraph Co. v. Martin* (Civ. App.) 191 S. W. 192.

28. **Laws of foreign countries.**—In the absence of evidence, the law in Mexico as to conversion will be presumed the same as that of Texas. *Mendiola v. Gonzales* (Civ. App.) 185 S. W. 389.

31. **Judicial proceedings—Administration of estate.**—Where an administrator de bonis non is appointed after the discharge of administrators, it will be presumed in the absence of anything to the contrary that the order closing the estate was set aside, and the administration legally continued. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

That the county court, by proper orders, continued the temporary administration of plaintiff, so long as necessary for the purpose of the appointment, will be presumed. El

*Paso & Southwestern Co. v. La Londe* (Civ. App.) 173 S. W. 890, writ of error denied (Sup.) 184 S. W. 498.

In the absence of contrary proof, every fact necessary to support the authority of the county court to make an order of sale, directing a guardian to sell the ward's land, and to confirm the sale, must be presumed. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

Where court records have been burned, it will be presumed, to sustain conveyance by surviving wife, that she made application for appointment of appraisers of community property and that their appraisal was duly approved by court. *Sealey v. Mutual Land Co.* (Civ. App.) 184 S. W. 1073.

In suit to declare void orders of county court sitting in probate, touching sale of realty of wards on application of their guardian who was, at time, clerk of the court, district court could not infer from silence of record of county court that a clerk pro tempore was appointed as required by Acts 20th Leg. c. 109 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 1745, 1746). *Goodman v. Schwind* (Civ. App.) 186 S. W. 282.

33. — **Jurisdiction.**—Every presumption will be indulged in favor of the record of superior courts as to jurisdictional facts, but there can be no presumption against the record. *McCamant v. McCamant* (Civ. App.) 187 S. W. 1096.

Where, in a suit in the county court for conversion of mortgaged cotton, there was no demurrer or special exception filed to the petition for failure to allege the value of the cotton, it would be presumed, after judgment, that the value was an amount within the jurisdiction of the court. *Houssels v. Coe & Hampton* (Tex. Civ. App.) 159 S. W. 864.

An exercise of jurisdiction by the district court is presumed rightful, in the absence of showing to the contrary. *Lauraine v. Ashe* (Sup.) 191 S. W. 563.

34. — **Judgment.**—In habeas corpus, a judgment of commitment and a subsequent order for release held to be presumed correct. *Ex parte McDowell*, 76 Cr. R. 1, 172 S. W. 213.

No evidence being offered to sustain the allegations of applicant for writ of habeas corpus, it must be presumed that the judgment committing him for contempt was correct. *Ex parte Long* (Cr. App.) 179 S. W. 567.

Where the order granting a temporary injunction recited that the case was submitted on the pleadings, it must be presumed to state the truth and is binding, no effort being made to correct it. *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 180 S. W. 1138.

In determining whether title offered was marketable, where the abstract showed a simple partition suit in which the commissioners departed from the primary judgment, it cannot be said that the presumption must obtain that pleadings were filed and evidence introduced on the hearing which authorized such final judgment. *Adkins v. Gillespie* (Civ. App.) 189 S. W. 275.

In garnishment proceedings under amended original judgment, presumption, in absence of contrary evidence, is that notice of motion to amend was waived, or given in some way. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

The presumption is that judgment of the county court simply for plaintiffs was rendered against both defendants, who had appealed from adverse judgment of a justice. *International & G. N. Ry. Co. v. Dawson* (Civ. App.) 193 S. W. 1145.

35. — **Jury.**—That a case was ordered placed on the jury docket and remained there for five years raised a strong presumption that it had been properly listed as a jury case, and that the jury fee had been paid. *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.* (Civ. App.) 160 S. W. 1109.

39. **Rebuttal of presumptions.**—While it is presumed that the best interest of the child demands that it be placed with its parents, such presumption may be rebutted. *Long v. Smith* (Civ. App.) 162 S. W. 25.

The presumption that negligent delay was caused by the negligence of the terminal carrier may be rebutted. *Gulf, C. & S. F. Ry. Co. v. Brackett-Fielder Mill & Grain Co.* (Civ. App.) 162 S. W. 1191.

The presumption that the relation of shareholder, shown to have once existed, continues, may be rebutted by competent evidence. *Green v. Galveston City Co.* (Civ. App.) 191 S. W. 182.

40½. **Custody of children.**—While the best interests of a child should determine the question of its custody, there is a presumption in favor of the surviving parent, and, in the absence of evidence of his disqualification, he has a paramount right to custody. *State v. Dowdell* (Civ. App.) 168 S. W. 2.

41. **Negotiable instruments.**—It is presumed that a check would have been paid if diligently presented. *Dorchester v. Merchants' Nat. Bank of Houston*, 106 Tex. 201, 163 S. W. 5, 50 L. R. A. (N. S.) 542.

Where a negotiable instrument is shown to have been indorsed in blank, there is a presumption that it was so indorsed and transferred before maturity. *Daniel v. Spaeth* (Civ. App.) 168 S. W. 509.

A third party's indorsement of draft drawn by defendant, payable to plaintiff bank, held presumed to have been a part of the original transaction. *Harper v. Winfield State Bank* (Civ. App.) 173 S. W. 627.

Where it is shown that notes were put in circulation fraudulently, there is no presumption that the indorsee is an innocent holder. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 177 S. W. 528.

As under Rev. Stat. 1911, art. 588, the validity of an indorsement of a note cannot be attacked unless it is specially questioned in the pleadings, there is a presumption that an indorsement in blank was made before maturity, and the holder is presumed to be the owner. *First Nat. Bank of Garner, Iowa, v. Smith* (Civ. App.) 183 S. W. 862.

42. **Boundaries.**—In the absence of evidence to the contrary, it will be presumed that the surveyor in locating an original survey of state land actually ran and established all

the lines and corners as called for in his field notes, but this presumption may be rebutted. *State v. Dayton Lumber Co.* (Civ. App.) 159 S. W. 391.

In trespass to try title, held, that the presumption was that bearing trees at points called for by field notes were there once, and, even in their absence, the boundaries of the survey would be fixed in accordance with the notes. *Goodrich v. West Lumber Co.* (Civ. App.) 182 S. W. 341.

**44. Contracts.**—If the vendor examined the contract of sale and did not rely on any representations of the purchaser as to its contents, the minds of the parties are presumed to have met in executing it, in absence of fraud. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

Provision that purchaser was to eliminate an indebtedness against east half of the tract tended to raise a presumption of the exclusion of other indebtedness. *Riggins v. Post* (Civ. App.) 172 S. W. 210.

In an action for fraud in representing the value of bonds given for the difference on an exchange of realty, in the absence of any evidence to the contrary, it must be presumed that the parties put the true value on the property they exchanged. *Moore v. Beakley* (Civ. App.) 183 S. W. 380.

In absence of contrary evidence, it will be presumed that farm rentals are not due until the crop is gathered. *J. B. Farthing Lumber Co. v. Williams* (Civ. App.) 194 S. W. 453.

**45. Damages.**—In an action against a carrier for damages to rice delayed in transportation, the burden was on plaintiff to show, not only that the damage occurred in transit, but to show the market value of the rice as it should have been delivered to the consignee, and also its market value in the condition in which it was delivered. *Gulf Coast Transp. Co. v. Dillard* (Civ. App.) 163 S. W. 635.

Mental suffering from personal injuries will be presumed in the case of an insane person, as well as a sane person, until such abnormal mental condition as prevents the party from experiencing mental suffering is proved. *Tweed v. Western Union Telegraph Co.* (Sup.) 166 S. W. 696, affirming judgment *Western Union Telegraph Co. v. Tweed* (Civ. App.) 138 S. W. 1155, and rehearing denied *Tweed v. Western Union Telegraph Co.* (Sup.) 177 S. W. 957.

Damages, which must be actual or liquidated, are presumed to flow from a breach of contract. *Reinhardt v. Borders* (Civ. App.) 184 S. W. 791.

**46. Death.**—It will be presumed that one is dead who, when last heard of was shot and carried to a hospital. *Wells v. Margraves* (Civ. App.) 164 S. W. 881.

Where a husband and wife, making mutual wills, were frozen to death in the same snowstorm, with no evidence as to which died first, there was no presumption as to survivorship or simultaneous death. *Fitzgerald v. Ayres* (Civ. App.) 179 S. W. 289.

**47. Delivery of deed.**—That a deed was recorded raises presumption of its delivery. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

That a deed was recorded raises presumption of its delivery which is sufficient proof of delivery preliminary to admission of secondary evidence of deed. *Id.*

A delivered instrument plainly amounting to a deed of gift should operate by presumed assent until a dissent or disclaimer appears. *Taylor v. Sanford* (Sup.) 193 S. W. 661.

**48½. Domicile.**—The presumption that every man has a fixed domicile applies as well to a single as to a married man. *Marsden v. Troy* (Civ. App.) 189 S. W. 960.

**55. Judicial sales.**—Where a widow's interest in community property was sold to pay debts, it would not be presumed that it was necessary to sell the same to pay community debts, where there was an agreement of the parties to the contrary. *Waterman Lumber & Supply Co. v. Robins* (Civ. App.) 159 S. W. 360.

Where an administrator in August, 1850, recited that, some time in 1843 or 1844 he conveyed the land in controversy to S. in consideration of his claims against the intestate's estate, it would be presumed, the deed being lost, that the conveyance was subsequent to Act Feb. 3, 1844 (Gammel's Laws, p. 990; Hartley's Dig. art. 1075), and was therefore based on legal authority. *Houston Oil Co. of Texas v. Sudduth* (Civ. App.) 171 S. W. 556.

**58. Marriage.**—Where a transferee of a school land entryman was married to A., and they lived together as man and wife for many years until the husband's death in 1908, and he recognized children born to A. as his own, it would be presumed in support of the title derived from the heirs that the transferee's prior marriage to another woman had been set aside under Rev. Civ. St. 1911, art. 1985. *Chambers v. Rawls* (Civ. App.) 153 S. W. 208.

**59. Mortgages.**—Where chattel mortgage to secure future advances authorized mortgagee to make advances in excess of those stipulated, it will be presumed agreement for advances in excess of amount stipulated was made after amount stipulated had been furnished. *G. M. Carleton Bros. & Co. v. Bowen* (Civ. App.) 193 S. W. 732.

**60. Negligence in general.**—Neither negligence nor causal connection between it and the injury will be presumed from the fact of injury alone. *Stone & Webster Engineering Corporation v. Brewer* (Civ. App.) 161 S. W. 38.

Theft of bailed property is not presumptive evidence of the bailee's negligence. *Staley v. Colony Union Gin Co.* (Civ. App.) 163 S. W. 331.

**61. — Proximate cause.**—Where defendant's foreman was occupying a boarding car in which fire originated, the presumption was, in the absence of testimony tending to sustain a different conclusion, that it began through some act or failure to act on his part or on the part of other employes. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

62. — **Contributory negligence.**—Contributory negligence cannot be presumed. *Wells Fargo & Co. v. Benjamin* (Civ. App.) 165 S. W. 120.

In the absence of contrary evidence, it must be assumed that plaintiff conducted himself as a prudent person should have done under the circumstances. *Id.*

Where an employé fell 52 feet, and the concussion and injury were such that the circumstances of the accident were a blank to him, held, that it would be presumed that he was exercising due care, in the absence of circumstances pointing to the contrary. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 168 S. W. 439.

In the absence of evidence whether decedent looked or listened for train, the presumption was that he did both in the exercise of ordinary care. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

In an action against railroad for death of its yard clerk, it cannot be presumed that decedent was guilty of negligence. *Galveston, H. & S. A. Ry. Co. v. Fred* (Civ. App.) 185 S. W. 896.

A child of very tender years may be presumed as matter of law not to have sufficient discretion to appreciate dangers obvious to one of maturer age; there is no such presumption as to a boy 14 years old. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 187 S. W. 491.

63. — **Carriage of goods.**—Where live stock sustains injuries while being transported with ordinary care, it will be presumed that they were caused by the inherent nature or proper vice of the animals, and not by any negligence of the carrier. *Ft. Worth & D. C. Ry. Co. v. Berry* (Civ. App.) 170 S. W. 125.

Where the shipper accompanied cattle and was as well placed as the carrier to know the cause of injuries, there is no presumption that injuries were caused by the delivering, instead of the initial carrier. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

In an action against a connecting carrier, evidence held sufficient to rebut the presumption that the cattle were received by defendant from the initial carrier in good condition. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.) 173 S. W. 273.

66. **Partnership.**—Promoters of a railroad working together in furthering whatever scheme they had, in the absence of proof to the contrary, would be presumed to be partners. *Vaughn v. Morris* (Civ. App.) 180 S. W. 954.

67. **Payment.**—Where notes are taken for a precedent debt, it will not be presumed that they are taken as payment, and the burden is on the party asserting it. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

Possession by the maker of a note is prima facie evidence that it has been paid. *Smith v. Cooley* (Civ. App.) 164 S. W. 1050.

A recital in a release executed by the president of a mortgagee bank that the note secured by the mortgage had been paid in full while the bank was the owner thereof supports a finding of payment. *First State Bank of Amarillo v. Jones* (Civ. App.) 171 S. W. 1057, judgment reversed (Sup.) 183 S. W. 874.

Where principal maker of note executed a renewal, but original was not delivered to him in exchange, there is a presumption that it was not the intention of the parties to discharge original by delivery to payee of the new note. *Jackson v. Home Nat. Bank of Baird* (Civ. App.) 185 S. W. 893.

For the vendor or one succeeding to his rights to rescind for nonpayment of vendor's lien note, after waiting over 20 years, he must pay back, with interest, the cash payment made. *Walls v. Cruse* (Civ. App.) 185 S. W. 1033.

Where abstract of title showed judgment for a claimed owner of land decreeing him title on condition that he pay another claimant a certain sum, which was entered in 1881, and the abstract further showed a conveyance by such person within three months of the judgment, it will be conclusively presumed in 1912 that the required payment was made and the title was good or marketable. *Strickland v. Duffie* (Civ. App.) 191 S. W. 622.

Failure to foreclose deed of trust for 25 years after maturity of the debt raises a presumption that the debt had been paid, in the absence of production of the note or of evidence that it had not been paid. *Mensing v. Fidelity Lumber Co.* (Civ. App.) 194 S. W. 208.

68. **Existence of agency and extent of authority.**—On motion to quash sequestration, the court will presume the authority of plaintiff's agent who signed the bond. *Hawkins v. First Nat. Bank of Canyon, Tex.* (Civ. App.) 175 S. W. 163.

Custom or usage to enlarge scope of agent's authority must exist long enough to become generally known so as to warrant presumption of silent inclusion by principal. *Holmes v. Tyner* (Civ. App.) 179 S. W. 887.

Agency when once shown to exist is presumed to be general, and not special. *Ha-zelrigg v. Naranjo* (Civ. App.) 184 S. W. 316.

Where corporation's bond is offered in evidence without objection, presumption is, in absence of evidence to contrary, that officer who signed was duly authorized. *Eastern Texas Traction Co. v. Harrison* (Civ. App.) 189 S. W. 302.

Where an unlocated land certificate was transferred many years ago pursuant to a power of attorney recited in the conveyance, the transfer will be presumed to have been executed under sufficient authority. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

69. **Ownership and possession.**—The rule that possession of a note is prima facie evidence of title does not apply to a note payable to order not transferable by delivery. *Sloan v. Gilmore* (Civ. App.) 167 S. W. 1089.

A finding that plaintiffs had no title by limitation does not destroy the presumption of title, raised by proof, that their grantors had prior possession of the property. *Buie v. Penn* (Civ. App.) 172 S. W. 647.

Unexplained possession of defendant raises presumption of fee-simple title, which must be overcome by showing he has no title, or that plaintiff has title as against the world. *Randell v. Robinson* (Civ. App.) 172 S. W. 735.

Where defendant in trespass to try title is in possession, there is a presumption of title in him, authorizing recovery against persons failing to make affirmative showing of title. *Speed v. Sadberry* (Civ. App.) 190 S. W. 781.

In action for value of horse killed on defendant railroad's right of way, it would be presumed that all cars operated on defendant's line were operated by it. *Quanah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

**70. Public lands.**—Where land was sold by the governor of a Mexican state, now within the limits of the state of Texas, the approval of the Mexican government, required by its acts and regulations, held to be presumed. *State v. Gallardo*, 166 S. W. 369, 106 Tex. 274, affirming judgment (Civ. App.) 135 S. W. 664.

**72. Sales.**—Where the seller of an automobile agreed to furnish a competent man who would instruct the purchaser how to operate the machine, and no agreement as to the period of instructions was made, it will be presumed that they were to extend over a reasonable time. *Buick Automobile Co. v. Weaver* (Civ. App.) 163 S. W. 594.

In the absence of an agreement to deliver goods sold at a particular place, the presumption is that delivery is to be made at the place of sale, and in such case, though sale is by sample, acceptance need not be shown. *Robert McLane Co. v. Swernemann & Schkade* (Civ. App.) 189 S. W. 282.

**73. Validity of statutes.**—A statute will not be declared invalid unless its invalidity is beyond reasonable doubt. *Trinity & B. V. Ry. Co. v. Empire Express Co.* (Civ. App.) 173 S. W. 217; *Judkins v. Robison* (Sup.) 160 S. W. 955; *Ex parte Francis*, 72 Cr. R. 304, 165 S. W. 147; *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 165 S. W. 491; *Glass v. Pool*, 106 Tex. 266, 166 S. W. 375; *Ex parte Mode* (Cr. App.) 180 S. W. 708.

It will be presumed that the Legislature knew when it enacted the Employers' Liability Act, that contributory negligence would bar a recovery by employé. *St. Louis, B. & M. Ry. Co. v. Vernon* (Civ. App.) 161 S. W. 84.

In testing the constitutionality of a statute, the language must receive such construction as will conform it to any constitutional limitation or requirement, if it be susceptible of such interpretation. *Glass v. Pool*, 106 Tex. 266, 166 S. W. 375.

It will not be presumed that the Legislature intended an act to be so construed as to render it unconstitutional. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court (Sup.) 169 S. W. 407. Judgment reversed 106 Tex. 500, 171 S. W. 707.

A law will be recognized as valid if, by reasonably fair construction, it appears that the Legislature was empowered to enact it. *St. Louis Southwestern Ry. Co. of Texas v. Griffin*, 171 S. W. 703, 106 Tex. 477, reversing judgment (Civ. App.) 154 S. W. 583.

Where there could have existed a state of facts justifying the classification made by a statute, the courts will assume that it existed. *Bruce v. City of Gainesville* (Civ. App.) 183 S. W. 41.

## II. Presumptions on Appeal or Writ of Error

**77. In general.**—It is the duty of the court in reviewing proceedings to indulge in support of the judgment every reasonable inference arising from the facts proven. *Tankersley v. Jackson* (Civ. App.) 187 S. W. 985; *Young v. Barcroft* (Civ. App.) 168 S. W. 392; *Floore v. Morgan* (Civ. App.) 175 S. W. 737; *Bean v. Cook* (Civ. App.) 182 S. W. 1166; *Texas & N. O. R. Co. v. Marshall & Marshall* (Civ. App.) 184 S. W. 643.

The court on appeal, to sustain the judgment, may, in the absence of anything in the record to the contrary, presume that proof of an essential fact was made. *Delaware Ins. Co. v. Hutto* (Civ. App.) 159 S. W. 73.

Where the record is silent as to the appointment of an official court stenographer, the presumption on appeal is that none was asked for or appointed. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 160 S. W. 108.

In a purchaser's action for the vendor's breach, evidence as to the purchaser's readiness, ability, and willingness to comply with the contract held to be viewed in the light most favorable to the judgment. *Cornelius v. Harris* (Civ. App.) 163 S. W. 346.

Where the trial court found that a telegraph company regularly closed its office from 8 p. m. Saturday until 10 a. m. the following morning, yet did not find that such closing hours were reasonable, and there was no statement of facts in the record, the Court of Civil Appeals could not imply a further finding that such office hours were reasonable. *Western Union Telegraph Co. v. Johnson* (Civ. App.) 164 S. W. 903.

In action for death of a railway employé, claimed to have been caused by slipping on brake step of platform, held, that it could not be assumed, in the absence of other evidence, that the jury found paint on the brake platform admitted in evidence, or indications evidencing a slip thereon. *Pecos & N. T. Ry. Co. v. Welshimer* (Civ. App.) 170 S. W. 263.

Where the record of a case does not show whether the stock law prohibiting horses and other animals from running at large was in force, the court on appeal will presume that it was not in force. *Missouri, K. & T. Ry. Co. of Texas v. Lovell* (Civ. App.) 179 S. W. 1111.

Where the record shows only part of the proceedings, every presumption will be indulged in favor of the court's ruling. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

Where, it being uncertain in whose possession the property was when seized, the

record does not show that the court directed which party should assume the burden of proving right of possession, it will be presumed the burden was on the writ plaintiff. *Dawedoff v. Hooper* (Civ. App.) 190 S. W. 522.

**78. Burden of showing error.**—One attacking the findings of the trial court has the burden of affirmatively establishing error on appeal. *Crawford v. Woods* (Civ. App.) 185 S. W. 667; *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 166 S. W. 499.

Appellant, complaining of the absence of any petition to support the judgment rendered for plaintiff, had the burden of establishing the fact upon which he relied. *Wiggins v. First Nat. Bank of Denton* (Civ. App.) 175 S. W. 735.

An order overruling a motion to vacate a default held to reasonably show that no evidence was heard, so that one appealing need not show whether any evidence was heard. *International Travelers' Ass'n v. Peterson* (Civ. App.) 183 S. W. 1196.

**79. Grounds and forms of action or defense.**—Where the court found that there were places provided for watering the stock in transit by the keeper in charge, but that he negligently failed to do so, it would be presumed that the contract imposed on such keeper the duty of watering the mules. *Dickerson v. San Antonio, U. & G. Ry. Co.* (Civ. App.) 170 S. W. 1045.

**80. Jurisdiction.**—Suit held presumed to have been filed in time to stop the running of limitations, where the record did not show when it was filed and trial court found against the claim of title by limitation. *Rio Grande & E. P. R. Co. v. Kinkel* (Civ. App.) 158 S. W. 214.

A presumption in favor of a court of general jurisdiction acting within the ordinary scope of its powers and upon a subject-matter within its jurisdiction arises only as to jurisdictional facts on which the record is silent, but the regularity of a judgment will not be presumed against a record disclosure that the court exceeded its jurisdiction. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

Where the record does not affirmatively show want of jurisdiction in the trial court, such jurisdiction will be presumed. *Reeves v. Fuqua* (Civ. App.) 183 S. W. 34.

Under presumption of jurisdiction, judgment of justice on note and foreclosing lien on furniture cannot be attacked on appeal from county court on ground that value of furniture was beyond jurisdiction of justice; such value not being shown by justice's record. *Robertson v. Balkam* (Civ. App.) 192 S. W. 583.

**81. Venue.**—In determining, on appeal, whether a plea of privilege to be sued in the county of defendant's residence was properly sustained it will be presumed that the allegations of the petition which are material for the purposes of determining the proper venue are true. *Theodore Keller Co. v. Mangum* (Civ. App.) 161 S. W. 19.

On appeal from district court of T. county, to which sequestration suit had been taken by certiorari, held that, in the absence of the writ of certiorari from the record, it would be presumed to support the judgment, that claimant residing in D. county had admitted that the property was in defendant's possession when levied on. *Josey v. Masters* (Civ. App.) 179 S. W. 1134.

Where a verdict found defendant's residence in accordance with plaintiff's claim, and the court entered judgment for plaintiff without mentioning the plea of privilege, the Court of Civil Appeals will regard the action as overruling the plea. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

**82. Parties.**—Where, in trespass to try title by an independent executor, the record of the proceedings showing the appointment and qualification of the executor was introduced, and there was nothing to show that the estate had been wound up by the probate court, it will be presumed that the executor was acting executor, and as such could maintain the suit. *Purinton v. Broughton* (Civ. App.) 158 S. W. 227.

On appeal from a judgment sustaining exceptions to a motion to reinstate a cause dismissed for want of prosecution, it could not be presumed that all of the defendants were given notice of the motion, where the judgment recited that certain defendants were not served with notice. *McAllen v. Crafts* (Civ. App.) 166 S. W. 3.

**83. Process and appearance.**—Where the court found plaintiff's full claim to be a laborer's lien upon property in the possession of defendant, notwithstanding plaintiff had extended the time of payment of a part, it cannot be presumed that the legal process by which defendant acquired possession, or the lien it asserted, was valid. *Carthage Ice & Light Co. v. Roberts* (Civ. App.) 166 S. W. 12.

Where the record shows merely that the cause was continued after answer filed without notice thereof, it cannot be presumed that plaintiff requested or agreed thereto, and the continuance does not operate as an appearance by plaintiff. *Smith v. Carr* (Civ. App.) 173 S. W. 602.

There is no presumption, on appeal from a default judgment, that process was served the requisite statutory time before the term at which default was entered. *McCaulley v. Western Nat. Bank* (Civ. App.) 173 S. W. 1000.

Where the record showed nothing to the contrary, held, that it will be presumed on appeal, defendants being served in a county other than that of their residence, that they were served with an alias writ. *Pierson v. Beard* (Civ. App.) 181 S. W. 765.

**84. Pleading.**—Where, in an action for usurious interest paid, the record does not show when the petition was filed, but that the answer was filed September 5, 1911, and that practically all of the interest was paid in less than two years before, the appellate court will presume that the petition was filed within two years subsequent to payment. *Cotton v. Sanderson* (Civ. App.) 160 S. W. 658.

Where the original answer which alone set up defendant's plea of privilege was not in the record, it will be presumed that the plea was properly denied. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

In view of Rev. St. 1911, arts. 1812, 2157, et seq., relating to pleadings and lost pleadings, held that, where corrected transcript contained copy of lost pleading sufficient to support judgment, it would be assumed that the pleading was before court at its rendition of judgment. *Wiggins v. First Nat. Bank of Denton* (Civ. App.) 175 S. W. 735.

In the absence of pleadings in the record, it must be presumed that they were sufficient, and that the rulings of the court thereon were correct, especially where it does not appear that any exceptions were called to the attention of the court and ruled upon. *Wertheimer v. Hargreaves Printing Co.* (Civ. App.) 180 S. W. 232.

While appellate court may presume that pleadings were filed by interveners, held that it will not be presumed that such pleadings where they do not appear in record, showed that interveners were entitled to priority over the original garnishor. *Reinertsen v. E. W. Bennett & Sons* (Civ. App.) 185 S. W. 1027.

Where plaintiff's pleadings before a justice were oral and there was no memoranda thereof in record from the county court, allegations in his petition will be presumed to have been consistent with the rulings of trial judge. *Gulf, C. & S. F. Ry. Co. v. Goodman* (Civ. App.) 189 S. W. 326.

Court of Civil Appeal must presume other oral pleading in justice court on behalf of plaintiff, not inferable from statement thereof in charge, necessary to sustain county court's judgment, if consistent with the charge, but cannot presume allegations contradictory to statement thereof in written charge. *Id.*

Where the trial court has sustained a general demurrer, the Court of Civil Appeals ordinarily will presume that the litigant against whom the ruling was made will not feel called upon to amend his petition as called for by some special exception, intended to reach informality only, though the special exception is well taken. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

**85. — Demurrer.**—Where the record does not show that demurrers or exceptions to the petition were ever presented to or ruled upon by the trial court, they will be presumed on appeal to have been waived. *Cotton v. Cooper* (Civ. App.) 160 S. W. 597; *Gillett v. Holligan* (Civ. App.) 162 S. W. 367; *Hales v. Peters* (Civ. App.) 162 S. W. 386; *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28.

Where the record shows no ruling on defendant's general demurrer, or that any was requested, it will be presumed that the demurrer was waived. *International & G. N. Ry. Co. v. Owens* (Civ. App.) 166 S. W. 412.

**88. Interlocutory proceedings.**—On appeal from an order quashing a writ of garnishment to which several grounds of objection were urged, it will be presumed that all were sustained, in the absence of record showing to the contrary. *Dickinson v. First State Bank of Blackwell* (Civ. App.) 185 S. W. 674.

Where the record showed that the county judge entered his disqualification, whereupon "counsel for plaintiff and defendants agreed upon" another judge, held a conclusive presumption on appeal that all the defendants agreed to such judge. *Fariss v. Beeville Bank & Trust Co.* (Civ. App.) 194 S. W. 1169.

**90. Conduct of trial.**—In an action for the conversion of mortgaged property, where there is no contention on appeal concerning an independent promise made by the purchaser to the mortgagee, it will be presumed that there was no such contention in the trial court, even though there was evidence of such promise. *First Nat. Bank v. Dunlap* (Civ. App.) 159 S. W. 502.

**91. Admissibility and reception of evidence.**—Where a case was submitted to the court, it will be presumed that the judgment was based on that portion of the testimony which was admissible and competent. *Gulf, C. & S. F. Ry. Co. v. Currie* (Civ. App.) 160 S. W. 656.

On a trial to the court, it would be presumed that letters, cards, etc., showing the market price of millet seed, were not considered as evidence of market value, but only as bearing on the weight of the testimony of witnesses as to the market. *Barteldes Seed Co. v. Bennett-Sims Mill & Elevator Co.* (Civ. App.) 161 S. W. 399.

Where there was sufficient legal evidence to establish a fact, the court on appeal will presume that the trial court disregarded improper evidence to show such fact. *Keenon v. Burkhardt* (Civ. App.) 162 S. W. 483.

It is presumed that the trial court's ruling on the evidence was correct. *Johnson v. Sullivan* (Civ. App.) 163 S. W. 1015.

Under an assignment of error in the admission of testimony of a witness as to a reasonable commission for effecting a lease, not objecting that the witness had not qualified himself to state his opinion on that matter, it would be assumed that he was duly qualified. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

Where there is sufficient competent evidence to support the finding, it will be presumed that inadmissible evidence received over objection was not considered. *Mallow v. Raynes* (Civ. App.) 188 S. W. 23.

Where it did not appear what examination was made to test qualifications of witness testifying as to value of automobile, the presumption was that court satisfied itself by proper inquiry as to competency of evidence, which was not overcome by mere statement that witness had not qualified. *Taylor Bros. Jewelry Co. v. Kelley* (Civ. App.) 189 S. W. 340.

Where bill of exceptions to admission of expert testimony does not show what examination, or that no examination, was made, presumption is that court made proper inquiry as to competency of witness to testify as expert. *Magnolia Motor Sales Corp. v. Chaffee* (Civ. App.) 192 S. W. 562.

**92. Dismissal or direction of verdict.**—Where there are both valid and invalid grounds for dismissal, it will be presumed on appeal that the dismissal was upon valid grounds only. *H. J. Murrell & Co. v. Edwards* (Civ. App.) 179 S. W. 532.

In suit on endowment policy issued by fraternal order, held, that Court of Civil Appeals will assume that undisputed evidence justified court in taking from jury, and

resolving in favor of defendant, as matter of law, question whether insured had ever been suspended from his lodge. *Grand Lodge, Colored Knights of Pythias, v. Horace* (Civ. App.) 191 S. W. 398.

**93. Instructions.**—The court will presume that the jury followed instructions to disregard evidence. *Glens Falls Ins. Co. of Glens Falls, N. Y., v. Melott* (Civ. App.) 174 S. W. 700; *Penn. v. Briscoe County* (Civ. App.) 162 S. W. 916; *Foster v. Atliir* (Civ. App.) 181 S. W. 520.

The record containing no charge, and the transcript being certified to contain a true and correct copy of all the proceedings had in the cause, as they appear on file and on record in the clerk's office, it cannot be presumed any instruction, eliminating the effects of prejudicial evidence improperly admitted, was given. *Bomar v. Munn* (Civ. App.) 158 S. W. 1186.

Where the transcript contains a requested charge by appellant, but does not show that it was given, the court may not assume that it was given. *White Sewing Mach. Co. v. Sneed* (Civ. App.) 174 S. W. 950.

In the absence of any information enabling it to determine error in the refusal to charge, the presumption must be in support of the judgment. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

On plaintiff's appeal from a verdict for defendant, in determining whether it was error to fail to submit an issue to the jury, the evidence on such issue will be taken at its strongest in favor of plaintiff. *Smith v. Texas Traction Co.* (Civ. App.) 180 S. W. 933.

In action for libel, refusal to strike part of petition setting up publication as libelous held not error, where the court told the jury they could not predicate libel thereon, since, without any showing to the contrary, it would be presumed that the jury obeyed the instruction. *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45.

It will be presumed on appeal that the jury followed instructions as to what they must find before finding verdict against defendant. *Cattlemen's Trust Co. v. Blasingame* (Civ. App.) 184 S. W. 574.

Unless contrary is shown it must be presumed that the trial judge would not have passed on motion for peremptory instruction without requiring its submission to opposing counsel in compliance with art. 1971. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

Where issue was submitted without objection in form required by statute, it raises presumption on appeal that appellant waived objection that evidence was insufficient to support instruction. *Vaky v. Phelps* (Civ. App.) 194 S. W. 601.

**95. Verdict.**—The appellate court cannot presume, in an action for damages by causing plaintiff's rafted logs to be lost, that the verdict included damages for the loss of cypress logs, when the evidence did not show that any cypress logs were lost, where there is sufficient evidence to sustain a larger verdict than that rendered without including any cypress logs among those for which damages were awarded. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Civ. App.) 164 S. W. 878.

In an action against a carrier for damages to cattle by wreck and delay, it will be assumed on appeal, the facts warranting that the jury in estimating damages for cost of feeding from Saturday to Monday took into account a custom among shippers to feed at least once immediately upon arrival at their own expense. *Gulf, C. & S. F. Ry. Co. v. Rodriguez* (Civ. App.) 185 S. W. 311.

Where no special issues are submitted and the jury returns a general verdict, it is presumed that the jury found in favor of appellee on every issue to sustain the judgment. *Southern Traction Co. v. Wilson* (Civ. App.) 187 S. W. 536.

It must be presumed on appeal, from the fact that the court submitted the case on special issues, that a request therefor had been made by one or both parties. *La Grone v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 189 S. W. 99.

In an action for negligently firing her household goods, held that judgment based on verdict for plaintiff should be upheld on theory that jury presumably found that she was occupying premises with consent of defendant, the owner. *Blount-Decker Lumber Co. v. Martin* (Civ. App.) 190 S. W. 232.

In action under federal Employers' Liability Act for death of brakeman, where no special charge was requested as to reduction of recovery by decedent's contributory negligence, and no complaint is made as to amount of verdict, which was general as to amount, Court of Civil Appeals will presume that jury found whatever was necessary to sustain verdict. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

**96. Findings of court.**—A Court of Civil Appeals is authorized to presume, in support of the judgment below, that the trial court made findings proper under the facts. *Lofland v. Greenwood* (Civ. App.) 181 S. W. 517.

In a suit to restrain the maintenance of a fence along the right of way near a station, where judgment was for the railroad, held that, in the absence of special finding on the degree of care required if there was no fence, it must be presumed that such issue was decided for the railroad. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

A judgment for defendants after claim of estoppel was interposed by plaintiffs, though not specifically referring to the plea, implies a finding adverse to the plaintiffs thereon. *Id.*

Where, without evidence erroneously admitted, the other evidence sustained the findings it will be presumed that such findings were based on the competent evidence. *Gulf, C. & S. F. Ry. Co. v. Moore* (Civ. App.) 188 S. W. 24.

If it is a controlling issue whether deed of husband alone, during wife's insanity, granting community property was for necessities of the community, and there is evidence sufficient to sustain finding that the sale was not necessary, and the court, without making such finding, declared the sale invalid, such finding would be presumed in aid of the judgment. *Priddy v. Tabor* (Civ. App.) 189 S. W. 111.



Although failure of court to file conclusions of law and fact was not shown by bill of exceptions, where judgment contained recital that defendant requested court to make and file such findings, and transcript does not contain them, held that appellate court will assume none were filed. *Ainsworth v. Dorsey* (Civ. App.) 191 S. W. 594.

Where the trial judge filed no conclusions of fact, the appellate court must presume that every fact which there was sufficient evidence to support and which was necessary to sustain the judgment was found. *Galveston-Houston Electric Ry. Co. v. Jewish Literary Society* (Civ. App.) 192 S. W. 324.

The rule as to presumption in favor of judgment is not applicable to conclusions of law, since an appeal from them alone is possible. *Cumby Light & Telephone Co. v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 194 S. W. 170.

In action for breach of warranty of silo, where no issue was submitted whether the contract was induced by fraud or the silo was worthless and plaintiff by trial amendment alleged fraud, but the evidence was insufficient to authorize submission of such issue to the jury, the court on appeal cannot assume in support of the judgment that the trial court so found. *Potter v. Mobley* (Civ. App.) 194 S. W. 205.

**97. Order granting or refusing new trial.**—Although during a trial the trial judge was taken sick, but there is no admission in the bill of exceptions or proof that he was too ill intelligently to pass upon a motion for new trial, it will be presumed that he was not. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

**98. Amount of recovery.**—Where the court cannot determine whether the party complaining is entitled to a credit, or, if entitled thereto, whether he has not received a credit, the judgment will not be disturbed on the theory of the disallowance of the credit. *Trimble v. Tucker* (Civ. App.) 168 S. W. 1021.

Where the verdict was under a general charge, it cannot be presumed that the entire award was on one claim of damage, so as to sustain an assignment that the award on that issue was excessive. *San Antonio, U. & G. Ry. Co. v. Storey* (Civ. App.) 172 S. W. 188.

Where the jury assessed a lump sum for cattle killed and cattle injured during shipment it cannot be assumed that for the cattle killed the jury awarded an amount greater than their value as shown by the proof. *Gulf, C. & S. F. Ry. Co. v. Vasbinder* (Civ. App.) 172 S. W. 763.

In favor of the judgment it will be presumed plaintiff's automobile, when fitted with pneumatic tires, after injury, was not of greater value than when fitted with hard rubber tires, before the injury. *Wells Fargo & Co. Express v. Keeler* (Civ. App.) 173 S. W. 926.

In suit for wrongful death against receiver and railroad with judgment against railroad alone, refusal to give peremptory instruction in favor of receiver who had been discharged, held not reversible error as there is no presumption that the amount of the verdict was increased by the fact that there were two defendants. *International & G. N. Ry. Co. v. Sneed* (Civ. App.) 181 S. W. 702.

Where the verdict was general, and it appeared that, as to some of the claims of recovery, plaintiff was not entitled, it will be presumed on appeal that no part of the recovery was on account of such claim. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

In suit for damages tried by court, it will not be presumed on appeal that court improperly allowed plaintiff's profits as damages, where there was no evidence to show that profits were actually lost to him. *Quanah, A. & P. Ry. Co. v. Moore* (Civ. App.) 189 S. W. 322.

On appeal any uncertainty as to the proper amount of recovery should be resolved in favor of the judgment of the court below. *Goodman v. W. S. Peck & Co.* (Civ. App.) 192 S. W. 785.

**99. Judgment.**—Where a tenant in common asked no finding as to whether the land could be partitioned, it will be presumed that a decree of partition was founded upon sufficient evidence. *Stephenson v. Luttrell* (Civ. App.) 160 S. W. 666.

In a case tried by the court, in which there are no conclusions of fact, the court on appeal must presume that the conflicts in the evidence on the issuable facts were resolved in favor of the successful party, and that every fact necessary to support the judgment was found by the trial court. *Davidson v. Lee* (Civ. App.) 162 S. W. 414.

Plaintiff held presumed to be a corporation, as against the objection first made on appeal that the judgment was void because rendered for a company without naming the parties composing it. *Grisham v. Connell Lumber Co.* (Civ. App.) 164 S. W. 1107.

Where a petition to enjoin the execution of a judgment alleged that the judgment originally read for "\$——", being the amount of" a replevy bond, but had been altered by the insertion of the figures 15,000 in the space left blank, it will be presumed that the bond was for a fixed amount, and that the amount thereof was the same as that inserted in the judgment. *Lester v. Gatewood* (Civ. App.) 166 S. W. 389.

Every reasonable presumption must be indulged in favor of the validity of the judgment appealed from. *Chicago, R. I. & G. Ry. Co. v. Bell* (Civ. App.) 168 S. W. 396.

In a garnishment proceeding, where all the execution docket entries during the life of the judgment against the debtor were not offered in evidence, it would be presumed that an execution on the judgment had been issued, so that the judgment was not dormant. *Citizens' Bank & Trust Co. v. Rogers* (Civ. App.) 170 S. W. 258.

In the absence of something in the record to the contrary, the Court of Civil Appeals must assume that a judgment of a justice was rendered upon proper grounds. *Farmer v. Witcher* (Civ. App.) 189 S. W. 293.

The issues properly presented by the pleadings would be presumed to have been disposed of by the judgment, though silent thereon, unless it appears otherwise from face of judgment itself. *Pitt v. Gilbert* (Civ. App.) 190 S. W. 1157.

**100. Orders and proceedings after judgment.**—Where the record shows that a motion for new trial on the ground that service was not in time for a valid default was

denied by the court on the ground that it was presented at the succeeding term, it must be presumed that the court did not find as a fact that the service was in time. *Grubbs v. Marple* (Civ. App.) 185 S. W. 597.

In garnishment proceedings under amended original judgment, court should presume on appeal that if notice of amendment was not waived by judgment debtor, garnishee would have proven fact either by record or aliunde evidence. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

Where neither the transcript nor the statement of facts disclosed the action of the court on motion for new trial, but the record disclosed subsequent proceedings, including final judgment, the court will assume that the motion was sustained. *Johnson v. Waggoner* (Civ. App.) 190 S. W. 835.

Where record does not show what evidence was introduced, on hearing of motion for new trial, it will be presumed that court's discretion in overruling the motion was not abused. *Martin v. Clements* (Civ. App.) 193 S. W. 437.

**102. Taking and perfecting appeal or other proceeding for review.**—Where the trial court, authorized on good cause shown to extend the time for the filing of bills of exception, extended the time, the court on appeal will presume that good cause was shown. *Fire Ass'n of Philadelphia v. Strayhorn* (Civ. App.) 165 S. W. 901.

Where a transcript was filed during vacation, it cannot be presumed that the clerk filed it by order of the court. *Robson v. Moore* (Civ. App.) 166 S. W. 908.

In the absence of a direct appeal from the striking of appellant's bill of exceptions and the substitution of another bill, it would be presumed that the order was properly made. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

Where, at the time affidavit of inability to pay costs was made, motion for new trial was pending, and no notice of appeal had been given, it must be presumed that the affidavit was presented to the trial judge off the bench and certified to by him. *Rhodes v. Coleman-Fulton Pasture Co.* (Civ. App.) 185 S. W. 355.

**103. Making and contents of bill of exceptions, case or statement of facts.**—Where the evidence, upon which a court based a conviction for contempt, is not before the court in habeas corpus proceedings, it will be presumed that it authorized the judgment. *Ex parte Ellerd*, 71 Cr. R. 285, 158 S. W. 1145, Ann. Cas. 1916D, 361.

Where the statement of facts was made up by the court after failure of the parties to agree, it will be presumed that the bill of exceptions properly recites the facts. *Streetman v. Lasater* (Civ. App.) 185 S. W. 930.

On appeal in partner's suit for dissolution and accounting, where defendants' bill of exceptions, to refusal to permit them to offer trial balance from books of firm, fails to incorporate balance, Court of Appeals cannot presume it would have thrown light on net profits of firm. *Tyler v. McChesney* (Civ. App.) 190 S. W. 1115.

It will be presumed by appellate court that qualification of bill of exceptions presented by plaintiff in error was made with his consent. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

**104. Appeal from justice court.**—Though the citation issued by the justice was ambiguous, held, in the absence of written pleadings, that it would be presumed that the oral pleadings authorized judgment for an amount only within the justice's jurisdiction. *Chicago, R. I. & G. Ry. Co. v. Gladish* (Civ. App.) 175 S. W. 863.

Where the judgment entered stated that all matters of fact and law, the introduction of evidence, and the argument of counsel, were submitted to the justice court, every presumption will be indulged to support the judgment; such recitals being decisive. *Vaughan Lumber Co. v. Bybee & Wood* (Civ. App.) 191 S. W. 827.

**105. Appeal from intermediate court.**—Where a case was appealed from the county court to the district court, and on appeal from the district court the proceedings in the county court were not made a part of the record, every presumption must be indulged in favor of the validity of the judgment of the district court. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

On appeal from the county court, where there is nothing in the record to show what were the pleadings in the justice court, it will be presumed that they were the same as in the county court. *Hufstutler v. Western Union Telegraph Co.* (Civ. App.) 170 S. W. 1053.

On appeal from the county court, it will be presumed that the oral pleadings in the justice court were in conformity with the account sued on and the citation issued thereon. *Id.*

In the absence of a transcript showing to the contrary, the presumption is that the judgment of the county court rendered on appeal from justice court is correct. *Chicago, R. I. & G. Ry. Co. v. Gladish* (Civ. App.) 175 S. W. 863.

### III. *Res Ipsa Loquitur*

**106. The fact speaks for itself.**—That plaintiffs' horse was found with its legs broken near defendant's track in its switchyard, and that the train by which the horse was probably struck passed through the town at high speed without sounding the bell, held insufficient to raise a presumption of negligence, requiring defendant to offer exculpatory evidence. *International & G. N. Ry. Co. v. Matthews Bros.* (Civ. App.) 158 S. W. 1048.

The *res ipsa loquitur* doctrine will raise a presumption of negligence by defendant railroad company, where plaintiff while plowing in his field about 50 feet from the track was struck by a spike "picked up" by a passing freight train and thrown with great force into plaintiff's field. *Trinity & B. V. Ry. Co. v. Blackshear* (Civ. App.) 161 S. W. 395.

In an action by a passenger who fell while alighting from a train from her dress catching upon something, where there was no showing that it caught on any projection

upon the platform, the doctrine of *res ipsa loquitur* does not raise an inference of negligence. *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 161 S. W. 932.

In an action by a passenger who fell while alighting from a train from her dress catching upon something, where there was no showing that it caught on any projection upon the platform, the doctrine of *res ipsa loquitur* does not raise an inference of negligence. *Id.*

When a servant sues his master for an injury caused by the negligence of the master, the servant must prove the negligence, and proof of the accident alone will not be sufficient to authorize a recovery. *Galveston, H. & S. A. Ry. Co. v. Chojnacky* (Civ. App.) 163 S. W. 1011.

In an action for converting a car load of cotton seed, plaintiff was entitled to recover, where he showed a delivery to the railroad, unless it appeared that the shipment had been delivered to the consignee. *Elias v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 166 S. W. 417.

Where a switchman, sitting near a station platform on which trunks were piled, was struck by a trunk which either fell from or was thrown over the pile, the doctrine of *res ipsa loquitur* has no application. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 173 S. W. 1186.

Proof of injury to cattle held to place the burden of proof on defendant carrier. *Kansas City, M. & O. Ry. Co. v. Cave* (Civ. App.) 174 S. W. 872.

A connecting carrier receiving a shipment of stock in good condition and delivering it in poor condition held presumptively negligent, in absence of explanation. *Gulf, C. & S. F. Ry. Co. v. King* (Civ. App.) 174 S. W. 960.

A shipper suing a carrier for negligent delay in transporting live stock, need only prove delay and resulting injury. *Texas & P. Ry. Co. v. Martin Bros.* (Civ. App.) 175 S. W. 707.

The doctrine of *res ipsa loquitur* applies in actions for personal injuries involving the relation of master and servant. *Missouri, K. & T. Ry. Co. of Texas v. Cassady* (Civ. App.) 175 S. W. 796, writ of error denied (Sup.) 184 S. W. 180.

In an action for the wrongful death of a brakeman in a derailment of defendant's train on a trestle, evidence held sufficient to sustain a verdict for plaintiff under the maxim *res ipsa loquitur*. *Id.*

Where there are no witnesses of an accident whereby a servant is killed, the happening of the accident raises no presumption of negligence against servant or the master. *Hutcherson v. Amarillo St. Ry. Co.* (Civ. App.) 176 S. W. 856.

The burden is on the carrier to explain the cause of injuries to horses during shipment, where they were not accompanied by the shipper or any one authorized to attend them. *Southern Pac. Co. v. W. T. Meadors & Co.* (Civ. App.) 176 S. W. 882.

The doctrine of *res ipsa loquitur*, while it does not ordinarily apply to servant cases, may apply to extraordinary cases. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

Where the eyes of a railroad station employé were injured when flame darted from the furnace where he was burning rubbish, as alleged, on account of the explosion of a torpedo, the case was not proper for the application of the maxim *res ipsa loquitur*. *Galveston, H. & S. A. Ry. Co. v. Chojnacky* (Civ. App.) 180 S. W. 141.

In an action by the owner of an oil barge for its destruction by fire, where the court found that the fire was caused by the negligence of a specified person, and such finding was sustained by the evidence, the doctrine of *res ipsa loquitur* could not be applied to uphold the court's alternative finding of negligence generally on the part of defendant. *Texas Co. v. Charles Clarke & Co.* (Civ. App.) 182 S. W. 351.

In an action for injuries due to explosion of a locomotive, held that proof that the explosion was caused by excessive steam pressure did not demand a verdict for plaintiff, in the absence of proof that such pressure was chargeable to defendant's negligence. *McGraw v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 182 S. W. 417.

Explosion of a locomotive boiler in charge of defendant's servants held to have presumably been due to defendant's negligence, though there was no direct proof thereof. *Galveston, H. & S. A. Ry. Co. v. Perez* (Civ. App.) 182 S. W. 419.

The expression "*res ipsa loquitur*" is a shorthand method of showing that the circumstances attendant upon an occurrence are of such a character as to speak for themselves in inferring the negligence and the cause of the disaster. *Canode v. Sewell* (Civ. App.) 182 S. W. 421.

The circumstances of an accident to an employé may themselves furnish proof of the employer's negligence. *Missouri, K. & T. Ry. Co. of Texas v. Cassady* (Sup.) 184 S. W. 180.

Where a railroad employé was injured when a trunk fell or was thrown from a stack on a platform and the trunks if properly piled would not have fallen, the fact that a trunk fell is in itself sufficient to show negligence. *San Antonio & A. P. Ry. Co. v. Blair* (Civ. App.) 184 S. W. 566.

In action for value of cotton destroyed by fire while in transit, upon establishment of plaintiffs' *prima facie* case that cotton was destroyed while in defendant's possession, burden was on defendant to show want of negligence. *Texas & P. Ry. Co. v. R. W. Williamson & Co.* (Civ. App.) 187 S. W. 354.

Where a carrier accepts uninjured cattle for shipment and delivers them injured, its negligence is presumed. *San Antonio & A. P. Ry. Co. v. Jackson & Allen* (Civ. App.) 187 S. W. 488.

While mere fact of injury is not of itself proof of negligence, yet, where the moving cause is under the employer's management, and the accident is such as does not usually happen if proper care is used, it is reasonable evidence of negligence in the absence of explanation. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

In an action for injuries by a falling window screen, burden was on defendant to show screen was not negligently fastened, and that fall occurred from other cause. *Southwestern Telegraph & Telephone Co. v. Sheppard* (Civ. App.) 189 S. W. 799.

Where the bailee has sole custody, mere fact of injury imputes negligence, and the bailee has the burden of showing that he was not negligent. *Mecom v. Vinton* (Civ. App.) 191 S. W. 763.

That a railway brakeman, walking on top of a furniture car in discharge of his duties, was struck by a telephone wire above the track, alone was evidence that the wires were within the railway zone, from which jury might infer negligence. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

Where goods in a warehouse are destroyed by fire, the burden of showing negligence is on the bailor, and is not presumed from occurrence of fire. *American Express Co. v. Duncan* (Civ. App.) 193 S. W. 411.

#### IV. Burden of Proof in General

**107. Nature and scope in general.**—The rule as to the burden of proof is important and indispensable in the administration of justice, and should be jealously guarded by the courts. *Boswell v. Pannell* (Sup.) 180 S. W. 593.

**108. Party asserting or denying existence of facts.**—Generally the burden of proof lies upon the party asserting a fact essential to his right of action or defense and put in issue by the pleadings of his adversary. *Texas Midland R. R. v. Ray* (Civ. App.) 168 S. W. 1013; *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

Plaintiff, suing for chattels in the possession of defendant, alleging in an amended petition that she had not consented to a third person's pledge, and denying the effect of a bill of sale, did not thereby assume the burden of proof. *Killman v. Young* (Civ. App.) 171 S. W. 1065.

In action to recover value of cotton seed and lint cotton delivered to defendant in excess of what he was entitled to under contract, and an excess credit allowed him in settlement, plaintiff had the burden of establishing the excessive deliveries and the excessive credit. *Farmers' & Merchants' Gin Co. v. Simmons* (Civ. App.) 178 S. W. 621.

The burden is on the defendant to establish his defenses to the plaintiff's alleged cause of action. *Boswell v. Pannell* (Sup.) 180 S. W. 593.

In a taxpayer's action to restrain the commissioners' court from transferring from the county purpose fund into the road and bridge fund sums which would make possible from the latter an expenditure in excess of the constitutional limit, where plaintiff showed an excess in the road and bridge fund for several years, the burden was on defendants to prove that such excess was only seeming, on account of authorized expenditures for streets in municipalities. *Williams v. Carroll* (Civ. App.) 182 S. W. 29.

The burden of proof to show that the action would result in road and bridge expenditure beyond the constitutional limitation of 30 cents on the \$100 valuation, held on plaintiff. *Id.*

The burden of proving that a creditor's debt was duly scheduled in the debtor's bankruptcy proceeding, and that the creditor had either statutory or other actual notice of the proceeding, rested upon the bankrupt. *Bogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

In suit to enjoin execution on a judgment which plaintiff claims was barred by his discharge in bankruptcy, the burden is on plaintiff to plead and prove the discharge, and that the debt involved was not within any class which the Bankruptcy Act excepts from the discharge. *Bunting Stone Hardware Co. v. Alexander* (Civ. App.) 190 S. W. 1152.

Where, in an action to try title, defendants alleged that claims of other parties were simulated, and the only evidence was a denial of one of such parties of such allegation, his denial left allegations unsubstantiated by any testimony, as a pleading is not evidence. *Jolley v. Brown* (Civ. App.) 191 S. W. 177.

**110. Extent of burden in general.**—The burden of proof never shifts, but is upon plaintiff throughout the trial to establish by a preponderance of the evidence the affirmative of the issues relied on for a recovery. *Boswell v. Pannell* (Sup.) 180 S. W. 593; *Powell v. Powell* (Civ. App.) 170 S. W. 111.

**113. Accord and satisfaction.**—Accord and satisfaction must be proved as any other agreement. *Myers v. Grantham* (Civ. App.) 187 S. W. 532.

**114. Limitations and adverse possession.**—Burden of proving adverse possession is on the one who sets it up and claims under it. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785; *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 182 S. W. 373.

An agreement of the parties in trespass to try title, which stipulates that it was agreed that the defendants claiming under junior patents have such title as was vested in the junior patentees, relieves defendants of the burden of establishing the consecutive links in their respective chains of title, and satisfies the requirement of the three-year statute of limitations that there shall be color of title from the sovereignty. *Campbell v. Gibbs* (Civ. App.) 161 S. W. 430.

The burden of proof rests upon one asserting a prescriptive right of way over another's land to show that the owners of the servient estate were free from legal disability during the prescriptive period. *West v. City of Houston* (Civ. App.) 163 S. W. 679.

In trespass to try title, where plaintiff connected himself with the sovereignty by a regular chain of title, the burden of establishing title by limitation rested upon defendant. *Nunez v. McElroy* (Civ. App.) 174 S. W. 829.

In an action to recover land claimed by adverse possession under the 10-year statute of limitations, the burden is on plaintiff to show peaceable and adverse possession, either actually or constructively, for such time as would give title. *Williamson v. Miller-Vidor Lumber Co.* (Civ. App.) 178 S. W. 800.

In trespass to try title, the burden is on a defendant, relying on title by adverse possession, to prove facts giving such title. *Hall v. Shoemaker* (Civ. App.) 178 S. W. 803.

In trespass to try title against mother and son, both living on the land, mother held

to have burden of showing her possession under a claim of exclusive ownership. *Wichita Valley Ry. Co. v. Somerville* (Civ. App.) 179 S. W. 671.

Rule that one asserting right of way over another's land by prescription has burden of establishing negative fact that owners of servient estate were free from legal disability during prescription period applies only where prescription is claimed against those who are not parties to suit. *Callan v. Walters* (Civ. App.) 190 S. W. 829.

In trespass to try title, defendant, claiming by adverse possession, has the burden of proving that he was in peaceable and adverse possession for ten years prior to the time when suit was brought, when it was agreed that the record title was in the plaintiffs. *Brown v. Fisher* (Civ. App.) 193 S. W. 357.

Parties claiming title by adverse possession have the burden of showing either continuous occupancy of the land, or that any break in their possession was only for a reasonable time. *Taylor v. Dunn* (Sup.) 193 S. W. 663.

The only question submitted to the jury in trespass to try title being whether defendant's house was on the section, paper title to which was shown in plaintiff, but which defendant claimed under the ten-year statute, it was error to instruct, in effect, that the burden of proof was on plaintiff on the question. *Miller-Link Lumber Co. v. Thompson* (Civ. App.) 194 S. W. 223.

115. **Alteration of Instruments.**—The burden is on one offering an altered or mutilated writing to explain its condition before it is admissible in evidence. *Kerbow v. Woolridge* (Civ. App.) 184 S. W. 746.

117. **Attorney and client.**—Burden was on attorney to show that a new contract for increased compensation, after the relation of attorney and client had commenced, was fairly made and was reasonable and without undue advantage. *Laybourne v. Bray & Shifflett* (Civ. App.) 190 S. W. 1159.

119. **Bills and notes.**—Where fraud in the execution of a note is shown, the burden is on one claiming to be a good-faith holder to prove his good faith; and hence, where plaintiff's indorsers did not appear or testify, it would be presumed that they had notice of the fraud. *Pope v. Beauchamp* (Civ. App.) 159 S. W. 867.

In an action upon a note, the burden was upon defendant to show the falsity of alleged representations. *Cowboy State Bank & Trust Co. v. Guinn* (Civ. App.) 160 S. W. 1103.

Where, in an action by an indorsee of a note, plaintiff proved that it had paid value for the note before maturity, and there was no evidence of bad faith, the burden was on defendant to show notice to plaintiff of equities sought to be proven in defense. *Malone v. National Bank of Commerce of Kansas City, Mo.* (Civ. App.) 162 S. W. 369.

In an action on a destroyed note, held that the burden was on defendant to establish his contention that he bought the note from Y. in good faith, in the usual course of trade, without knowledge that Y. had no right to sell same. *Allen v. Rettig* (Civ. App.) 177 S. W. 215.

In action on lien note given in payment for land, brought against original purchaser and subsequent purchaser, subsequent purchaser held to have the burden of proving that price per acre agreed upon between original vendor and original purchaser was as he alleged. *Orand v. Whitmore* (Civ. App.) 185 S. W. 347.

120. **Bona fide purchasers.**—A junior purchaser attempting to defeat the title of a holder of a prior unrecorded deed from the same grantor must show, outside the recitals of his conveyance, that he purchased for a valuable consideration without notice. *Rule v. Richards* (Civ. App.) 159 S. W. 336.

The burden of proof does not shift from one claiming as a purchaser for value without notice. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

Parties asserting an equitable title as against a purchaser for value have the burden of showing that he had notice of all the facts constituting their title. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

Where plaintiff sued on notes given for the price of land, and transferred to him before maturity, and defendants pleaded fraud and want of consideration, the burden was on plaintiff to show that he was a bona fide purchaser for value. *Ruth v. Cobe* (Civ. App.) 165 S. W. 530.

One asserting an equity in land against the purchasers of the legal title has the burden of showing that such purchasers were not bona fide purchasers without notice. *Meador Bros. v. Hines* (Civ. App.) 165 S. W. 915.

An innocent holder of a note as collateral, to which there is a valid defense against the payee, has the burden of showing that his debt is unpaid, and the amount due thereon, and the recovery must be restricted to the amount so shown. *Iowa City State Bank v. Friar* (Civ. App.) 167 S. W. 261.

In an action by an indorsee of a note who took it before maturity, the maker has the burden of proving that the indorsee received it without consideration and that he took it with notice that the consideration therefor had failed. *Daniel v. Spaeth* (Civ. App.) 168 S. W. 509.

The maker first has the burden of proving the fraud or illegality, and thereupon the indorsee must show that he paid consideration before maturity, whereupon the maker is bound to show that he took the note with knowledge of the fraud or illegality. *Id.*

Where a maker of a note seeks to defeat recovery by indorsee on the ground that the consideration failed, he must show that the indorsee at the time he received the note had notice of failure of consideration. *Id.*

The maker of a note sued by its indorsee, denying plaintiff bought it before maturity for value, and alleging and giving evidence that the payee fraudulently put it in circulation, plaintiff has the burden of proving that it was a bona fide purchaser. *Word v. Bank of Menard* (Civ. App.) 170 S. W. 845.

That the payee of a note put it in circulation, contrary to agreement with the maker, is such fraud, as, being proved by the maker sued by an indorsee, shifts to plaintiff the burden of proof as to his being a bona fide purchaser. *Id.*

Where notes were evidently without consideration and fraudulently put in circula-

tion, the burden is upon an indorser to prove that he is a bona fide holder. *El Fresno Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

The holder of an equitable title has the burden of showing that a subsequent purchaser invested with the legal title is not an innocent purchaser. *Delay v. Truitt* (Civ. App.) 182 S. W. 732.

Parties claiming under a subsequent deed, as against a prior deed of their grantor, have the burden of showing that they are innocent purchasers. *Id.*

The possession of a vendor's lien note, together with its indorsement by the vendor "without recourse," put the burden of proof upon the purchaser and his grantee to show that the assignee was not an innocent transferee of the note. *Biswell v. Gladney* (Civ. App.) 182 S. W. 1168.

Where a wife held the legal title to lands and conveyed, the burden was on the heirs of her husband, asserting their equitable title in trespass to try title, to show that the purchasers of the legal title were not innocent. *Ferguson v. Dodd* (Civ. App.) 183 S. W. 391.

One claiming to be a bona fide holder of a note has the burden of showing that it acquired the note before maturity. *First Nat. Bank of Garner, Iowa, v. Smith* (Civ. App.) 183 S. W. 862.

In an action by the transferee of drafts given by defendant for goods bought, evidence that the transferor defrauded the defendant in the sale placed upon the transferee the burden of proving that he took the drafts before maturity in good faith and for a valuable consideration. *Calfee v. Bryant* (Civ. App.) 185 S. W. 323.

To recover land of one having the legal title under purchase from patentee, plaintiffs must show he purchased with notice of their equitable title, or was not a purchaser in good faith for value. *Kirby Lumber Co. v. Smith* (Civ. App.) 185 S. W. 1068.

In view of art. 5655, the burden was on the purchasers from a mortgagor of mules to show that their dealing with the mortgaged property was in good faith. *Maloney v. Greenwood* (Civ. App.) 186 S. W. 228.

In suit on note by one in possession, his ownership not being questioned, burden was on defendant maker to prove holder did not pay valuable consideration, if he sought to defeat such holder's right to recover on theory that he was not purchaser for value. *Davis v. Converse* (Civ. App.) 188 S. W. 697.

One claiming to be a bona fide purchaser has the burden of proving it. *Niles v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 748.

Since title by adverse possession is legal, and not equitable, the burden of proof was not upon plaintiff claiming adversely to show that defendant claiming under deed was not an innocent purchaser without notice. *Houston Oil Co. of Texas v. Ainsworth* (Civ. App.) 192 S. W. 614.

Where title asserted is equitable, the burden is upon him claiming to be a purchaser for value without notice to prove it by preponderance of the evidence. *Id.*

In action by purchaser of silo for breach of warranty, where seller counterclaimed for notes given for purchase price, and his wife set up her separate ownership of the notes, the burden of proving that she was a bona fide holder was not on the defendants. *Potter v. Mobley* (Civ. App.) 194 S. W. 205.

**121. Boundaries.**—A plaintiff has the burden of establishing the location of the ancient grant under which he claims, so as to include the land sued for. *Campbell v. Gibbs* (Civ. App.) 161 S. W. 430.

Where the evidence, in trespass to try title, showed that defendant's senior deed to 200 acres from a common source covered at least a part of the land claimed by plaintiff, the burden was upon plaintiff to show what part of the tract claimed by him was not included within defendant's conveyance. *Masterson Irr. Co. v. Foote* (Civ. App.) 163 S. W. 642.

In trespass to try title to a strip of land lying between the plotted part of a survey and one of the boundary lines thereof, the plaintiff had the burden of showing the true location of such line, and of furnishing testimony by which the court could ascertain and by its judgment fix such line. *Harkrider v. Gaut* (Civ. App.) 167 S. W. 164.

He who claims land by virtue of a grant from the state, when the boundaries are in issue, must prove the location of such boundaries and that the land in controversy is included therein. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court (Sup.) 169 S. W. 407. Judgment reversed 106 Tex. 500, 171 S. W. 707.

Where plaintiff alleged that the land in controversy was not included in defendant's deed, he has the burden of proving that allegation. *Hermann v. Schroeder* (Civ. App.) 175 S. W. 788.

Where plaintiff's right to recover rested on the establishment of a disputed line he could not object that defendant's evidence tending to show that the line was not as claimed did not definitely locate the line, since the burden was on plaintiff. *Higginbotham v. Weaver* (Civ. App.) 177 S. W. 532.

**122. Brokers.**—In a broker's action for a commission on an exchange of properties, where his employment was only to sell, held, that the burden was on plaintiff to prove that the parties to the exchange had reached a definite agreement. *Williams v. Phelps* (Civ. App.) 171 S. W. 1100.

A broker, to recover the reasonable value of services in procuring a customer to whom the owner sold at a price less than that fixed in the contract of employment, must show the reasonable value of the services. *Martin v. Jeffries* (Civ. App.) 172 S. W. 148.

**123. Carriers.**—The burden is upon a railroad company to prove any rule or regulation which relieves it of its prima facie obligation to transport one, who has purchased a ticket, upon a train going in the direction called for by the ticket, and which stopped at the station where the ticket holder was. *Trinity & B. V. Ry. Co. v. Voss* (Civ. App.) 160 S. W. 663.

Where a carrier claims limitation of liability, it has the burden of proving that the shipper received some consideration for his consent thereto. *International & G. N. Ry. Co. v. Rathblath* (Civ. App.) 167 S. W. 751.

One who attempts to ride on a nontransferable pass issued to another has the burden of showing that he was accepted by the carrier as a passenger. *Beard v. International & G. N. Ry. Co.* (Civ. App.) 171 S. W. 553.

Under Act Cong. Feb. 4, 1887, as amended by the Hepburn-Carmack Act, an interstate carrier has the burden of showing that a provision in its bill of lading is reasonable. *Hovey v. Tankersley* (Civ. App.) 177 S. W. 153.

In an action for damages to a shipment of live stock, the carrier held required to prove that as to particular shipment stipulation as to notice was reasonable, and that it had an agent to whom notice might be given. *Chicago, R. I. & G. Ry. Co. v. Dalton* (Civ. App.) 177 S. W. 556.

Burden of proof held on plaintiff shipper of fruit, suing for injury by freezing, to show that direction in bill of lading signed by his agent to keep car vents open was inserted by fraud, accident, or mistake. *Abilene & S. Ry. Co. v. Ward* (Civ. App.) 178 S. W. 638.

Where a railroad by cross-action sought to recover freight charges under an interstate rate, and plaintiff traversed, as required by statute, that the freight was such as to fall within the rate, the burden was on the road to prove the fact. *International & G. N. Ry. Co. v. Carter* (Civ. App.) 180 S. W. 663.

In an action for injuries to an interstate shipment of cattle, where the carrier relied on a contract made under authority of the Carmack Amendment, claiming limitations of liability were in consideration of a reduced rate, the carrier has the burden of proving that the limitations were reasonable and supported by consideration, and were not a subterfuge to escape responsibility for negligence. *Panhandle & S. F. Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1.

Where a railroad company limited its liability to injuries occurring on its own line, evidence that the shipment had a good run after delivery to the connecting carrier was admissible to show that the loss occurred on defendant's line. *Texas & P. Ry. Co. v. McMillen* (Civ. App.) 183 S. W. 773.

In action for damages to shipment of live stock, carrier has burden of proving that the stipulation in a written contract as to time within which shipper must give notice of injury was reasonable. *Kansas City, M. & O. Ry. Co. v. Hansard* (Civ. App.) 184 S. W. 329.

**124. Contracts in general.**—Where, in a suit on notes, the defendant pleaded a contract with the owner of the notes as a satisfaction, it was error to permit defendant to excuse his failure to comply with the contract by testifying that he had not been requested to do so, as the burden of proof was on defendant to show the contract and his compliance with it. *Holderman v. Reynolds* (Civ. App.) 159 S. W. 67.

In an action on an alleged oral agreement to convert into a gas well an oil well bored under a written contract, burden of proof held not on plaintiff to show certain facts. *Stine Oil & Gas Co. v. English* (Civ. App.) 185 S. W. 1009.

In suit by vendor of ranch to enjoin buyer from closing road across it on ground that right to use it had been reserved to vendor, burden was on plaintiff to establish allegation that as part consideration for sale buyer agreed to keep road open for travel by plaintiff and tenants. *Day v. Williams* (Civ. App.) 193 S. W. 239.

**125. Want or failure of consideration.**—The burden of proving want of consideration is upon defendants. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

Where a party admits the execution of an instrument and then attempts to avoid it by showing failure of consideration or otherwise, the burden is on him to establish such defense. *Kennedy v. Winfrey* (Civ. App.) 163 S. W. 1018.

In action for injuries against railroad by its employé, burden was on plaintiff, who asserted his written release of liability in consideration of further employment was without consideration, to prove the fact. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

**126. Corporations.**—The burden held on subscribers to prove that a change in the corporate name constituted a material alteration such as released them from their subscriptions. *Bohn v. Burton-Lingo Co.* (Civ. App.) 175 S. W. 173.

Where a foreign corporation's petition and proof show that it was not doing business in the state, the burden is on the defendant to prove that plaintiff cannot maintain the action under *Vernon's Sayles' Ann. Civ. St. 1914, art. 1318*. *Latham Co. v. Louer Bros.* (Civ. App.) 176 S. W. 920.

A creditor seeking to recover amounts due on a subscription contract to corporate stock has the burden of proof. *Rich v. Park* (Civ. App.) 177 S. W. 184.

In an action against a railroad on notes, not approved by the railroad commission, as required by arts. 6717-6732, the burden of proof held on plaintiff to show the commission had decided the road was suburban, so that the commission may refuse to assume control under article 6731. *Davis v. Watertown Nat. Bank* (Civ. App.) 178 S. W. 593.

**126½. Custom.**—In a broker's suit for commissions on exchange of land in which interveners claim a portion of commissions, and there were no material issues between plaintiff and defendant, interveners had burden of proof to establish their allegation that there was a universal custom, where more than two brokers are interested, to pool commissions, and that they had such agreement with plaintiff. *Knight Realty Co. v. Williams* (Civ. App.) 193 S. W. 168.

**127. Damages.**—In proceedings to condemn land for a railroad right of way, the burden of proof of damages sustained by the landowner is on him, and not on the railroad company. *Wichita Falls & W. Ry. Co. of Texas v. Wyrick* (Civ. App.) 158 S. W. 570.

One suing for injury to a shipment of live stock en route was not required to allege or prove a measure of the damages where the written contract relied on, if valid, fixed a measure of damages, since, if it was not valid, the law would fix the measure of damages. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943.

The fact that the exact number of logs lost by plaintiff because of defendant's unlawful obstruction of a stream cannot be definitely ascertained would not defeat plaintiff's right to damages, where the evidence enabled the jury to estimate plaintiff's loss with reasonable certainty. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Civ. App.) 164 S. W. 878.

Where, though evidence showed value of peaches lost, through carrier's delay less cost of crates, picking, packing, and delivering, there was no evidence as to the cost of the crates, etc., there was no basis for the court's finding as to the damages. *Texas & N. O. R. Co. v. Weems* (Civ. App.) 165 S. W. 1194.

A father could not recover for the death of a minor son without proving the probable expense of maintaining him during minority, as the jury could not properly find such expense from their own experience and without evidence. *Chicago, R. I. & G. Ry. Co. v. Loftis* (Civ. App.) 168 S. W. 403.

Plaintiff's failure to establish the measure of damages in an action against a carrier for injuries to animals shipped was fatal to a recovery. *Dickerson v. San Antonio, U. & G. Ry. Co.* (Civ. App.) 170 S. W. 1045.

In action for damages from seller's misrepresentations as to pea thresher, held, that burden was on buyer to furnish proof necessary to enable the court to make deduction from damages claimed. *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084.

Where the buyer alleged fraud by the seller in making a sale of mules, the burden is on the buyer to show not only a right to recover damages, but also the amount of such damages. *Latham Co. v. Snell* (Civ. App.) 176 S. W. 917.

Plaintiff, whose automobile was injured by defendant under such circumstances as to entitle him to recover the expenses of its repair, to recover must show what the repairs were reasonably worth. *Galveston-Houston Electric Ry. Co. v. English* (Civ. App.) 178 S. W. 666.

In an action by an abutting owner for damages due to construction of a railroad in the street, the burden was upon him to allege and prove that an instrument executed by his authority, constituting a relinquishment of damages, was revoked, and that the railroad had notice thereof. *Quannah, A. & P. Ry. Co. v. Dickey* (Civ. App.) 179 S. W. 69.

No damages can be allowed where the true value of bonds given on an exchange of realty at the time of the exchange is not shown, but the suit is based on the fact that the bonds thereafter depreciated in value. *Moore v. Beakley* (Civ. App.) 183 S. W. 380.

Contract to furnish advertising matter held a contract of hire, and the damages, prima facie, the amount agreed to be paid, throwing on defendant the burden of proving that they might have been mitigated. *Bogata Mercantile Co. v. Outcault Advertising Co.* (Civ. App.) 184 S. W. 333.

It is necessary to show the reasonable value of nursing services performed by his wife to support an award for the amount claimed. *Tarrant County Traction Co. v. Bradshaw* (Civ. App.) 185 S. W. 951.

A shipper cannot recover as damages for injuries to live stock in transit an amount alleged to have been expended for medicines and care, in the absence of showing that such amount was reasonable and necessary. *Panhandle & S. F. Ry. Co. v. Norton* (Civ. App.) 188 S. W. 1011.

The jury can estimate the value of the services of a child and the cost of supporting it, the same as an expert could, and can render a verdict for the parents for the loss of such services, though there is no evidence as to their value. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

Where tenant offered no proof as to cost of harvesting and marketing additional crops which might have been raised had defendant furnished irrigation water, judgment for full value of such crops was erroneous. *Louisiana, Rio Grande Canal Co. v. Elliott* (Civ. App.) 193 S. W. 255.

130. **Descent.**—In an action for a legatee's interest under a will, which gave the proceeds of the estate to certain persons and their children, and, if any of them died without issue, gave their interest to the living legatees, the burden was on plaintiff to prove a deceased legatee died without children. *Wells v. Margraves* (Civ. App.) 164 S. W. 881.

134. **Estoppel and waiver.**—In an action to cancel a stock subscription and recover money paid thereon, held, that the burden was on defendant to prove the facts relied on as constituting a waiver of plaintiff's right to recover. *Commonwealth Bonding & Casualty Ins. Co. v. Cator* (Civ. App.) 175 S. W. 1074.

136. **Administration of estate.**—In an action by children against one who purchased land from the husband, as community administrator, under an agreement to pay to the children, as part of the consideration, the value of one-half of such community estate, the burden was on defendant to show that the community property was not more than sufficient to pay expenses of administration and community debts. *Hales v. Peters* (Civ. App.) 162 S. W. 386.

139. **Fraud and duress.**—One suing for fraud inducing the purchase by him of property has the burden of proving it. *Foix v. Moeller* (Civ. App.) 159 S. W. 1048.

In an action for damages for the fraudulent interference of a selling agent's principal whereby the agent was deprived of a commission, it appearing that the principal made a direct bargain with a customer whom the agent had interested, the agent cannot recover his commission, in the absence of a showing that the purchaser would have bought without a reduction made by the principal. *J. I. Case Threshing Mach. Co. v. First Nat. Bank* (Civ. App.) 160 S. W. 662.

In an action to have a transfer of notes by plaintiff in consideration of corporate stock declared fraudulent, and to have the notes surrendered, or, in the alternative, for a personal judgment against defendant for damages from fraudulent representations



in inducing plaintiffs to buy the stock, the general rule as to the burden of proof in fraud cases applies. *Newman v. Lyman* (Civ. App.) 165 S. W. 136.

Evidence in a suit to recover the amount paid and to cancel a note for the balance due on a stock subscription contract on the ground of fraudulent representations of defendant's agents, held insufficient to sustain plaintiff's burden of showing the fraud. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936.

Voluntary conveyance is prima facie void as to existing creditors; burden of proof resting on donee to establish circumstance that donor had ample means to meet his liabilities. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

In suit to remove cloud on title, by one claiming under parol gift from a debtor, against lenders of money to him claiming the rights of mortgagees by subrogation, burden was on plaintiff to show her donor's solvency at time of gift only if defendants were prior creditors of donor. *First State Bank & Trust Co. of Abilene v. Walker* (Civ. App.) 187 S. W. 724.

One pleading duress in the making of a deed has the burden of proving it. *Burnett v. Continental State Bank of Alto* (Civ. App.) 191 S. W. 172.

Where plaintiff seller introduced purchase price notes and a mortgage securing them, defendant buyer had the burden of proving that the sales contract upon which they were based was obtained by fraud. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

In action against part owner of property by abandoned wife of other owner for fraudulently obtaining the entire ownership, that defendant had been her husband's partner, and that she had trusted him regarding the property since her abandonment, did not establish a fiduciary relationship, placing upon defendant the burden of proving his fairness. *Baugh v. Houston* (Civ. App.) 193 S. W. 242.

Where defendant, in action on note given in purchasing acetylene plant, alleged fraud in inducing him to execute contract, burden was upon him to prove such defense. *Osweld Acetylene Co. v. Darden* (Civ. App.) 194 S. W. 1131.

140. **Statute of frauds.**—One relying upon a parol contract for the sale of land has the burden to prove the facts, such as change of possession and improvements, that take the case out of the statute. *Page v. Vaughan* (Civ. App.) 173 S. W. 541.

141. **Garnishment.**—In garnishment proceedings on amended judgment which did not recite notice to judgment debtor of motion to amend, burden was on garnishee to show there was no notice, which was not satisfied by showing that clerk issued none. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

142. **Guardian and ward.**—The burden is upon the sureties on a guardian's bond to clearly establish a defense which would relieve them of liability. *Childs v. McGrew* (Civ. App.) 171 S. W. 506.

A surety on the bond of a father who was guardian of his minor children has the burden of proving that the father was unable to support them himself, so as to be justified in using their estate in their support. *United States Fidelity & Guaranty Co. v. Hall* (Civ. App.) 173 S. W. 892.

143. **Homestead.**—Proof that plaintiffs in trespass to try title resided on the premises established only a prima facie case as against defendant relying on a mortgage executed by husband alone. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

Where a wife sought to set aside her husband's conveyance of their homestead on the ground of his insanity, defendant has the burden of proving the amount of the purchase price expended by her for necessaries. *Rowan v. Hodges* (Civ. App.) 175 S. W. 847.

When property has been impressed with a homestead character it will be presumed to so continue until its use as such has been discontinued with the intention not to use it as a home, and the burden of proof rests upon the one asserting the abandonment. *Bogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

In suit to set aside a conveyance of land as fraudulent, that the property was a homestead was a defense, which it rested with defendant to sustain, and only burden that rested on plaintiff if homestead character was established, was to show that the homestead had been abandoned. *Colgrove v. Falfurrias State Bank* (Civ. App.) 192 S. W. 580.

145. **Indemnity.**—Where in an action on a policy defendant alleged that it had paid the amount to a garnishee, and in its cross-bill over against the garnishee alleged that he agreed that, if the defendant was required to pay any part of such amount to plaintiff, the garnishee would reimburse it, the burden was upon defendant to prove such promise, in order to entitle it to judgment over against the garnishee. *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

To recover of a single guarantor on guaranty against liability by stockholders in proportion to their holdings, his proportion must be shown. *Paddleford v. Wilkinson* (Civ. App.) 194 S. W. 467.

148. **Insurance.**—Under a policy excepting liability where insured commits suicide, but not requiring the beneficiary to establish that death was accidental, the presumption of law is against suicide and the insurer, defending on that ground, has the burden of establishing the fact. *First Texas State Ins. Co. v. Jiminez* (Civ. App.) 163 S. W. 656.

A beneficiary suing on a fraternal benefit certificate has the burden of proving that the certificate subject to forfeiture for nonpayment of dues was in force at the death of the member. *Supreme Lodge of Pathfinder v. Johnson* (Civ. App.) 163 S. W. 1010.

In an action against an insurance broker undertaking to keep property insured, the burden was upon the broker to prove the amount of unpaid premiums, if admissible in mitigation of damages on the general issue. *Diamond v. Duncan* (Sup.) 177 S. W. 955, denying rehearing 172 S. W. 1100.

Where an accident policy excepted certain causes, the insurer has the burden of proving that an accident came within the exceptions. *Travelers' Ins. Co. v. Harris* (Civ. App.) 178 S. W. 816.

In an action on a certificate of benefit insurance, burden of proof was on defendant to establish alleged falsity of answer of insured on application as to cause of her mother's death. *Loesch v. Supreme Tribe of Ben Hur* (Civ. App.) 190 S. W. 506.

If felonious killing of insured by beneficiary rendered policies void burden to establish such killing rested on insurer, and finding of coroner, or newspaper accounts of homicide, did not establish felony, and burden did not rest on beneficiary, in her suit against insurer, to establish her innocence of felonious homicide. *New York Life Ins. Co. v. Veith* (Civ. App.) 192 S. W. 605.

In action on a policy of fraternal insurance by beneficiary named, held that presumption would be that deceased stated her correct age in her application for insurance, and it devolved upon defendant to prove contrary. *Collins v. United Brothers of Friendship and Sisters of the Mysterious Ten* (Civ. App.) 192 S. W. 800.

In an action on a fraternal benefit certificate in which defense was that insured committed suicide which rendered certificate void under its terms, death of insured being established, it devolved upon defendant to show that insured committed suicide. *Sovereign Camp of Woodmen of the World v. McCulloch* (Civ. App.) 192 S. W. 1154.

150. **Judgment or order.**—Burden to show that there was no service is on party assailing judgment for lack of such service as is required by law. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

In suit to foreclose a judgment lien where dormancy of judgment was pleaded because execution was not issued as required by *Vernon's Sayles' Ann. Civ. St.* 1914, art. 5617, the plaintiff had the burden of proving the vitality of his judgment. *Spaulding Mfg. Co. v. Blankenship* (Civ. App.) 191 S. W. 1167.

The burden of proving the vitality of the judgment which plaintiff sought to foreclose was not met by the introduction of the alias execution reciting that the original was issued within 12 months after judgment as required by art. 5617, where no reason was given for not producing the original. *Id.*

151. **Landlord and tenant.**—In an action by a tenant on shares for damages for his wrongful eviction, the burden is on the landlord to show that the tenant could have procured another lease. *Bost v. McCrea* (Civ. App.) 172 S. W. 561.

A purchaser from a tenant, when sued by the landlord for the value of the crop, has the burden of proving that the landlord waived his lien for rent and advances. *Adams v. A. A. Paton & Co.* (Civ. App.) 173 S. W. 546.

152. **Libel and slander.**—As a privileged communication is one made on an occasion and under circumstances that rebut the prima facie inference of malice arising from the publication of matter prejudicial to the character or reputation of the plaintiff, the plaintiff in a libel suit has the burden of proving malice in fact. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463.

In a libel case the burden is on the defendant to establish the privileged character of the communication. *Id.*

154. **Malicious prosecution.**—In action for malicious prosecution coupled with charge of false imprisonment, burden is upon defendant to show that imprisonment was lawful. *Suhre v. Kott* (Civ. App.) 193 S. W. 417.

156. **Marriage.**—While persons seeking to trace their title to land through a marriage of the former owner have the burden of proving a marriage, it is presumed that the marriage was valid, and the burden of proof is upon those contesting its validity. *Adams v. Wm. Cameron & Co.* (Civ. App.) 161 S. W. 417.

157. **Master and servant in general.**—In an action for master's breach of contract, he has burden of pleading and proving the servant did not attempt to minimize damages by securing other like employment. *Southern Wells Sales Co. v. Eastham* (Civ. App.) 181 S. W. 698.

158. **Mechanics' liens.**—The assignee of claims of laborers engaged in drilling an oil well, who after foreclosure asserted a lien under art. 5644, superior to that of an existing chattel mortgage, had the burden of showing that such a lien was given by the statute. *Barton v. Wichita River Oil Co.* (Civ. App.) 187 S. W. 1043.

158 $\frac{1}{4}$ . **Mental incapacity.**—The burden rests on parties seeking to set a deed aside for incapacity of the grantor to show such fact. *Milner v. Sims* (Civ. App.) 171 S. W. 784.

158 $\frac{1}{2}$ . **Mistake.**—In suit by heirs to recover part of ancestor's land, against party claiming through successive conveyances from purchaser at a sale on partition, burden to show that purchaser on partition sale was party to mistake whereby part of ancestor's land was omitted from pleadings in partition suit was on defendant, who relied upon defense of mutual mistake. *Darden v. Vanlandingham* (Civ. App.) 189 S. W. 297.

159. **Mortgages.**—In suit to remove cloud on title, by one claiming under parol gift from a debtor, against lenders of money to him claiming the rights of mortgagees by subrogation, burden was on defendants to show they were prior creditors of the donor. *First State Bank & Trust Co. of Abilene v. Walker* (Civ. App.) 187 S. W. 724.

The grantor in a deed of trust who sues to set aside a sale made by the trustee has the burden of proving that the trustee abused his discretion, acted unfairly, or took undue advantage of him. *Zeiss v. First State Bank* (Civ. App.) 189 S. W. 524.

One alleging that a deed is a mortgage has the burden of proving it. *De Shazo v. Eubank* (Civ. App.) 191 S. W. 369.

160. **Ordinance.**—Where a jitney owner charged with violating an ordinance by operating a jitney without a license complains that requirements of the ordinance that he pay a license fee and give bond amount to a prohibition, the burden is on him to establish his contention. *Ex parte Bogle* (Cr. App.) 179 S. W. 1193.

**162. Notice.**—As against a creditor whose lien has been fixed on land by legal process, the holder of an unrecorded deed from the debtor is bound to prove notice of his rights to the creditor before the attachment of the lien. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

As between the holder of an unrecorded deed and a judgment creditor, of the grantor, who has abstracted his judgment on the records of the county in which the land is situated, the burden is on the holder of the unrecorded conveyance to show notice to the judgment creditor at the time of the registration of his judgment. *Bowles v. Belt* (Civ. App.) 159 S. W. 885.

The custom of a railroad company to allow persons to enter its trains to assist passengers excuses plaintiff, in jumping from the train after it started, from showing notice to the company of his intent to alight. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 179 S. W. 62.

A vendor, asserting that a mortgagee of the purchaser was charged with notice of his vendor's lien notes, has the burden of proving notice. *Anderson v. Farmer* (Civ. App.) 189 S. W. 508.

**162½. Novation.**—Where notes are taken for a precedent debt, it will not be presumed that they are taken as a novation, and the burden is on the party asserting it. *Rushing v. Citizens' Nat. Bank of Plainview* (Tex. Civ. App.) 162 S. W. 460.

**166. Partnership.**—On accounting between partners, where the books had been incorrectly kept, so that it was impossible to determine in what proportion partnership and personal funds had been commingled by defendant, it became incumbent upon him to show the amount of credit to which he was entitled. *Navarro v. Lamana* (Civ. App.) 179 S. W. 922.

In an action for an accounting in respect to a general partnership, wherein defendant denied the existence of such partnership, the burden of proof was on plaintiff. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

In a broker's action for commissions for the sale of land, held, that the burden of showing that the partnership of the defendants had been dissolved before the sale was made was upon the defendants. *Wick v. McLennan* (Civ. App.) 186 S. W. 847.

**167. Payment.**—Burden of proving payment of note sued on held on defendant. *Brunson v. Dawson State Bank* (Civ. App.) 175 S. W. 438.

In a suit to recover the sum paid to the defendant loan society under an agreement for a loan, plaintiff had the burden of proving that he was entitled to the relief sought. *National Equitable Soc. of Belton v. Dunnington* (Civ. App.) 184 S. W. 590.

**168. Agency and authority.**—In an action for a debt which defendants claimed they had paid to plaintiff's agent, defendants have the burden of proving the agency of the one to whom they paid the debt. *Bray-Robinson-Curry Woolen Mills v. W. F. Walker & Son* (Civ. App.) 165 S. W. 107.

Burden of proof of authority of agent to incur the debt represented by the draft in suit held to be on plaintiff bank. *Cummer Mfg. Co. of Texas v. First Nat. Bank of Center* (Civ. App.) 173 S. W. 536.

In an action against a wife, based on transactions with her deceased husband, plaintiff had the burden of proving ratification and affirmance pleaded in avoidance of her defense that her husband was insane. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

One who lends money on corporation credit to its agent has the burden of proving that the agent was authorized to borrow for the corporation. *Planters' Cotton Oil Co. v. Guaranty State Bank of Mertens* (Civ. App.) 188 S. W. 38.

Party dealing with agent is bound to ascertain, not only fact of agency, but extent of powers, and if either is controverted, the burden is on him to establish it. *Overton v. First Texas State Ins. Co.* (Civ. App.) 189 S. W. 514.

In an action against a railroad to recover for groceries furnished defendant's section hands and laborers pursuant to an alleged agreement with defendant's section foreman that defendant would be responsible, burden of proof was upon plaintiff to show right to recover. *Texas & P. Ry. Co. v. Lucas* (Civ. App.) 190 S. W. 800.

Persons dealing with an agent have the burden of showing his authority. *Rishworth v. Moss* (Civ. App.) 191 S. W. 843.

Persons dealing with an assumed agent have the burden of proving agency. *Id.*

**169. Principal and surety.**—The surety of a building contractor has the burden of proving, as against the owner of the building, that there have been material alterations in the contract which released its liability. *Grant v. Alfalfa Lumber Co.* (Civ. App.) 177 S. W. 536.

The burden is on the surety of a subcontractor to prove that the contractor did not act in good faith in completing the work, and what the reasonable cost of such completion should be. *American Const. Co. v. Kleinie* (Civ. App.) 177 S. W. 1176.

In action against surety on note, it was incumbent on defendant to prove defense that it was agreed between his principal and the payee that a second note, executed by his principal, was given to and accepted by the payee in discharge of the original note. *Jackson v. Home Nat. Bank of Baird* (Civ. App.) 185 S. W. 893.

**170. Title and ownership.**—In a suit to remove a cloud on title, plaintiff, having purchased the land, taken possession and paid vendors' lien notes and made valuable improvements, held entitled to the vacation of a title emanating from G. to defendant at a time when plaintiff was in possession, in the absence of evidence showing any title to the property in G. or connecting him with plaintiff's title. *Turner v. Cunningham* (Civ. App.) 158 S. W. 176.

In trespass to try title, oral licensee of a party who took possession without right or title held to have the burden of showing that its licensor acquired title by limitation. *Rio Grande & E. P. R. Co. v. Kinkel* (Civ. App.) 158 S. W. 214.

Where, in trespass to try title, plaintiff alleged as title, and especially pleaded, cer-

tain assignments of a headright certificate, the burden was on him to prove such assignments. *McCullough v. Randall* (Civ. App.) 158 S. W. 219.

In trespass to try title, plaintiff must establish prima facie his title and right to recover, before the defendant is required to make any defense. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

Where though in trespass to try title, there was evidence that both parties claimed under M. as a common source of title, who was not shown to have had any title, defendant also showed the acquisition by him of the interests of the heirs of a person admitted to have had title, burden held to be on plaintiff to show that M. acquired the equitable title from such person. *McBride v. Loomis* (Civ. App.) 170 S. W. 825.

In trespass to try title involving a boundary dispute, proof of possessory title, though it made a prima facie case, held not to change burden of proof, and upon introduction of evidence in rebuttal the burden was on plaintiff to prove a legal title. *J. D. Fields & Co. v. Allison* (Civ. App.) 171 S. W. 274.

In trespass to try title, where defendant has shown title to the land by a regular chain of transfers, plaintiffs who attack such title have the burden of proof. *Ragley-McWilliams Lumber Co. v. Davidson* (Civ. App.) 178 S. W. 785.

In trespass to try title by cotenants against the grantee of their cotenant, after plaintiffs connected their title with the agreed common source, the burden shifted to the grantee to show that plaintiffs' title had been parted with or lost. *Broom v. Pearson* (Civ. App.) 180 S. W. 895.

Plaintiff, in a suit against a railroad for the killing of mules, was required to show, by a preponderance of the testimony, that he owned them when they were killed. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 182 S. W. 357.

The burden held to be on plaintiffs to prove an alleged equitable title from one of defendants, and that the defendant grantees had notice or did not pay value. *Deweese v. Nicholson* (Civ. App.) 182 S. W. 396.

Where in trespass to try title defendant shows possession of title deeds and the land in suit at the date of plaintiff's deeds to the same land, the burden of proof is on plaintiff to show want of mental capacity of grantor. *Wentzell v. Chester* (Civ. App.) 189 S. W. 304.

Where in trespass to try title defendant shows possession of title deeds and the land in suit at the date of plaintiff's deed to the same land, the burden of proof is on plaintiff to show nondelivery of defendant's deeds. *Id.*

Plaintiff, claiming under a sheriff's deed in which the description was insufficient without aid of extrinsic evidence, had the burden of offering such proof. *Leal v. Moglia* (Civ. App.) 192 S. W. 1121.

One holding the equitable title to real estate has the burden of showing that his title is superior to the legal title. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

In suit on improvement certificate indorsed in blank by original holder, brought by city for benefit of such holder, burden of proof was on plaintiff to establish ownership of certificate at time of institution of suit. *Kernagan v. City of Ft. Worth* (Civ. App.) 194 S. W. 626.

In a suit on improvement certificate, brought by city for benefit of original holder, evidence held not to discharge burden of proof on plaintiff to show ownership of certificate. *Id.*

In action to recover deposit in defendant bank for credit of proposed bank, defendant has burden of proving that such proposed bank, or its stockholders, were not entitled to fund in preference to depositor, where defendant's cashier had recognized such fund as belonging to the proposed corporation. *Cozart v. Western Nat. Bank of Ft. Worth* (Civ. App.) 194 S. W. 644.

**173. Reformation of instruments.**—In order to reform a contract, plaintiff must show the exact form to which the contract should be brought. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

In an action to reform an insurance policy, the evidence must be clear and convincing to overcome the presumption that the policy embodies the real intention of the parties. *Western Assur. Co. v. Hillyer-Deutsch-Jurratt Co.* (Civ. App.) 167 S. W. 816.

The burden is on the grantor to prove that the excess of land conveyed over that intended was such that a court of equity would correct it, if made by mutual mistake. *Seureau v. Frazer* (Civ. App.) 189 S. W. 1003.

**174. Release.**—In a suit to be relieved from liability on a judgment because of the release of the principal obligors on the note sued on, the burden is on the complainants to show the release. *Price v. Logue* (Civ. App.) 164 S. W. 1048.

**176. Sales.**—Where plaintiff seller introduced purchase price notes and a mortgage securing them, defendant buyer had the burden of proving that the sales contract was breached by plaintiff. *Varley v. Nichols-Shepard Sales Co.* (Civ. App.) 191 S. W. 611.

**178. Set-off and counterclaim.**—In an action to foreclose vendor's lien notes, a plea in reconviction or cross-bill is in substance an independent suit, and, where no proof is offered therein, the proper practice is to dismiss it for want of prosecution. *Swift v. Beemer* (Civ. App.) 160 S. W. 989.

**179. Sheriffs and constables.**—In an action against a sheriff for damages for failure to record an attachment lien, plaintiff held to have the burden of showing he lost his lien thereby. *Neville v. Miller* (Civ. App.) 171 S. W. 1109.

**181. Taxes and taxation.**—In suit to enjoin collection of school tax for failure to give notice of election, as required by Acts 31st Leg. c. 12, § 1, amending Acts 29th Leg. c. 124, § 58, burden held on defendants to show that all or a substantial majority of the qualified voters had actual knowledge of the election. *Cochran v. Kennon* (Civ. App.) 161 S. W. 67.

Where no notice of a school tax election was posted, the burden was on the collector in a suit to restrain collection of the tax to show that such a majority of the voters

had actual notice as to preclude the idea that the result would have been affected by notice. *Howard v. Oliver* (Civ. App.) 170 S. W. 261.

**184. Conversion of property.**—Seller suing a compress company for its conversion of cotton which it was to weigh as a basis of settlement with the buyer had the burden of proof. *Shippers' Compress & Warehouse Co. v. Cumby Mercantile & Lumber Co.* (Civ. App.) 172 S. W. 744.

In an action on a note, defendants, whose pleadings raised the issue that plaintiff had failed to account for certain collateral, and sought relief to the extent of the value thereof, had the burden of showing the value of the securities not accounted for. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

**186. Usury.**—The burden of proving usury in notes is upon defendants. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

Defendants admitting execution of vendor's lien notes sought to be foreclosed held to have burden of establishing usurious transaction pleaded as defense. *Wedgworth v. Smith* (Civ. App.) 178 S. W. 641.

**187. Vendor and purchaser.**—In an action to redeem land by a wife, to whom her husband voluntarily conveyed subject to the vendor's lien, where plaintiff specifically pleaded her title and rights, burden was on her to allege and prove all necessary facts to establish them, among which was that a rescission had not been declared by the vendor, etc. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

**188. Venue.**—Since art. 1830 provides for bringing suit in county where defendant resides, except in specified cases, plaintiff has burden of showing that his right to sue in another county comes within exception. *Graves v. McCollum & Lewis* (Civ. App.) 193 S. W. 217.

**190. Water courses and water supply.**—Defendants setting up prescriptive title against other riparian owners had the burden of showing which part of the flow of the stream they were claiming during the prescriptive period. *Martin v. Burr* (Civ. App.) 171 S. W. 1044.

In mandatory injunction against irrigation company, held that burden was on plaintiff to establish, not only that his lands were riparian, but that there was water in the stream to which he was lawfully entitled. *Toyah Valley Irr. Co. v. Winston* (Civ. App.) 174 S. W. 677.

**191. Negligence—Injuries to person in general.**—Neither an alleged negligent act or omission nor the causal connection between it and the injury can be presumed, but the burden is on plaintiff to prove it. *International & G. N. Ry. Co. v. Matthews Bros.* (Civ. App.) 158 S. W. 1048.

Negligence of the master must not only be shown, but must be shown by affirmative evidence to have been the proximate cause of the injury. *Sherman Oil Mill v. Neff* (Civ. App.) 159 S. W. 137.

While a railroad company must exercise a high degree of care to furnish suitable cars and platforms, it is not an insurer in this respect, and one injured upon a car platform has the burden of proving the company's negligence. *Gulf, C. & S. F. Ry. Co. v. Davis* (Civ. App.) 161 S. W. 932.

The burden is upon the master to show that he discharged his duty to warn a minor servant. *Lawson v. Hamilton Compress Co.* (Civ. App.) 162 S. W. 1023.

In an action against a cotton oil company for the death of a servant caused by cotton seed hulls falling upon him and smothering him, the burden was upon plaintiff to prove his allegation that defendant failed to warn the servant as to the danger incidental to the work. *Industrial Cotton Oil Co. v. Lial* (Civ. App.) 164 S. W. 40.

In an action for death from falling down an elevator shaft, the burden of proof is on plaintiff to show with reasonable certainty how the accident occurred. *Bock v. Fellman Dry Goods Co.* (Civ. App.) 173 S. W. 532.

One suing for the death of a freight brakeman run over by a passenger train has the burden of proving the negligence of the freight conductor in failing to discover decedent on the track. *Southern Kansas Ry. Co. of Texas v. Barnes* (Civ. App.) 173 S. W. 880.

Passenger suing for a personal injury must show actionable negligence. *Beaty v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 450.

In a servant's action for injury, negligence must be shown by affirmative proof, and it must further appear that such negligence was the proximate cause of the injury. *Missouri, K. & T. Ry. Co. of Texas v. Robeson* (Civ. App.) 178 S. W. 862.

Where specific acts of negligence are relied upon the plaintiff has the burden of proving such specific acts. *Dowdy v. Southern Traction Co.* (Civ. App.) 184 S. W. 687.

In a widow's action against a railroad for death of its servant, plaintiff has burden to prove road's negligence, and that it caused her husband's death. *Galveston, H. & S. A. Ry. Co. v. Fred* (Civ. App.) 185 S. W. 896.

Under federal Employers' Liability Act, negligence on part of the carrier, its officers or agents, must be shown by the injured employé. *Panhandle & S. F. Ry. Co. v. Fitts* (Civ. App.) 188 S. W. 528.

Where a child was struck in a manner not accounted for while crossing track, the burden of proving negligence of the company was on plaintiff. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

In a servant's action for injuries caused by the fall of a stack of kegs, the burden is upon him to show the actionable negligence on the employer's part pleaded. *San Antonio Brewing Ass'n v. Sievert* (Civ. App.) 194 S. W. 989.

**192. — Proximate cause of injury.**—In a suit for injuries resulting in death, the plaintiff must show that the injuries were the proximate cause of the death. *Texas Traction Co. v. Nennet* (Civ. App.) 178 S. W. 797.

In a servant's action for injury, negligence must be shown by affirmative proof, and it must further appear that such negligence was the proximate cause of the injury. *Missouri, K. & T. Ry. Co. of Texas v. Robeson* (Civ. App.) 178 S. W. 862.

Where a servant alleged injuries due to rigidity in the trucks of a freight car on which he was working, which caused the car to leave the rails twice within a few minutes it was unnecessary for him to show the cause of the defect. *Galveston, H. & S. A. Ry. Co. v. Webb* (Civ. App.) 182 S. W. 424.

Where plaintiffs pleaded that their goods were burned in defendants' warehouse, the burden is on them to prove that the fire was caused by the warehouseman's negligence. *Thornton v. Daniel* (Civ. App.) 185 S. W. 585.

When one seeks to recover damages from negligence, it is incumbent on him to establish not only the negligence alleged, but also that it caused the injury. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

In an employé's action for injuries, the burden was on plaintiff to show, not only that defendant was guilty of negligence, but that its negligence was the proximate cause of the injury. *Hattaway v. Planters' Cotton Oil Co.* (Civ. App.) 194 S. W. 1119.

194. — **Assumption of risk.**—Where a servant's injury was caused by the negligence of the foreman, the burden is upon the master to show that the servant assumed the risk. *Missouri, K. & T. Ry. Co. of Texas v. Scott* (Civ. App.) 160 S. W. 432.

The burden is on employer to show defense of assumption of risk. *Barnhart v. Kansas City, M. & O. Ry. Co. of Texas* (Sup.) 184 S. W. 176.

195. — **Contributory negligence.**—The burden of proving the servant's contributory negligence is on the defendant. *Peden Iron & Steel Co. v. Jaimes* (Civ. App.) 162 S. W. 965.

In an action by a servant for an injury, the burden is upon the defendant to prove contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Chojnacky* (Civ. App.) 163 S. W. 1011.

Where plaintiff's evidence did not raise a suspicion of contributory negligence, the burden of proving such negligence was on defendant. *Galveston, H. & S. A. Ry. Co. v. Linney* (Civ. App.) 163 S. W. 1035.

In a personal injury case, wherein plaintiff's evidence raised the question of contributory negligence, it was error to place the burden on defendant to show it. *Texas Trac-tion Co. v. Wiley* (Civ. App.) 164 S. W. 1028.

In an action for the wrongful death of a servant, where defendant pleaded contributory negligence, the fact that some of the evidence of contributory negligence was introduced by plaintiffs did not alter the rule casting the burden of proof on defendant. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

In an action for wrongful death of one run down at a crossing, the burden of establishing deceased's contributory negligence is upon the railroad company, and does not shift upon its establishing a prima facie case. *Galveston, H. & S. A. Ry. Co. v. Pennington* (Civ. App.) 166 S. W. 464.

The burden of proving contributory negligence of a passenger sustaining a personal injury while alighting rests on the carrier. *Galveston, H. & S. A. Ry. Co. v. Brassell* (Civ. App.) 173 S. W. 522.

Where a person on a track was run over from failure of trainmen to keep a lookout, the company, to escape liability, must show that his negligence proximately caused the accident. *St. Louis Southwestern Ry. Co. of Texas v. Watts* (Civ. App.) 173 S. W. 909.

When undisputed evidence establishes prima facie contributory negligence on the part of one killed at a railroad crossing, the burden of proof is upon the plaintiffs to show facts justifying an inference of freedom from negligence. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

In a suit for injuries received at a railroad crossing, burden of proof to show contributory negligence of plaintiff held on defendant, except where prima facie established by plaintiffs' proof or pleadings. *Id.*

Passenger suing for a personal injury must show freedom from contributory negligence. *Beaty v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 450.

Where plaintiffs averred that their minor son was asleep at a point dangerously near defendant's tracks when killed, they had the burden of proving that he was not guilty of contributory negligence in being in that place of danger when struck. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 181 S. W. 711.

In action for injuries received by plaintiff, a minor, when he exploded powder stolen from defendant's quarry, the pleadings held to put in issue the question of his contributory negligence, so that the burden of showing freedom therefrom was on plaintiff. *Dudley & Orr v. Hawkins* (Civ. App.) 183 S. W. 776.

The burden of proving alleged contributory negligence on the part of a pedestrian struck by defendant railroad's locomotive is upon the railroad. *Ft. Worth & D. C. Ry. Co. v. Houston* (Civ. App.) 185 S. W. 919.

In an action for injuries caused by defendant's street car striking plaintiff's automobile, where only act of negligence charged was discovered peril, burden of proof was on plaintiff to establish that employé actually had knowledge of plaintiff's peril and that they did not exercise reasonable care. *Jacobe v. Houston Electric Co.* (Civ. App.) 187 S. W. 247.

In action for injuries at railroad crossing, there being nothing in plaintiff's pleadings to indicate that he was negligent, and nothing in his evidence to suggest it, the burden is on defendant to prove contributory negligence. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

Where a child was struck in a manner not accounted for while crossing track, the burden of proving contributory negligence was on the company. *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

198. — **Carriage of goods and live stock.**—When an extraordinary delay in the transportation of a shipment of live stock is sought to be excused by the carrier on the ground of unusual congestion, the carrier has the burden of proof to show every fact

essential to the validity of its excuse. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

The burden is on a passenger to show that personal effects taken by the passenger into the coach and not checked as baggage were lost by the carrier's negligence. *Missouri, K. & T. Ry. Co. v. Kirkpatrick* (Civ. App.) 165 S. W. 500.

Where a shipper of live stock, required by the contract to accompany it, was not afforded an opportunity to do so, the rule that the burden of proof rested on him to show which of the connecting carriers inflicted the injury to the stock complained of did not apply. *Texas & P. Ry. Co. v. Tomlinson* (Civ. App.) 166 S. W. 446.

Where a carrier of live stock contracted to transport it to designated stockyards, but proceeded to take the stock by a belt line railway, the belt line was but an agency of the carrier, and the shipper, suing for injuries to stock, did not have the burden of proving which carrier inflicted the injuries. *Id.*

Where cattle delivered in good condition for transit reached their destination after delay in an injured condition, the burden is on the railroad to excuse the delay to escape liability. *Rodgers v. Texas & P. Ry. Co.* (Civ. App.) 172 S. W. 1117.

A shipper can recover damages for injuries to horses during shipment, notwithstanding his failure to prove the manner and place in which the injuries were received. *Southern Pac. Co. v. W. T. Meadors & Co.* (Civ. App.) 176 S. W. 882.

A shipper of cotton must, to establish a negligent delay in transportation, show that the delay was not due to a delay authorized to compress the cotton. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Civ. App.) 178 S. W. 810.

In an action to recover the value of hogs which died of cholera during shipment, plaintiff, having averred that the cars furnished were not clean as required by rule 31 of the State Sanitary Stock Commission, has the burden of proving that allegation. *Clampitt v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 185 S. W. 342.

The carrier has the burden of proof on its defense that damage to freight was caused by an unprecedented flood. *St. Louis Southwestern Ry. Co. of Texas v. Hughston Grain Co.* (Civ. App.) 186 S. W. 429.

On a shipment of cattle, where shipper accompanies them, and, under the special contract, assumes specific duty to care for them, if the cattle are injured by lack of feed and water, the burden is upon shipper to show negligence. *Ft. Worth & D. C. Ry. Co. v. Allen* (Civ. App.) 189 S. W. 765.

In action for negligent carriage of cattle, where defendant pleaded and proved that plaintiffs' contract gave them special charge of the cattle in transportation, the burden was on plaintiffs to exonerate themselves for any negligence, effecting injury to the cattle. *Kansas City, M. & O. Ry. Co. of Texas v. James* (Civ. App.) 190 S. W. 1136.

Where defendant railroad proved plaintiff delivered mare to it in damaged condition, burden then rested upon plaintiff to show defendants' negligence. *Jones v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 193 S. W. 373.

199. — **Negligent fires.**—In an action for the firing of plaintiff's barn from a spark from defendant's engine, plaintiff has the burden of proof and the refusal of a charge so stating is error. *Texas Midland R. R. v. Ray* (Civ. App.) 168 S. W. 1013.

Where fire was shown to have escaped from one of defendant's locomotives, burden was on defendant to show that its communication to plaintiff's property was not result of lack of care on part of its employés in charge of locomotive. *St. Louis Southwestern Ry. Co. of Texas v. Wood* (Civ. App.) 192 S. W. 812.

200. — **Killing or injuring live stock.**—Where plaintiffs' horse was killed by defendant railroad company at a point within the switch limits of a town, plaintiffs could not recover without proof that defendant was negligent and that such negligence was the proximate cause of the death. *International & G. N. Ry. Co. v. Matthews Bros.* (Civ. App.) 158 S. W. 1048.

In an action for killing plaintiff's mule, the burden was on plaintiff both to establish negligence and to show that such negligence was the proximate cause of the accident. *Chicago, R. I. & G. Ry. Co. v. O'Dell* (Civ. App.) 160 S. W. 1098.

In an action against a railroad for injuries to stock driven on its right of way, plaintiff held to have the burden of showing that the trainmen saw the stock, and realized its peril in time to stop or slacken the train before collision. *Irving v. Texas & P. Ry. Co.* (Civ. App.) 164 S. W. 910, affirming judgment on rehearing 157 S. W. 752.

Where a horse was killed upon the right of way, it is presumed that defendant's train ran him down, and it has the burden of proving that the train was owned and operated by another company. *Chicago, R. I. & G. Ry. Co. v. Porter* (Civ. App.) 166 S. W. 37.

The burden is on the owner to show negligence by the trainmen resulting in injury to stock on the track, and not on the railroad to show exoneration. *International & G. N. Ry. Co. v. Leuschner* (Civ. App.) 166 S. W. 416.

One suing a railroad company for injuries to an animal on the right of way has the burden of proving that the animal was struck by a train. *St. Louis Southwestern Ry. Co. of Texas v. Tabb* (Civ. App.) 168 S. W. 866.

In an action for killing a mule, held, that the burden was on defendant to prove that the place where the mule went upon the right of way was within the necessary switch and depot limits, where a fence was not required. *St. Louis, B. & M. Ry. Co. v. Knowles* (Civ. App.) 171 S. W. 245.

Plaintiff, whose horse was killed in a town where defendant's railroad was not required to fence, held to have the burden of proof as to negligence. *Missouri, K. & T. Ry. Co. of Texas v. Long* (Civ. App.) 174 S. W. 329.

In view of art. 6603, held that, on showing that animals were within defendant's switchyards when killed, defendant had burden of establishing that it was not permitted by law to fence at that point. *St. Louis, B. & M. Ry. Co. v. Dawson* (Civ. App.) 174 S. W. 850.

In an action for damages for a horse killed by defendant's engine, the burden was on defendant to show that it could not fence its track at the point where the injury

occurred, even though within the switch limits. *Houston & T. C. Ry. Co. v. Holbert* (Civ. App.) 182 S. W. 1180.

Where there was nothing to show that defendant railroad could not have fenced its tracks at point where plaintiff's horse was killed, though within its switch limits, without inconveniencing the public, it was unnecessary for plaintiff to show negligence to recover; the mere killing being enough. *Id.*

In action against railroad company for killing of stock, burden is on the company, place of accident not being fenced, to show that it was not permitted by law to fence such place, or that to do so would endanger train operatives or inconvenience public. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 193 S. W. 392.

201. — **Injuries to third persons by acts of servants and independent contractors.**—Although proof that automobile causing injury is being driven by servant raises inference that driver was engaged in master's business, burden of proof as matter of law remains upon plaintiff to establish material allegations upon which right of recovery rests. *Gordon v. Texas & Pacific Mercantile & Mfg. Co.* (Civ. App.) 190 S. W. 748.

In an owner's suit for destruction of his oil barge by fire, where the person was shown whose negligence in carrying a lighted lantern near the oil caused the fire, the burden was on plaintiff to show that such person was defendant's servant acting within the scope of his employment in going upon the barge with the lighted lantern. *Texas Co. v. Charles Clarke & Co.* (Tex. Civ. App.) 182 S. W. 351.

#### V. Sufficiency of Evidence to Sustain Burden of Proof in First Instance

202. **Prima facie case.**—In action for damages for nicks put in diamond by defendants, evidence held sufficient to make prima facie case that diamond was damaged while in possession of defendants. *Joy v. Crawford* (Civ. App.) 154 S. W. 357.

Proof in a suit on a forfeited bail bond that one had received a letter from the principal stating that he was sick, but expressing willingness to come to trial, and that for two years the principal had not been heard from, did not present the issue of his death. *Heiman v. State*, 70 Cr. R. 480, 158 S. W. 276.

Where the petition, which alleged that defendant indorsed the notes sued on, was supported indisputably by the evidence and there was nothing in the pleadings or the evidence that would justify the court in refusing to render judgment on the prima facie case thus made, it was error for the court not to give judgment against the indorser. *Henderson v. Wilkinson* (Civ. App.) 159 S. W. 1045.

An instruction that if plaintiff's evidence showed that defendant's engines had caused the fire in question by the emission of sparks, such proof made a prima facie case of negligence, sustaining a recovery unless rebutted by evidence that the engine was properly equipped with approved spark arresters, etc., held proper. *Roman v. St. Louis Southwestern Ry. Co.* (Civ. App.) 160 S. W. 431.

A broker's evidence that he made the contracts held to establish a prima facie case without proof by each of the purchasers. *E. R. & D. C. Kolp v. Brazer* (Civ. App.) 161 S. W. 899.

Where, in an action for delay in the transportation of cattle for sale at stock markets, market reports covering the time involved were received in evidence without objection, and the shipper testified to the classes and condition of the cattle in the several shipments, and gave market prices at several periods, stating that the shipments would be included in the range of such prices, a prima facie case of market values was shown. *St. Louis, S. F. & T. Ry. Co. v. Armstrong* (Civ. App.) 166 S. W. 366.

Proof that sparks escaped from a railroad engine and destroyed property by fire established a prima facie case of actionable negligence of the railroad company, and to escape liability it must show that the engine was equipped with proper spark arresters, and that the same were in good repair, and that the company exercised reasonable care to keep the same in good repair. *Texas & N. O. R. Co. v. Cook* (Civ. App.) 167 S. W. 158.

Plaintiff's testimony that her fall was caused by a sudden lurch of the street car, after it had slowed down for a stop at the street crossing, and while she was proceeding to get off, is sufficient, prima facie, to support a finding of negligence, in the absence of evidence as to the jerk being usual or unusual. *Cleburne St. Ry. Co. v. Barnes* (Civ. App.) 168 S. W. 991.

A municipal ordinance, or a regulation passed by a quasi municipal corporation as a school board, is prima facie valid. *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840.

Proof of a subscription and a valid call upon stockholders makes out a prima facie case in an action to recover on stock subscriptions. *Rich v. Park* (Civ. App.) 177 S. W. 184.

In suit by heirs to recover land from one party, who took title from purchaser at partition sale, partition proceedings having included only part of ancestor's lands, proof of heirship established plaintiff's prima facie right of recovery to extent of land not involved in partition suit. *Darden v. Vanlandingham* (Civ. App.) 189 S. W. 297.

A deed conveying lands bounded by courses and distances and testimony as to a calculation of the acreage thereby embraced is prima facie sufficient to establish the quantity conveyed. *Seureau v. Frazer* (Civ. App.) 189 S. W. 1003.

In suit by wife, grantee of husband's lands, to restrain sale under execution by creditor of husband, wife's deed, executed before creditor secured judgment, makes prima facie case in her favor. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

Possession of unlocated land certificates is prima facie evidence of ownership. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

Under Ft. Worth City Charter, c. 14, §§ 7, 8, 10, 15, in suit on improvement certificate, reciting that legal prerequisites, etc., had been complied with, such recital was at most prima facie proof of performance by city of essential steps to fix lien upon abut-



ting property, and when other evidence tended strongly to show that no steps were taken, prima facie effect of such recital was overcome. *Kernagan v. City of Ft. Worth* (Civ. App.) 194 S. W. 626.

Defendant could not rebut prima facie case of negligence arising where cotton was set afire by locomotive, by showing use of approved spark arrester and care in operating engine, without showing care to keep arrester in working order. *Nussbaum & Scharff v. Trinity & B. V. Ry. Co.* (Sup.) 194 S. W. 1099.

#### VI. General Rules as to Weight and Sufficiency of Evidence

**203. Weight and conclusiveness in general.**—Where plaintiff alleged that the explosion causing her injury was due to excessive steam pressure of the locomotive which exploded, and that such pressure was created by defendant's negligence, the burden was on her to prove this allegation by facts rather than by mere speculation. *McGraw v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 182 S. W. 417.

An injured servant need not prove "with reasonable certainty" that his condition resulted from the heat of a furnace in which he alleged he worked with resultant injury. *Consolidated Kansas City Smelting & Refining Co. v. Dill* (Civ. App.) 188 S. W. 439.

**205. Positive and negative evidence.**—Testimony of witnesses that they did not hear the bell on an engine has probative force, provided they were so situated that in the ordinary course of events they would have heard the bell had it been rung. *Paris & G. N. R. Co. v. Lackey* (Civ. App.) 171 S. W. 540.

Although there are cases in which negative testimony might sustain verdict against positive testimony, yet in such cases not only must comparative credibility of witnesses be placed in balance, but there must be something by which the means of knowledge can be weighed. *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.

**206. Circumstantial evidence.**—The existence of undue influence may be established by circumstantial testimony as to the condition of testator's mind, surroundings attending the execution of the will, the opportunity for the exertion of undue influence, the confidential relations between testator and beneficiary, and the unnatural character of the will. (Civ. App.) *Holt v. Guerguin*, 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

Agency may be established by circumstantial evidence. *Sargent v. Barnes* (Civ. App.) 159 S. W. 366.

Circumstantial evidence is sufficient to justify setting aside a will for undue influence only when all the circumstances produce in the ordinary mind a reasonable belief that undue influence has been exerted in procuring the will. *Mayes v. Mayes* (Civ. App.) 159 S. W. 919.

Matters may be proven by circumstantial evidence as well as by direct testimony. *Gulf, C. & S. F. Ry. Co. v. Battle* (Civ. App.) 169 S. W. 1048.

That a survey was merely an office survey may be established by circumstantial evidence. *McSpadden v. Vannerson* (Civ. App.) 169 S. W. 1079.

A material fact or issue may be established as well by circumstantial as by direct evidence. *J. M. Guffey Petroleum Co. v. Dinwiddie* (Civ. App.) 182 S. W. 444.

It may be established by circumstances that a person was killed by a train at a public crossing through the negligence of the railroad's servants, and that he exercised due care. *Luten v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 798.

In a suit on a note, the issue of the plaintiff's bad faith in the purchase of the note, like the issue of his assignor's fraud in obtaining the note, could be established by circumstantial evidence. *Landon v. Holcomb* (Civ. App.) 184 S. W. 1098.

The fact that a minor, who is claimed to have ratified his previously made contract after attaining majority, had knowledge that it was not binding upon him may be shown by circumstantial evidence. *Fletcher v. A. W. Koch Co.* (Civ. App.) 189 S. W. 501.

**207. Credibility of witnesses.**—The jury may disregard testimony of either party or his witnesses. *Blount-Decker Lumber Co. v. Martin* (Civ. App.) 190 S. W. 232.

A jury may reject part of a witness' testimony and believe the rest. *Gulf, C. & S. F. Ry. Co. v. Higginbotham* (Civ. App.) 173 S. W. 482.

In a trial of right of property attached in the hands of a tenant and claimed by the landlord as security, the jury might properly reject the testimony of both tenant and landlord on ground of interest, and answer, as to a portion of the goods attached, that the tenant still had possession thereof. *Riley v. Hallmark* (Civ. App.) 180 S. W. 134.

A juror is not required to believe a witness, although he makes a plain statement of what is not impossible and is neither impeached nor contradicted by direct evidence, but may discredit him on account of the manner of testifying and attendant circumstances. *Wichita Falls Traction Co. v. Berry* (Civ. App.) 187 S. W. 415.

While a jury is not compelled to accept as true the evidence of corporation's servants because they are such, the jury has no right to disbelieve such evidence for that reason. *Northern Texas Traction Co. v. Nicholson* (Civ. App.) 188 S. W. 1028.

In action for death of railroad's brakeman, jury were not bound to believe testimony of road's conductor, as he was an interested witness. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 191 S. W. 579.

Though witness is contradicted, jury has right to pass on his credibility and accept his version to exclusion of conflicting evidence. *Texas & P. Ry. Co. v. Bursey* (Civ. App.) 192 S. W. 809.

In an action for breach of contract between plaintiff and defendant for the joint purchase of cattle, although defendant offered only testimony on his cross-action for damages for an alleged loss by reason of annoyance by plaintiff while defendant was selecting cattle, as defendant was an interested witness, court had right to disregard his testimony. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

**207½. Conclusiveness as to party introducing.**—In a suit to set aside a conveyance of land as fraudulent, where plaintiff introduced deed in evidence to show that it has its inception in fraud, he was not bound by any of its recitals. *Colgrove v. Falfurrias State Bank* (Civ. App.) 192 S. W. 580.

Where plaintiff introduced in evidence the defendant's answer without limitation, plaintiffs were concluded thereby. *Texas & N. O. Ry. Co. v. Patterson & Roberts* (Civ. App.) 192 S. W. 585.

**209. Evidence improperly admitted.**—A verdict cannot be sustained by incompetent testimony, even though admitted without objection. *Atchison, T. & S. F. Ry. Co. v. Smith* (Civ. App.) 190 S. W. 761.

In trespass to try title by party to whom general land office awarded forfeited lands, where no objection was urged to defendant's hearsay testimony on that ground, court properly considered it as tending to show application by him to have his rights reinstated, and a tender of interest due. *Speed v. Sadberry* (Civ. App.) 190 S. W. 781.

**210. Uncontroverted evidence.**—Where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

The jury may disregard testimony of a witness though neither impeached nor contradicted. *First Nat. Bank of Ft. Wayne, Ind., v. Howard* (Civ. App.) 174 S. W. 719.

Where testimony of station agent that he had authority to arrange for reshipment was not contradicted, finding that agreement with him for reshipment was not binding held error. *Whitley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 183 S. W. 36.

Although the entire testimony as to the instructions given a chauffeur which were depended upon to show the scope of his employment came from defendant and his wife, yet their uncontradicted testimony cannot be disregarded. *Hill v. Staats* (Civ. App.) 187 S. W. 1039.

A jury is not required to believe a witness, though he makes a plain statement of what is not impossible, and is neither impeached nor contradicted, but may discredit him on account of the manner of testifying and attendant circumstances. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 193 S. W. 392.

Where the only evidence offered by plaintiff was the unimpeached testimony of defendant, which was directly opposed to plaintiff's contention, judgment for plaintiff was improper. *Steed v. Wren & Berry* (Civ. App.) 194 S. W. 963.

**211. Degree of proof in general.**—Absolute certainty in proving the amount of damages, in actions for injuries to land from overflow, is not required. *City of Ft. Worth v. Burgess* (Civ. App.) 191 S. W. 863.

**212. Sufficiency to support verdict or finding.**—Where a shipper testifies without objection to the value of property claimed to have been injured through the carrier's negligence, held, that there is sufficient basis for a judgment. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 175 S. W. 749.

To support a verdict there must be more than a scintilla of evidence; there must be evidence sufficient to warrant a reasonable belief of the existence of the fact sought to be inferred. *Canode v. Sewell* (Civ. App.) 182 S. W. 421.

Findings must rest on something more substantial than conjecture or surmise. *Galveston, H. & S. A. Ry. Co. v. Fred* (Civ. App.) 185 S. W. 896.

**213. Preponderance of evidence.**—A verdict sustained by the testimony of one witness and contradicted by several witnesses is not necessarily contrary to the preponderance of the evidence. *San Antonio Traction Co. v. Badgett* (Civ. App.) 158 S. W. 803.

A finding of fact in a cause tried to the court without a jury may be based upon the positive testimony of one witness, though it was contradicted by that of another. *Ratcliff v. Ratcliff* (Civ. App.) 161 S. W. 30.

Ordinarily and in the absence of statute, the party having the burden of proof in a civil action need only make proof by a preponderance of the evidence. *Gameson v. Gameson* (Civ. App.) 162 S. W. 1169.

**215. Particular facts or issues.**—In an action on a mutual benefit certificate, evidence held sufficient to show the loss of the certificate and its contents. *Sovereign Camp Woodmen of the World v. Ruedrich* (Civ. App.) 158 S. W. 170.

In an action by a brakeman for personal injuries, evidence held insufficient to show that a disease of the kidneys from which the brakeman was suffering was the result of his fall from the train. *St. Louis Southwestern Ry. Co. of Texas v. Cole* (Civ. App.) 159 S. W. 146.

In an action on a note transferred by the payee to plaintiff, evidence held sufficient to show that a letter negotiating the transfer and offered in evidence, showing that the transfer was to be without recourse, was duly received. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 163 S. W. 396.

In an action to recover an interest claimed under a will, evidence held to sustain a finding that one of the legatees was dead. *Wells v. Margraves* (Civ. App.) 164 S. W. 881.

In an action to recover a legatee's interest under a will, which gave the proceeds of the estate to certain persons and their children, and, if any of them died without children, gave their interest to the other legatees, evidence held not to show that the daughter of a certain legatee was dead or died without issue. *Id.*

Evidence in an action for personal injury to plaintiff's wife from falling while alighting from a car, in which defendant claimed that plaintiff was deliberately attempting to defraud, held to sustain a verdict for defendant. *Bryning v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 167 S. W. 826.

In an action for the purchase price of coal claimed to have been furnished to defendant's agent, evidence held insufficient to show the relationship of principal and agent. *Kohlberg v. Awbrey & Semple* (Civ. App.) 167 S. W. 828.

Evidence, in a bank's action on the fidelity bond of its cashier, held to show that the bank had complied with its warranties as to when his accounts were last examined, that there was then no shortage, and as to monthly examinations and reports as to his accounts. *Southern Surety Co. v. First State Bank of Montgomery* (Civ. App.) 167 S. W. 833.

In a suit to rescind the purchase of an automobile, because of false representations, evidence held to show that purchaser did not know that a dealer in automobiles was not defendant's agent, but that defendant, by its conduct, led him to believe that such agency existed. *Half Co. v. Jones* (Civ. App.) 169 S. W. 906.

Evidence held insufficient to establish a conspiracy between an insurance company and B. to terminate plaintiff's employment by the insurance company and to charge him with improper conduct in the padding of his expense account. *Oklahoma Fire Ins. Co. v. Ross* (Civ. App.) 170 S. W. 1062.

In a personal injury action, evidence held sufficient to sustain an award of \$4,500 damages. *Missouri, O. & G. Ry. Co. v. Plemmons* (Civ. App.) 171 S. W. 259.

That persons who made false representations approached plaintiff as to trade of property owned by defendant held not sufficient evidence that they were defendants' agents. *Kirkland v. Rutherford* (Civ. App.) 171 S. W. 1031.

Evidence held sufficient to show that plaintiff's condition was the result of the accident complained of. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 172 S. W. 750.

Evidence in a libel suit held not to show malice, so as to support a verdict for exemplary damages. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 173 S. W. 467.

Testimony of plaintiff that his earning capacity in some lines of business had been diminished held not overcome by proof that he received his pay while laid off and a larger salary on resuming work. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 173 S. W. 937.

Evidence in action for malicious prosecution for having broken and entered defendant's cars and stealing therefrom held sufficient to show that one making the arrest and prosecuting charge acted within his authority as employé or agent of defendant. *Missouri, K. & T. Ry. Co. v. Craddock* (Civ. App.) 174 S. W. 965.

In a suit on a note for unpaid price, evidence held not to show a rescission by the buyer. *Chilton v. Jennings* (Civ. App.) 178 S. W. 563.

In an action against defendant on a draft drawn by his store manager, evidence held insufficient to show that defendant authorized such draft. *Simon v. Temple Lumber Co.* (Civ. App.) 178 S. W. 681.

In an action by an automobile dealer to recover the value of a car bartered by a demonstrator, evidence held insufficient to show authority to barter. *Holmes v. Tyner* (Civ. App.) 179 S. W. 887.

Evidence, in an action for the value of an automobile sold by one representing himself as agent for plaintiff, held sufficient to support finding of agency. *Id.*

Testimony in an action to recover for repairs, that some one over the telephone represented himself as plaintiff's manager and agreed to a certain price, held insufficient to establish that fact. *W. K. Henderson Iron Works & Supply Co. v. Wilkins* (Civ. App.) 180 S. W. 913.

Evidence, in an action for libel in publishing plaintiff's unwarranted arrest and imprisonment on mere suspicion of connection with a murder committed in another state, held sufficient to show actual malice, justifying an award of exemplary damages. *Houston Chronicle Pub. Co. v. Bowen* (Civ. App.) 182 S. W. 61.

In father's action for loss of minor son's services, due to injuries, evidence held to sustain finding that minor son's capacity to perform manual labor had been destroyed or greatly impaired. *Acme Laundry v. Weinstein* (Civ. App.) 182 S. W. 408.

In an action for the value of services in cleaning and drilling wells, evidence held insufficient to support a finding that the one who ordered the work done was the agent of the owner of the land to contract for the work, or for any other purpose, or that he purported to act as such. *Eardley Bros. v. Burt* (Civ. App.) 182 S. W. 721.

Evidence held to show that supplies were furnished on the defendant's credit at the instance of his agent who acted within the scope of his authority. *Daggett v. Avis Hardware Co.* (Civ. App.) 183 S. W. 20.

In a switchman's action for injuries against his employing railroad, evidence held sufficient to support a finding that plaintiff sustained permanent injuries to his back and spinal column resulting in paralysis of his legs and certain organs. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

Where plaintiff testified that he lost a certain sum on account of defendant's refusal to perform their contract, and defendant failed to show on cross-examination the basis on which such sum was figured, plaintiff's testimony was a sufficient basis for judgment for the amount testified to, especially where it was a mere mathematical computation. *Bain v. Polasek* (Civ. App.) 184 S. W. 279.

In a suit for the price of horses, where defendant claimed plaintiff was bound to recompense him for duties paid on the animals, evidence held to warrant a finding that defendant's brother, to whom the duties were paid, was defendant's agent authorized to receive payment. *Hazelrigg v. Naranjo* (Civ. App.) 184 S. W. 316.

In an action by a contractor for a house against the owners for a balance, evidence held sufficient to support finding that there was no proof that the building could have been rented from the time it was contracted to be finished until it was actually finished. *Kaufman v. Christian-Wathen Lumber Co.* (Civ. App.) 184 S. W. 1045.

Evidence in buyer's suit for loss of profits from defendant's refusal to deliver a quantity of bran according to its contract, held to show that the seller's agent was authorized to bind him by the contract of sale. *Kolp v. S. F. Scattergood & Co.* (Civ. App.) 185 S. W. 329.

Evidence that plaintiff sent for a doctor and accepted his services, together with the doctor's statement that his services were of the reasonable value of \$25, if plaintiff could pay it, is sufficient to sustain an award of that amount. *Tarrant County Traction Co. v. Bradshaw* (Civ. App.) 185 S. W. 951.

Where the defense to suit upon a note and to foreclose a land lien securing it was that the agent of plaintiff had accepted a conveyance of the land in payment of the debt, evidence held insufficient to show that the agent had the authority to accept such conveyance as payment. *Peck v. Loux* (Civ. App.) 185 S. W. 955.

The connection between a note and guaranty contract not being shown, it cannot, on evidence, at most merely raising a surmise, be held that the consideration of the note failed, defeating recovery thereon, on the cancellation of the contract. *Baker v. Brown* (Civ. App.) 186 S. W. 813.

A finding that a road contractor knew that certain warrants were given him in full payment is sustained, where he appeared before the authorities and protested against such limitation before cashing the warrants. *Clopton v. Caldwell County* (Civ. App.) 187 S. W. 400.

In suit for automobile wrongfully attached and sold as property of another, testimony held not to constitute such proof of reasonable market value when taken as to afford basis for judgment. *Taylor Bros. Jewelry Co. v. Kelley* (Civ. App.) 189 S. W. 340.

In garnishment proceedings on account of goods sold to garnishee in violation of Bulk Sales Law, evidence held sufficient to warrant trial court in inferring that garnishee had disposed of goods, especially in absence of evidence to contrary. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

Felonious killing of insured by beneficiary, rendering policies void, is not shown by finding of coroner, or newspaper accounts of homicide. *New York Life Ins. Co. v. Veith* (Civ. App.) 192 S. W. 605.

#### RULE 13. PUBLIC OFFICERS ARE WHAT THEY ARE REPUTED TO BE

**De facto officers in general.**—A de facto officer can demand pay for his services, so that a vote to give him such compensation would not have the effect of appointment, confirmation, and qualification. *Uhr v. Brown* (Civ. App.) 191 S. W. 379.

A de facto officer can demand pay for his services. *Id.*

#### RULE 14. THE REGULARITY OF OFFICIAL ACTS IS PRESUMED

**In general.**—Under Interstate Commerce Act, § 6, when schedules adopting the interstate joint rate for freight under the Hepburn Act were printed and filed with the Commerce Commission and approved, publication of the new rates prior to approval would be presumed, and a road could recover such rates without proving such publication. *International & G. N. Ry. Co. v. Carter* (Civ. App.) 180 S. W. 663.

In the absence of allegation and proof to the contrary, officers are presumed to do their duty. *Riley v. Coleman County* (Civ. App.) 181 S. W. 743.

The presumption is that the officer charged with issuing a permit to a foreign corporation on its filing of an affidavit showing its deposit of \$100,000 with the state treasurer did his duty. *Commonwealth Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 184 S. W. 247.

**Of officers in land department.**—Under art. 5306, requiring surveyors to make plats and file sketches thereof in the general land office, maps from the land office would be presumed to be a reproduction of such plats and sketches, etc. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

Under art. 5306, it would be presumed that when a patent issued in the case of a block for any subdivision thereof to the grantee, the land commissioner had not only the field notes, but the plat returned with the field notes before him. *Id.*

**Of clerks of courts.**—In action against title abstract company for failure to make diligent search for matters affecting title to land bought, court could presume the county clerk without delay recorded and noted a trust deed in index of the Record of Mortgages and Trust Deeds of the county, as required by arts. 6790, 6792, 6793. *Decatur Land, Loan & Abstract Co. v. Rutland* (Civ. App.) 185 S. W. 1064.

**Of sheriffs and constables.**—There is a presumption that the sheriff who served a writ of sequestration seized the property mentioned in the writ. *Hawkins v. First Nat. Bank of Canyon, Texas* (Civ. App.) 175 S. W. 163.

**Of surveyors.**—In the absence of proof to the contrary, it must be presumed that surveyors, in making a survey, did their duty and marked the corner thereof with some object of reasonable permanence, and the presumption is that the original survey was actually made on the ground. *Harkrider v. Gaut* (Civ. App.) 167 S. W. 164.

It will be presumed that a surveyor marked a corner which his notes state he established on a tree locating it. *Goodrich v. West Lumber Co.* (Civ. App.) 182 S. W. 341.

Under Rev. St. 1911, art. 5340, as to notice of surveyor's running division line between two occupants, where such survey is proved, it will be presumed, in the absence of proof to the contrary, that the notice was given. *Bivins v. Lanier* (Civ. App.) 186 S. W. 779.

The law presumes that surveys were made as stated in field notes approved by the General Land Office. *Nanny v. Vaughn* (Civ. App.) 187 S. W. 499.

**RULE 15. COURTS WILL, WITHOUT PROOF, TAKE NOTICE OF FACTS OF A PUBLIC OR GENERAL NATURE**

**2. Matters of common knowledge in general.**—The court could not judicially know, nor could the jury from common knowledge say, that mud and water two inches deep was injurious or uncomfortable to hogs during summer months. *Ft. Worth & D. C. Ry. Co. v. Atterberry* (Civ. App.) 190 S. W. 1133.

**4, 5. Qualities and properties of matter.**—The court cannot judicially know that oil escaping from a pipe line is poisonous, and will cause the death of cattle drinking it. *Texas Co. v. Earles* (Civ. App.) 164 S. W. 28.

The court will take judicial cognizance of the fact that rails and ties left on a railroad right of way will ultimately become worthless if they remain unused. *Enid, O. & W. Ry. Co. v. State* (Civ. App.) 181 S. W. 498.

**8. Geographical facts.**—The court judicially knows that Bowie county lies along the eastern border of Texas, adjacent to the line of Arkansas. *Wade v. Crump* (Civ. App.) 173 S. W. 538.

The courts will not take judicial notice of the scenic beauty along the line of a railway company. *Texarkana & Ft. S. Ry. Co. v. Schevoight* (Civ. App.) 181 S. W. 802.

Court will take judicial cognizance of fact that standard time at Dallas, Tex., is the actual time along ninetieth degree of longitude west from Greenwich, that Dallas is approximately on longitude 96° 51' 30" west from Greenwich, and that there is a difference of four minutes in time for every degree of longitude. *Walker v. Terrell* (Civ. App.) 189 S. W. 75.

**9. Historical facts.**—The Court of Civil Appeals knows as a matter of history that the Civil War actually closed in Texas in May, 1865, when the Confederate forces surrendered to the federal government. *Fielder v. Houston Oil Co. of Texas* (Civ. App.) 165 S. W. 48.

Judicial notice will be taken that Palafox was established as a town by the Spanish government. *Alexander v. Garcia* (Civ. App.) 168 S. W. 376.

**12. Facts relating to human life, health, habits, and acts.**—The court, in a negligence case, could not take judicial notice that plaintiff, a young man, had such a life expectancy that if \$10 per month be allowed for the remainder of his life for permanently diminished capacity to labor the amount so claimed would give an aggregate of more than \$1,000. *Cisco Oil Mill v. Van Geem* (Civ. App.) 166 S. W. 439.

The courts will take judicial notice that vaccination is, in the common belief, a preventative of smallpox. Hence, where it was contended that a school regulation requiring vaccination of the pupils was invalid, it is unnecessary for the jury to find that vaccination is a preventative of smallpox. *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840.

The courts can take judicial notice that the danger of contagion from smallpox is equally great in theaters and street cars as in the schools. *Id.*

**14. Weights, measures, and values.**—The court will take judicial notice that a gallon of water weighs 8½ pounds. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

The court cannot, in construing a deed, take judicial notice that the recited consideration of \$500 for the fee in 1,579 acres of land was inadequate, so as to construe the deed to be a quitclaim only. *Baldwin v. Drew* (Civ. App.) 180 S. W. 614.

It is matter of common knowledge that a reasonable amount of pasture land when sold in connection with a farm has a higher market value than when sold otherwise. *City of Ft. Worth v. Burgess* (Civ. App.) 191 S. W. 863.

The court and jury do not judicially know what would be a reasonable attorney's fee which art. 2178, authorizes plaintiff to recover in action on bona fide claim for stock killed. *Quanah, A. & P. Ry. Co. v. Price* (Civ. App.) 192 S. W. 805.

**15. Management and conduct of occupations.**—Courts cannot take judicial notice that the business of keeping and selling nonintoxicating malt liquors under a federal license is not calculated to disturb the peace and good order of society or injuriously affect the public welfare so as to preclude the regulation thereof by the exercise of the state's police power. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

Judicial notice will be taken that when lands are rented under the farm tenant system by the year the rent is not due until a reasonable time has elapsed for harvesting the crops. *J. B. Farthing Lumber Co. v. Williams* (Civ. App.) 194 S. W. 453.

**16. — Railroads.**—Courts can take judicial notice of the fact that engines and cars extend outside the rails upon which they run. *International & G. N. R. Co. v. Walters* (Civ. App.) 165 S. W. 525, reversing judgment on rehearing 161 S. W. 916.

The court judicially knows that trains do not run at all times on any railroad in the state. *City of Waxahachie v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 183 S. W. 61.

The state courts will take judicial notice that practically all of the railroads in the state are engaged in interstate commerce. *State v. Beaumont & G. N. R. R.* (Civ. App.) 183 S. W. 120.

**19. Matters relating to government and its administration in general.**—The Court of Criminal Appeals knows as a matter of common knowledge that the fire limits in a city include the thickly settled and business parts of the city. *Ex parte Bradshaw*, 70 Cr. R. 166, 159 S. W. 259.

The Court of Civil Appeals takes judicial notice that the purchase of public free school land from the state is upon a condition of occupancy which is more or less onerous. *Sears v. Ainsworth* (Civ. App.) 166 S. W. 60.

The courts will take judicial notice that the state was originally the owner of all lands not granted prior to the organization of the state. *State v. Post* (Civ. App.) 169 S. W. 401, certified questions answered by Supreme Court 169 S. W. 407, and judgment reversed 171 S. W. 707, 106 Tex. 500.

The court judicially knows that the proper representative of the state could have been served with a citation on appeal within a day or two after the issuance of citation. *Cruz v. State* (Cr. App.) 172 S. W. 235.

**22. Foreign governments.**—The court judicially knows the existence of a revolution and anarchy in Mexico, and the consequent powerlessness of its courts. *Mendiola v. Gonzales* (Civ. App.) 185 S. W. 389.

**23. Laws of the state—Public statutes.**—Sp. Laws 1909, pp. 601-611, will not be considered by the courts, in the absence of proof of its existence; there being no provision therein making it a public act and requiring the courts to take judicial notice of it. *Galveston-Houston Electric Ry. Co. v. Stautz* (Civ. App.) 166 S. W. 11.

**24. — Private statutes.**—The court cannot take judicial notice of a special law not made a public act by its own provisions. *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

**26. — Municipal ordinances.**—The courts do not take judicial notice of municipal ordinances, but they must be averred and proved like other facts. *Woodruff v. Deshazo* (Civ. App.) 181 S. W. 250.

**27. Laws of United States.**—The courts will take judicial notice that before statehood the decisions of the Supreme Court of the United States were the law of the land in the territory of New Mexico. *Stamp v. Eastern Ry. Co. of New Mexico* (Civ. App.) 161 S. W. 450.

The courts of a state will take judicial notice of federal statutes. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

**28. Laws of other states.**—The courts do not take judicial notice of the laws of other states. *Ogg v. Ogg* (Civ. App.) 165 S. W. 912; *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

The full faith and credit clause of the federal Constitution, article 4, § 1, does not require one state to take judicial notice of the laws of another state. *Tourtelot v. Booker* (Civ. App.) 160 S. W. 293.

A foreign law must be proved. *Stamp v. Eastern Ry. Co. of New Mexico* (Civ. App.) 161 S. W. 450.

A telegraph company, sued in Texas for mental anguish due to its failure to deliver a message received in New Mexico for transmission to one temporarily in Texas, has the burden of proving the laws of New Mexico on the issue of the right to recover for mental anguish. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

**31. Terms of courts.**—Judicial notice will be taken by the Court of Civil Appeals of the terms of the district court in Harrison county. *Sanders v. Bledsoe* (Civ. App.) 173 S. W. 539.

Court judicially knows there are four terms of district court held in Potter county annually, that suits for collection of delinquent taxes have precedence on trial of causes, when executions could have been issued on judgments, and when sales could have been made. *Potter County v. Boesen* (Civ. App.) 191 S. W. 787.

**32. Rules and procedure of courts.**—Court judicially knows there are four terms of district court held in Potter county annually, that suits for collection of delinquent taxes have precedence on trial of causes, when executions could have been issued on judgments, and when sales could have been made. *Potter County v. Boesen* (Civ. App.) 191 S. W. 787.

**33. Judicial proceedings and records.**—The district court could take judicial notice of a judgment entered by it. *Yarbrough v. Etheredge* (Civ. App.) 163 S. W. 998.

The Court of Civil Appeals will take judicial notice of the opinion and record on a former appeal of the same action. *Good v. Texas & P. Ry. Co.* (Civ. App.) 166 S. W. 670.

Upon transcript on appeal, held that the court could not judicially know that judgment was rendered upon an agreement to arbitrate, or upon an award, and hence could not consider an assignment of error therein. *Hamilton v. Eiland* (Civ. App.) 181 S. W. 260.

It was the duty of the district judge to take judicial cognizance of the fact that his order appointing a temporary receiver had been appealed from, and it was the duty of the Court of Civil Appeals to take judicial cognizance of its own records in such appeal. *Abilene Independent Telephone & Telegraph Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 185 S. W. 356.

In an action for killing of a cow begun in justice court, appealed to county court, and finally appealed to Court of Civil Appeals, the court may take judicial notice that an award of \$15 as attorney's fees was not excessive. *Kansas City, M. & O. Ry. Co. of Texas v. Oates* (Civ. App.) 185 S. W. 1014.

While a garnishment suit is docketed separately from the main suit, it is ancillary to and a part of the main suit, and the court on appeal from judgment in the garnishment suit will take judicial notice of the proceedings in the main suit. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

The Court of Civil Appeals will take judicial notice of the record on a former appeal and of the facts proved on a former trial. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

The court will not take judicial notice of its records in another case until offered in evidence. *General Bonding & Casualty Ins. Co. v. Lawson* (Civ. App.) 194 S. W. 1020.

**36. Administrative rules and regulations.**—A shipper suing the initial carrier of an interstate shipment must introduce a regulation of the State Railroad Commission if he desires to rely thereon. *Stevens & Russell v. St. Louis Southwestern Ry. Co.* (Civ. App.) 178 S. W. 810.

The court will not take judicial notice of a lease of the operating part of a railroad, although authorized by the Railroad Commission under a statute. *Pecos & N. T. Ry. Co. v. Chatten* (Civ. App.) 185 S. W. 911.

**RULE 16. ANCIENT WILLS, DEEDS AND OTHER INSTRUMENTS MORE THAN THIRTY YEARS OLD, WHEN OFFERED IN EVIDENCE, UNBLEMISHED BY ALTERATIONS AND COMING FROM SUCH CUSTODY AS AFFORDS A REASONABLE PRESUMPTION IN FAVOR OF GENUINENESS, WITH OTHER CIRCUMSTANCES OF CORROBORATION, WILL BE ADMITTED IN EVIDENCE WITHOUT PROOF OF THEIR EXECUTION**

**In general.**—The execution of a power of attorney under which an ancient instrument purports to have been made will be presumed. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**Deed.**—Where the deed of a trustee was an ancient document, held, that it would be presumed that he complied with the provisions of the trust deed. *Wacaser v. Rockland Savings Bank* (Civ. App.) 172 S. W. 737.

Lapse of 30 years since the execution of a deed by a county judge without record evidence of its authorization held insufficient to create a presumption that he was given authority. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

Deed of a railroad company under which neither the grantee nor his heirs had asserted any claim for more than 50 years held inadmissible as an ancient instrument on the ground that the power under which it purported to have been executed would be assumed. *Emory v. Bailey* (Civ. App.) 181 S. W. 831.

Recitals in ancient deeds are admissible to prove sale of personalty, such as corporate stock, without showing of possession under recited transfer, assertion of title thereunder, or enjoyment of property transferred. *Condit v. Galveston City Co.* (Civ. App.) 186 S. W. 395.

Where county records are shown to have been destroyed by fire, recitals in sheriff's deed nearly 40 years old, which was ancient instrument, are sufficient to show that sale was made on execution under valid judgment, and deed cannot be excluded on ground that it was only secondary evidence of facts recited. *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

That deed is ancient one will not justify admission of record book showing record of deed. *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

**Land certificates.**—Ex parte affidavits on file in the Land Office are not admissible to prove the facts therein recited on the ground that they are ancient instruments, though they have been on file for more than 30 years. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

A bill of sale of an unlocated duplicate land certificate, which has existed for more than 30 years and which has been recorded for more than 25 years, is properly admitted in evidence as an ancient instrument. *Id.*

**Maps and plats.**—That a map of a city addition had been hanging in the county clerk's office for 30 years, and its correctness not questioned during that period, was strong evidence that it was correct. *Spencer v. Levy* (Civ. App.) 173 S. W. 550.

**Grants.**—The execution of Mexican land grants held not sufficiently proven to admit copies in evidence. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

**Letters.**—A letter addressed to the Commissioner of the General Land Office and forming a part of the records of the Land Office is admissible as an archive when more than 30 years old. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

**RULE 17. THE EXISTENCE OF A DEED MAY BE PRESUMED FROM POSSESSION UNDER CLAIM OF TITLE CORROBORATED BY OTHER CIRCUMSTANCES**

**In general.**—To sustain a presumption of the existence or execution of a deed from circumstances, actual possession is not necessary, but open claim of ownership and acquiescence by the holder of the adversary title with knowledge of his interest held essential. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

**RULE 18. A GRANT MAY BE PRESUMED IN SUPPORT OF A JUST AND LEGAL CLAIM, FROM LONG AND UNINTERRUPTED POSSESSION**

**In general.**—To sustain a presumption of the existence or execution of a deed from circumstances, actual possession is not necessary, but open claim of ownership and acquiescence by the holder of the adversary title with knowledge of his interest held essential. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

In trespass to try title, in which both parties claim under grants from sovereignty, and the only issue is as to boundary, doctrine of presumed grant invoked by defendant

had no applicability; hence a charge that evidence could not be considered as establishing an adverse claim was not reversible error. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**RULE 19. A FACT MAY BE INFERRED FROM THE PROVED EXISTENCE OF A RELEVANT FACT IN THE ABSENCE OF OPPOSING EVIDENCE**

**In general.**—The mere fact that plaintiff knew that the superintendent did not have authority to allow him to take his wife to live with him in railroad bunk cars will not support an inference that plaintiff knew the superintendent was without authority to allow his young sons to accompany him. *Chicago, R. I. & G. Ry. Co. v. Oliver* (Civ. App.) 159 S. W. 853.

Direct evidence is not required by law, and juries may indulge all reasonable inference from the facts shown by the evidence, or which unbiased and rational minds can properly deduce from the facts proved. *Cotton v. Cooper* (Civ. App.) 160 S. W. 597.

A deed and a bill of sale of personalty with the grantee's simultaneously executed mortgage and notes to secure the payment of the purchase price held proof that the purchase money was not fully paid at the time of the conveyance. *Vinson v. W. T. Carter & Bro.* (Civ. App.) 161 S. W. 49, writ of error denied, 106 Tex. 273, 166 S. W. 363.

Proof that the common law prevails in New Mexico does not show that damages for mental anguish occasioned by a delay in delivering a message are not recoverable there. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

Where there were only a few instances of the crossing of defendant's right of way by herds of cattle, it could not be presumed that defendant had knowledge thereof. *Irving v. Texas & P. Ry. Co.* (Civ. App.) 164 S. W. 910, affirming judgment on rehearing 157 S. W. 752.

Where it could be equally inferred that a car door which struck a brakeman came open because of a defective latch or because it had not been fastened, the jury could not choose the inference that it was because of the defective latch, as an inference of negligence cannot be adopted unless it is more reasonable than the inference of its absence. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

An obviously inadequate consideration in itself tends to show that an injured servant did not, as he claims, sign a release. *San Antonio, U. & G. R. Co. v. Moya* (Civ. App.) 173 S. W. 608.

In an action for death of one on a switching track, suggested inferences held to amount to no more than surmises or conjectures which could not reasonably be given any probative force. *St. Louis, S. F. & T. Ry. Co. v. West* (Civ. App.) 174 S. W. 287.

Proof of the explosion of a locomotive which caused plaintiff's injury held not to authorize the presumption that the explosion occurred on account of excessive steam pressure. *McGraw v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 182 S. W. 417.

That a deed by a town to which land had been granted included only to a certain line is not conclusive that the deed to the town was of the same extent, although it may be evidence to that effect. *Crosby v. Stevens* (Civ. App.) 184 S. W. 705.

In action against railroad for death of yard clerk, ignorance of decedent of approach of train which killed him cannot be inferred from fact he was killed. *Galveston, H. & S. A. Ry. Co. v. Fred* (Civ. App.) 185 S. W. 896.

In suit against buyers of stallion by contract stipulating for return by certain date, evidence of defendants' counsel held presumptive evidence that letter offering to return horse had been received by sellers. *First Nat. Bank of La Fayette, Ind., v. Fuller* (Civ. App.) 191 S. W. 830.

From evidence that locomotive was properly equipped with spark arrester and carefully operated, but that emission of sparks was observed, it might be inferred that arrester was out of order. *Nussbaum & Scharff v. Trinity & B. V. Ry. Co.* (Sup.) 194 S. W. 1099.

**Fraud and conspiracy.**—That defendants withdrew their cross-actions, and plaintiff's attorney stated that he represented them and that they made no defense, was not evidence of a conspiracy to pervert the course of justice. *Varn v. Gonzales* (Civ. App.) 193 S. W. 1132.

**Motive and malice.**—Malice may be inferred from the reckless publication of libelous matter. *Cobb v. Garlington* (Civ. App.) 193 S. W. 463; *Houston Chronicle Pub. Co. v. Wegner* (Civ. App.) 182 S. W. 45; *Same v. Bowen* (Civ. App.) 182 S. W. 61; *Same v. Quinn* (Civ. App.) 184 S. W. 669.

**RULE 20. PAROL OR EXTRINSIC EVIDENCE IS GENERALLY INADMISSIBLE TO CONTRADICT, VARY OR ADD TO THE TERMS OF A WRITTEN INSTRUMENT**

**4. Judicial records and proceedings—Affecting jurisdiction.**—Where a judgment adjusting property rights between an infant and his guardian did not show on its face that it was void because the infant was represented only by the guardian, parol evidence that no issue was made between the parties, and that the infant was not in court to settle any dispute with the guardian, was admissible to show that the judgment was void. *Pearce v. Heyman* (Civ. App.) 158 S. W. 242.

**8. Wills.**—Where the language of an instrument disposing of property does not clearly express the intention of the maker as to whether it is a deed or a will, parol evidence is admissible to determine intention. *Low v. Low* (Civ. App.) 172 S. W. 590.

In absence of ambiguity in terms of will, previous conversations and other matters in parol will not be considered to ascertain testator's intent. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.



11. **Deeds—Description of premises.**—Where the description in a deed is definite and certain, parol evidence that other land than that described was intended to be conveyed, is not admissible in trespass to try title. *Lewis v. Bennette* (Civ. App.) 193 S. W. 233.

14. — **Time of taking effect.**—In trespass to try title, where court, in submitting question, properly assumed delivery of deed to plaintiff by owner of land, legal effect of execution and delivery of deed could not be changed by jury finding that owner did not intend that deed should pass title until his death, since, when actual delivery of deed is shown, deed defines its purpose, and cannot be contradicted except upon ground of fraud, accident, or mistake. *Johnson v. Masterson* (Civ. App.) 193 S. W. 201.

19. **Contracts in general.**—In view of art. 2276, providing for the keeping of the minutes of the court of county commissioners, a contract between the county commissioners' court and a third person embraced in a written proposal and acceptance cannot be varied by parol. *Douglass v. Myrick* (Civ. App.) 159 S. W. 422.

Where the terms of a contract are reduced to writing, parol evidence is not admissible to add to or vary its terms, in the absence of fraud, accident, or mistake. *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438.

Where the contract sued on was plain, and was not attacked for fraud, accident, or mistake, statements by either party after its execution, not amounting to a new contract, were inadmissible to contradict, vary, or impeach its terms. *Dr. Koch Vegetable Tea Co. v. Malone* (Civ. App.) 163 S. W. 662.

One signing a stock subscription contract which recites that no representation by the person taking the subscription shall annul the contract, unless reduced to writing, may not, in the absence of fraud, accident, or mistake, show by parol an agreement not embodied in the contract. *Cattlemen's Trust Co. v. Beck* (Civ. App.) 167 S. W. 753.

In an action for breach of contract, parol testimony of prior negotiations seeking to vary the terms of the contract held inadmissible. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Civ. App.) 171 S. W. 1103.

Parol testimony is inadmissible to vary a written instrument, in the absence of fraud inducing its execution. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

A written contract cannot be varied, altered, or contradicted by parol, except for fraud, accident, or mistake. *Lummus Cotton Gin Sales Co. v. Farmers' Co-op. Gin Co.* (Civ. App.) 176 S. W. 894.

In the absence of fraud, accident, or mistake, oral evidence is not admissible to contradict or vary the terms of a written instrument. *Adams v. First Nat. Bank of Waco* (Civ. App.) 178 S. W. 993.

20. — **Completeness of writing and presumption in relation thereof.**—It is presumed that a written contract embodied the whole contract, and previous statements or representations of the parties cannot be brought into the contract by parol evidence, except where the contract consisted of distinct parts, only part of which was reduced to writing, or something was omitted by fraud, accident, or mistake, in which cases parol evidence is admissible. *South Texas Mortgage Co. v. Coe* (Civ. App.) 166 S. W. 419; *Texas Mortgage Co. v. Erwin* (Civ. App.) 166 S. W. 422.

Where a writing is couched in such terms as to be plain and without any uncertainty as to the object or extent of the agreement, it is conclusively presumed that the whole agreement was reduced to writing. *James v. Doss* (Civ. App.) 184 S. W. 623.

22. **Contracts for buildings and other works.**—Under a contract binding defendant to contribute to the drilling of a test oil well and providing that the contribution should not be paid until operations began, the well could be drilled in the customary way by using such tools as would be most advantageous to the drillers, so that it could not be shown in an action on the contract that the agreement was to drill with "cable tools." *Herron-Robbins v. Allen* (Civ. App.) 159 S. W. 1046.

Testimony of defendant's witness as to oral agreement to complete construction work under written contract within 60 days held inadmissible. *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739.

23. **Contracts of sale.**—In an action for the agreed price of machinery sold under a written order stating the price, evidence that the machinery in good condition was worth less than half the price held inadmissible. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 167 S. W. 256.

Evidence that the form of the contract of sale of a traction engine was a form used for stationary engines held inadmissible. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

A seller may by written contract limit his warranty of the article sold, and, in the absence of fraud, accident, or mistake, parol evidence is not admissible to vary or contradict this contract. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

25. **Bills and notes.**—In the absence of an allegation of fraud, accident, or mistake, parol evidence was not admissible to alter a note. *Baldwin v. W. H. Coyle & Co.* (Civ. App.) 185 S. W. 426.

28. **Contracts of insurance.**—Parol negotiations and agreement for insurance preceding execution of the policy, cannot be shown to vary or contradict its terms. *Great Eastern Casualty Co. v. Thomas* (Civ. App.) 178 S. W. 603.

Oral evidence to establish fact disclosed by policy itself which was unambiguous is properly excluded. *First Texas State Ins. Co. v. Burwick* (Civ. App.) 193 S. W. 165.

29. **Contracts of carriage.**—In an action against an initial carrier for loss of goods, plaintiff was entitled to testify that certain notations appearing on a copy of the shipping contract had been written thereon after she signed the original. *St. Louis, B. & M. Ry. Co. v. Gould* (Civ. App.) 165 S. W. 13.

31. **Memoranda or writing not constituting contract or disposition of property.**—A certificate issued by a bank showing the deposit of drafts with bills of lading attached

being merely a receipt, plaintiff could testify as to the arrangement on which the drafts were received. *First Nat. Bank of Gorman v. Mangum* (Civ. App.) 176 S. W. 1197.

**32. Writing incomplete on its face.**—Where a contract for the sale of land contained an equivocal expression, evidence of declaration made by the second agent of the vendor is admissible, where, until he signed the contract, it was not binding, though signed by another agent. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 184 S. W. 523.

**34. Evidence extrinsic to writing in general.**—Where a telegram was addressed "to Calvin Stewart, Bernice, La., care Frank Johnson, phone," it does not contradict the telegram to show, by parol testimony, that the company accepted it and undertook to deliver it, and to telephone same from its office at Bernice to the addressee at the residence of Frank Johnson. *Stewart v. Western Union Telegraph Co.* (Civ. App.) 158 S. W. 1034.

**41. Matters not included in writing or for which it does not provide—Contracts in general.**—Where a check was given as part of a more comprehensive transaction, the terms of which were not attempted to be expressed in writing, parol evidence of the terms of the transaction in which the check was given and of the mode provided for the check's discharge is admissible. *Rahe v. Yett* (Civ. App.) 164 S. W. 30.

Where no specific date of payment is named in the note, it is permissible to prove by extrinsic evidence, and especially by a notation in the margin of the note, the date agreed upon by the parties. *Walker v. Flanary* (Civ. App.) 178 S. W. 992.

In action for breach of timber sawing contract, it was error to exclude evidence that it was contemplated by both parties that green timber only was to be made into lumber; the contract not specifically covering the point. *McKinnon v. Porter* (Civ. App.) 192 S. W. 1112.

**43. — Contracts of sale.**—Evidence held insufficient to show that written transfer of partner's interest in business purported to express only a part of the transaction so as to authorize parol proof of a transfer of the claim sued on. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

**44. — Contracts of carriage.**—In an action against an initial carrier for loss of goods, there being no valuation in the shipping contract, plaintiff was entitled to prove their value. *St. Louis, B. & M. Ry. Co. v. Gould* (Civ. App.) 165 S. W. 13.

**45. Parties to instrument or obligation.**—A deed is a contract under seal, and parol evidence to prove that the grantee's partner, not named therein, was interested, was inadmissible to show such partner's liability on notes given for the price by the grantee, and thus to vary the deed. *Manley v. Noblitt* (Civ. App.) 180 S. W. 1154.

A contract of reinsurance, being unambiguous parol evidence, was inadmissible to show an intention to contract for the benefit of insured. *Southwestern Surety Ins. Co. v. Stein Double Cushion Tire Co.* (Civ. App.) 180 S. W. 1165.

**48. Existence of condition or contingency—Deeds—Contracts of sale.**—On an order for the sale of goods to be shipped at the seller's earliest convenience, the verbal agreement of the seller's salesman that the order should not be delivered to the seller within 30 days was binding upon the seller, and the contract was avoided by a violation of the agreement. *National Novelty Import Co. v. Duncan* (Civ. App.) 182 S. W. 888.

**49. — Bills and notes.**—The terms of a promissory note are conclusive of the contract, and cannot be changed by parol evidence of an understanding that it was never to be paid. *Lockney State Bank v. Damron* (Civ. App.) 179 S. W. 552.

**53. Nature and extent of liability.**—Evidence contradicting a written agreement with respect to whether the liability thereunder was joint or several was properly excluded. *Galveston-Houston Electric Ry. Co. v. Stautz* (Civ. App.) 166 S. W. 11.

**55. — Bills and notes and indorsement thereof.**—Whatever the apparent relation of parties to a note, their true relation as between themselves may be shown by parol evidence. *Shepherd v. Mott* (Civ. App.) 166 S. W. 128.

Where one not the payee of a note indorsed it at the time of its inception without words defining his undertaking, parol evidence to ascertain the understanding of the parties held admissible. *Brooks v. Stevens* (Civ. App.) 178 S. W. 30.

**56. — Contracts of guaranty.**—Where a contract of guaranty which was part of the same transaction as a note does not show in its face that the liability of the defendant on the note was only that of guarantor, that fact may be shown by parol if it was known to the payee. *May v. Waniger* (Civ. App.) 164 S. W. 1106.

**57. — Principal or surety.**—One not the payee, who signs his name on the back of a note at date of its inception without explanatory words, may show by parol whether his liability is as promisor or surety. *Clevenger v. Commercial Guaranty State Bank* (Civ. App.) 183 S. W. 65.

**58. Effect of writing as to persons not parties thereto or privies.**—Evidence that, at the time of the purchase, the purchaser was notified that a house on the lot was not a part of the realty, and not intended to be conveyed, by the deed, was not inadmissible as contradicting the legal effect of the deed; the owner of the house being a stranger to the deed. *Clayton v. Phillipp* (Civ. App.) 159 S. W. 117.

**59. Writings collateral to issues in general.**—In an action for the purchase price of coal furnished a party having charge of the heating and lighting of a hotel, where the question was whether such purchaser was an independent contractor or the agent of the hotel proprietor, the purchaser may testify that a note given by him in connection with his business was really the obligation of the proprietor, and that it was understood the proprietor should discharge it, without violating the parol evidence rule. *Kohlberg v. Awbrey & Semple* (Civ. App.) 167 S. W. 828.

**60. Evidence for purpose other than varying rights or liabilities dependent upon terms of writing.**—Where plaintiffs claimed under the 10 years' limitation and not under

a deed, evidence by plaintiff that the lots, which included what defendants claim is an alley, were all under fence when he bought them, and that he had possession thereof for 12 years, was not objectionable as varying the terms of the deed which contained a reference to a plat and map calling for an alley. *Guadalupe County v. Poth* (Civ. App.) 163 S. W. 1050.

In an action prosecuted by attorneys, assignees of one-half the cause of action, after their client had compromised, where the written contract between the client and the attorneys expressed only the agreement to pay one-half the recovery and not the fact of the assignment, the client was properly permitted to testify to a conversation with defendant's agent at the time of the compromise, in which he told the agent of the interest of the attorneys; it not varying the written contract. *St. Louis, S. F. & T. Ry. Co. v. Thomas* (Civ. App.) 167 S. W. 784.

Where buyer sought to recover the purchase price of motor truck on the ground that it was secondhand and wholly defective, evidence that the seller agreed to furnish a mechanic to put the truck in condition held admissible to show good faith of the buyer in requesting that a mechanic be sent, and not as contradicting the warranty of sale. *Avery Co. of Texas v. Staples Mercantile Co.* (Civ. App.) 183 S. W. 43.

**61. Declarations, representations, and expressions of opinion preceding contract.**—Oral statements of a party prior to the execution of a written contract were merged therein, and, though received in evidence without objection, could not form the basis of a finding or judgment. *Lock v. Citizens' Nat. Bank* (Civ. App.) 165 S. W. 536.

Where a written contract for the sale of land provided for drilling of a well and guaranteed water, evidence that vendor's agent just before signing said the well would produce enough water to irrigate the land is admissible. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 184 S. W. 523.

**64. — Discharge without performance.**—Notwithstanding a written contract of partnership, it could be shown by parol, for the purpose of showing that no partnership in fact existed, that one of the parties ignored and disregarded the contract and wholly failed to furnish his contribution to the partnership capital. *Rush v. First Nat. Bank* (Civ. App.) 160 S. W. 609, denying rehearing 160 S. W. 319.

**65. — Estoppel or waiver.**—In action on policy on stock of lumber which insurer claimed to be void for want of inventory required by policy, evidence that before its issuance insurer's agent told insured what inventory should contain, that he followed such instruction, and that his inventory was approved by agent held admissible. *Camden Fire Ins. Co. v. Yarbrough* (Civ. App.) 182 S. W. 66.

**RULE 21. CONTEMPORANEOUS WRITTEN AGREEMENTS RELATING TO THE SAME SUBJECT ARE TO BE CONSTRUED TOGETHER, AND SEVERAL DISTINCT STIPULATIONS ARE TO BE CONSTRUED SO AS TO GIVE EFFECT TO ALL. A PRIOR OR CONTEMPORANEOUS PAROL AGREEMENT CONSISTENT WITH AND FORMING A PART OF THE CONTRACT IS TO BE CONSTRUED WITH THE WRITTEN PART THEREOF**

**1. Connection of contemporaneous writings.**—In an action to set aside a contract for the sale of land for fraud of the agent who negotiated the sale, a memorandum of sale prepared by the agent but never signed was admissible over the objection that there was a subsequent written contract entered into between the parties where it tended to show the agency and corroborated the testimony of the purchaser. *Sargent v. Barnes* (Civ. App.) 159 S. W. 366.

Where land held in trust was sold, all of the parties interested joining in the conveyance which created a trust of the proceeds, the original instrument cannot be considered in construing the second trust instrument, where it distinctly stated that all former agreements of every kind were abrogated. *Barnett v. Elliott* (Civ. App.) 160 S. W. 671.

A deed and a bill of sale of personalty with the grantee's simultaneously executed mortgage and notes to secure payment of the purchase price, construed together, held to show an executory contract for a conveyance of land; the superior title to remain in the grantor until payment of the purchase price. *Vinson v. W. T. Carter & Bro.* (Civ. App.) 161 S. W. 49, writ of error denied 106 Tex. 273, 166 S. W. 363.

Contemporaneous instruments relating to the same subject-matter may be read together as forming parts of one transaction. *Rankin v. Rhea* (Civ. App.) 164 S. W. 1095.

A provision of a land contract that vendor will not be responsible for statements made regarding its property, except as stated in its printed literature or letters signed by its officers, left its liability for representations not incorporated in the contract the same as if the provision had not been inserted, so that it would not be bound to open and macadamize a street, though its printed advertisement stated that it would do so. *South Texas Mortgage Co. v. Coe* (Civ. App.) 166 S. W. 419; *South Texas Mortgage Co. v. Erwin* (Civ. App.) 166 S. W. 422.

Where a contract of sale was made by correspondence, a letter from the seller containing a warranty must be considered in determining the contract, though the buyer's letter ordering the goods was subsequently written. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 167 S. W. 256.

Provision of a contract for the sale of goods that no statement by the salesman should be a part thereof unless written in the original order held to refer only to verbal statements; and hence a written agreement attached to the contract by the salesman that the seller would furnish the buyer with an indemnity bond was a part of the contract. *National Novelty Import Co. v. Griffin & Griffin* (Civ. App.) 168 S. W. 85.

In an action for goods sold under a contract providing that no statement by the salesman should be a part thereof unless written in the original order accepted by the seller in which defendant set up a condition attached to the contract by the salesman that the seller would give an indemnity bond to the buyer, evidence for defendant as to the cir-

cumstances under which such agreement was made, and as to its nonperformance, held admissible. *Id.*

A deed, bill of sale, notes for part of the purchase price, and a mortgage on the property conveyed, executed simultaneously, must be construed as but one and the same agreement. *Dicken v. Cruse* (Civ. App.) 176 S. W. 655.

A letter accompanying a contract which contained statements additional to the warranties in the contract is inadmissible in an action for breach of warranty. *Phillip-Carey Co. v. Manes* (Civ. App.) 177 S. W. 158.

Written warranty of horse, executed as part of contract of sale, held to exclude any warranty not therein contained, as well as evidence of fraudulent representations. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

Where, pursuant to his contract to convey, the vendor of land executed a deed to the buyer alone, not mentioning such buyer's partner, such partner was not liable on notes, executed by the grantee alone, for the price, since all the antecedent negotiations and executory contracts were merged in the deed as written. *Manley v. Noblitt* (Civ. App.) 180 S. W. 1154.

A stock subscription agreement, a note, and an agreement attached thereto to hypothecate the stock subscribed, all simultaneously delivered, constitute but a single subscription contract. *Cattlemen's Trust Co. of Ft. Worth v. Turner* (Civ. App.) 182 S. W. 438.

Two deeds executed at the same time between the parties thereto, both referring to the same subject-matter, are to be taken as parts of the same contract, and as forming one agreement. *Ferguson v. Dodd* (Civ. App.) 183 S. W. 391.

In construing simultaneous contracts, the court should seek the intention from the words, the subject-matter, and the purpose of the contracts, reconciling conflicting clauses, and consider the instruments in the light of circumstances to give them fair and customary construction. *Id.*

A deed, expressly referring to the land as a part of a designated survey, made it proper to resort to the field notes of that survey to ascertain its location, form, and area. *Diffie v. White* (Civ. App.) 184 S. W. 1065.

Two or more writings, executed contemporaneously between same parties and as to same subject-matter, must be deemed as forming the same contract. *Wadsworth v. Powell* (Civ. App.) 191 S. W. 169.

**3. Prior and contemporaneous collateral parol agreements in general.**—Where a telegram was addressed "to Calvin Stewart, Bernice, La.," parol testimony is admissible to show that the company agreed to deliver the message by telephone from Bernice to the addressee, six miles in the country. *Stewart v. Western Union Telegraph Co.* (Civ. App.) 158 S. W. 1034.

A written contract may not be varied by proof of oral contemporaneous or other agreements. *Chapman v. Witherspoon* (Civ. App.) 192 S. W. 281.

Evidence of prior or contemporaneous parol agreement or understanding is frequently admissible where such agreement is consistent with writing in question and it is apparent that instrument was not intended as a complete embodiment of the undertaking. *Id.*

**8. — Contracts for buildings and other works.**—Where architect ordered school building roof changed from tile to metal, at no difference in cost, testimony of parol agreement to pay for difference held improperly admitted to vary written order in absence of participation by contractor in alleged fraud of architect. *Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County* (Civ. App.) 182 S. W. 386.

**10. — Sale of personal property.**—Where a written contract of sale provided that no statement by the seller's agent should be considered a part of the contract unless written into it, promises by the seller's agent not made a part of the contract did not bind the seller. *Blackstad Mercantile Co. v. J. W. Porter & Co.* (Civ. App.) 158 S. W. 216.

In an action upon a contract by defendant to subscribe a certain sum for the drilling of a test oil well, it could not be shown that the other party to the contract agreed to contribute a certain sum of money, where the contract did not so provide, especially where such amount was contributed in the form of an interest in realty. *Herron-Robbins v. Allen* (Civ. App.) 159 S. W. 1046.

In an action for the price of a secondhand traction engine, sold under a written contract excluding such machinery from the operation of warranties and stating that the agent had no authority to change its provisions as to warranty unless authorized in writing by plaintiff, evidence for defendant as to a warranty made by such agent held properly excluded. *Clark & Schaeffer v. Gaar-Scott & Co.* (Civ. App.) 163 S. W. 681.

Where a clause in a written contract for the sale of cattle provided that the purchaser would not have to take any cattle that did not get fat, parol evidence was not admissible to show that there was a parol agreement that the purchaser was to be the sole judge of whether they were fat, since this would materially vary the written contract. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

Where a sales agent had no authority to make warranties other than those contained in the written contract signed by the purchaser, which declared that it should contain all of the agreements between the parties, a parol warranty by the sales agent is not binding, unless ratified by the seller. *First Nat. Bank of Garner, Iowa, v. Smith* (Civ. App.) 183 S. W. 862.

Without pleading and proof of fraud or false representations, a purchaser of a silo who signed a written contract providing that it should contain all the written agreements between the parties, cannot ingraft upon the contract a contemporaneous parol agreement. *Id.*

Where parties made two written contracts, one concerning the purchase of a stallion, and the other concerning a stallion taken in exchange for him, the date for exchange specified by each contract controls any prior oral agreement. *First Nat. Bank of Lafayette, Ind., v. Fuller* (Civ. App.) 191 S. W. 830.

**11. — Bills and notes or indorsement thereof.**—Where plaintiffs, stockholders of a corporation, executed a note to defendant to secure a debt of the corporation, evidence

of a contemporaneous parol agreement by defendant not to negotiate the note, but to carry and extend it until certain other debts of the corporation were discharged, was inadmissible to vary the expressed terms of the note. *Martin v. Daniel* (Civ. App.) 164 S. W. 17.

A contemporaneous parol agreement that a maker and an indorser of a note will relieve comakers from liability as surety is admissible to prove a parol contract of indemnity. *Clevenger v. Commercial Guaranty State Bank* (Civ. App.) 183 S. W. 65.

In a suit on a note payable unconditionally at a time certain, a contemporaneous agreement to postpone the time of payment cannot be proved by parol, notwithstanding art. 589. *Hendrick v. Chase Furniture Co.* (Civ. App.) 186 S. W. 277.

In action by buyer of engine to cancel purchase-money notes, testimony that the engine was taken on trial, subject to satisfaction, etc., held not inadmissible as contradicting the written order and the notes. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

In an action on notes transferred as part consideration for an exchange of property under a written contract agreeing to sell and convey notes, parol evidence held inadmissible to prove terms either additional to or different from those contained in writing. *Borschow v. Wilson* (Civ. App.) 190 S. W. 202.

Where plaintiff executed notes for unpaid purchase price of land, parol agreement that, if he should pay notes in reasonable time, he should receive rebate of \$350 from \$500 commission, held not inconsistent with notes, and therefore not inadmissible as tending to vary their terms; such notes not being intended as complete embodiment of transaction. *Chapman v. Witherspoon* (Civ. App.) 192 S. W. 281.

**19. Completeness of writing—Contracts of sale.**—Where a grantor sues on notes given for the price and for a foreclosure of the vendor's lien retained in the deed, the notes and deed evidence a completed written contract, and all prior negotiations are merged therein, and they cannot be proved by parol. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

**22. Relation of oral agreement to writing.**—Where an action was founded on a written contract and on a subsequent oral contract, proof of the oral contract not contradicting the written contract was admissible. *Barnard & Moran v. Williams* (Civ. App.) 166 S. W. 910.

Where oral negotiations were by agreement or custom tentative only, a contract held not made until reduced to writing and accepted. *Walker Grain Co. v. Denison Mill & Grain Co.* (Civ. App.) 178 S. W. 555.

In an action for verbal misrepresentations of the agent of the seller of a piano, in absence of evidence of the terms of the written contract later made between the parties, plaintiff's evidence tending to prove the terms of the agent's verbal representations, was not improper as varying the terms of a writing. *Jesse French Piano & Organ Co. v. Gibbon* (Civ. App.) 180 S. W. 1185.

The rule that where there is a verbal contract and part of it is reduced to writing, parol evidence may be offered to show that which was not contained in the writing, applies only when it is collateral, and relates to a subject distinct from that to which the written contract applies. *James v. Doss* (Civ. App.) 184 S. W. 623.

Where initial carrier furnishes cars for stock without requiring a written contract of the shipper and presents one before the cars are to start, which the shipper signs without reading and to secure passage, the contract is not binding on him. *Atchison, T. & S. F. Ry. Co. v. White* (Civ. App.) 188 S. W. 714.

The written contract by which the owner of land agrees to pay a broker commissions on subsequent sales, by whichever of them made, being substantially the same as an existing parol contract between them, takes effect as of the date of the parol contract. *Daugherty v. Smith* (Civ. App.) 192 S. W. 1131.

**23. — Inducement to make writing.**—Where shippers of live stock orally contracted for cars for shipment, knowing that a written contract would be required, and with the purpose of executing such contract, and did so, they are bound by its terms. *Atchison, T. & S. F. Ry. Co. v. Smyth* (Civ. App.) 189 S. W. 70.

Under the Interstate Commerce Act, §§ 1, 6, and 20, and other sections making furnishing of cars a part of "transportation," contract or bill of lading fixing conditions of liability for failure to furnish cars pursuant to previous oral agreement held controlling, and the parties cannot substitute a special agreement, so that plaintiff cannot recover on the alleged previous oral contract. *Id.*

Where the soliciting agent represented that the annual premium would be a certain sum, whereas the by-laws, by reference incorporated in the policy, provided for assessments, the fact that the representation was oral and preceded delivery of the policy which was accepted without objection, is of no serious consequence. *Illinois Bankers' Life Ass'n v. Dodson* (Civ. App.) 189 S. W. 992.

**24. — Merger of separate agreements.**—If a verbal contract of shipment was partly executed by loading the stock when the written contract was presented to the shipper, the verbal contract would control, unless the shipper afterwards assented to the terms of the written contract; the rule that prior negotiations are merged into a subsequently executed written contract not applying. *Galveston, H. & S. A. Ry. Co. v. Sparks* (Civ. App.) 162 S. W. 943.

Where the agent of a carrier verbally contracted with a shipper, the carrier is liable on such contract, though a written bill of lading was subsequently drawn up and accepted, unless the shipper at the time of making the verbal contract knew he would be required to sign the written contract. *St. Louis, S. F. & T. Ry. Co. v. Gilliam & Jackson* (Civ. App.) 166 S. W. 706.

Where a carrier undertook to bed cattle cars before the cattle were loaded or the shipping contract signed, it could not rely on a provision of the contract subsequently executed to relieve it from liability for a failure to provide proper bedding. *Gulf, C. & S. F. Ry. Co. v. Boger* (Civ. App.) 169 S. W. 1093.

Where produce was transported in interstate commerce under an oral contract, a

written contract, not signed until the shipment had started, would not prevail, unless the shipper had knowledge of its contents and agreed thereto. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 172 S. W. 1116.

One having a verbal contract should not be deprived of his original security by the acceptance of an additional contract in writing, binding other parties, especially where such security is accepted at the instance and for the protection of the original parties. *Pierce Fordyce Oil Ass'n v. Woods* (Civ. App.) 180 S. W. 1181.

Damages are recoverable against a railroad company for breach of a verbal contract to furnish cars for the shipment of live stock on a day certain, though a bill of lading is subsequently executed. *Pecos & N. T. Ry. Co. v. Stinson* (Civ. App.) 181 S. W. 526.

As the Carmack Amendment did not deprive shippers of remedies under the existing laws, a shipper of live stock may, where the written contract was not binding, recover under an oral contract. *Panhandle & S. F. Ry. Co. v. Jones* (Civ. App.) 182 S. W. 1.

Where the contract for an interstate shipment of cattle was oral, but just before the train started the shipper was required to sign a written bill of lading which he did not have time to read and could not have understood, the oral contract was not supplanted, the contract contained in the bill of lading not being mutual. *Id.*

Shipper of live stock who knew that carrier was relying upon a written contract and who was required to sign it, and who did not read contents including a limitation of six months for actions for damages to stock, held not relieved from the effect of such provision. *Atchison, T. & S. F. Ry. Co. v. White* (Civ. App.) 188 S. W. 714.

In an action against a carrier for breach of an oral agreement to furnish cars for an interstate shipment of live stock, a provision of a subsequent written contract pleaded in the answer in support of contention that the recovery cannot be had until the value of the stock be reduced below \$30 per head, held not to defeat a recovery of damages for injury to the cattle, or to support the contention. *Atchison, T. & S. F. Ry. Co. v. Smyth* (Civ. App.) 189 S. W. 70.

In an action against a carrier of live stock for breach of an oral agreement to furnish cars, a plea alleging a written contract merging all previous negotiations, and providing stipulation for notice, and that suit should be brought within six months or action should be barred, set up a good defense in the absence of a showing of want of consideration, duress, fraud, or mistake. *Id.*

The written contract for an interstate shipment, contemplated by Carmack Amendment, being free from fraud, prevails over the precedent oral contract, so that provision of the written contract for notice of claim of damages, if reasonable, controls. *Panhandle & S. F. Ry. Co. v. Bell* (Civ. App.) 189 S. W. 1097.

Damage from decline in market price during delay in transportation of live stock is not within the provision of the contract of shipment for notice of claim for loss or injury to stock during transportation. *Id.*

**RULE 22. WHERE THE MEANING OF THE WORDS IN A WRITTEN INSTRUMENT ARE DOUBTFUL, IT MAY BE READ IN THE LIGHT OF SURROUNDING CIRCUMSTANCES, AND PAROL EVIDENCE OF CUSTOM AND USAGE IS ADMISSIBLE TO SHOW ITS MEANING**

1. **Grounds for admission of extrinsic evidence.**—Contracts that are not self-explanatory must be construed in the light of reason and of the surrounding circumstances shown by the evidence. *St. Louis, B. & M. Ry. Co. v. Hicks* (Civ. App.) 158 S. W. 192.

Where there is no ambiguity in a written contract, parol evidence to explain its meaning is inadmissible. *Conn v. Rosamond* (Civ. App.) 161 S. W. 73.

Where a deed is ambiguous, evidence of the attendant circumstances is admissible to determine its meaning. *Cook v. Smith* (Sup.) 174 S. W. 1094, reversing judgment *Smith v. Cook* (Civ. App.) 142 S. W. 26.

Where an instrument is ambiguous in some of its expressions, testimony by those who drew it is admissible to aid in its construction. *Hahl v. McPherson* (Civ. App.) 176 S. W. 804.

In case of ambiguity, the situation of the testator at the time of executing the will should be considered. *West v. Glisson* (Civ. App.) 184 S. W. 1042.

While extraneous circumstances attending execution of a will may be considered, the principle is never so extended as to substitute new words for those used, or to add terms not inferable from the writing. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

Parol proof will be received where there is ambiguity or uncertainty either in terms of a will itself or because of existence of some extraneous fact. *Id.*

2. **Nature of ambiguity or uncertainty in instrument in general.**—An instrument creating a trust of money held so ambiguous as to warrant the admission of parol evidence to explain its terms. *Barnett v. Elliott* (Civ. App.) 160 S. W. 671.

Where testator, owning tracts of 17, 15, 41, and 284 acres, gave the tracts of 17 and 15 acres to two daughters and 325 acres to another daughter, held that, there being no ambiguity in the will, an intention shown by parol testimony to give the 41-acre tract to the two daughters could not be given effect. *Morton v. Calvin* (Civ. App.) 164 S. W. 420.

There was no ambiguity about a writing asking B. and A. to accept this, and a note to them, both signed by V., and inclosed in a sealed envelope, on which was written "Notes" and B.'s name, the intention evidenced being to make a gift rather than a will, and it was improper to admit parol evidence to vary, contradict, or add to their expressed terms. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

Clause of testator's will making absolute devise to his wife, providing that on her death whatever might be left should be divided among their relatives, giving her full power of disposition, was not such a legal limitation upon the estate previously granted the wife as to create an ambiguity in the will to admit evidence of the maker's intention. *Feegles v. Slaughter* (Civ. App.) 182 S. W. 10.

Ambiguity is an uncertainty of meaning or expression used in a written instrument; wanting clearness or definiteness; difficult to comprehend or distinguish; of doubtful import. *San Antonio Life Ins. Co. v. Griffith* (Civ. App.) 185 S. W. 335.

Where testator's will devised all his property to two of his brothers and one of them predeceased him, there was no ambiguity in the will or because of the existence of extraneous facts. *Hagood v. Hagood* (Civ. App.) 186 S. W. 220.

Where mortgages were of doubtful meaning, it was not error to admit parol testimony as to the mutual understanding at the time of their making in aid and explanation of them. *T. W. Marse & Co. v. White* (Civ. App.) 189 S. W. 1027.

4. — **Contracts in general.**—A contract of employment between an insurance company and an agent consisting of two written contracts held ambiguous, in that one contract spoke of agents' compensation as a salary, and the other as an advance against commissions, so as to warrant parol evidence in explanation. *Generes v. Security Life Ins. Co. of America* (Civ. App.) 163 S. W. 386.

An ambiguous contract is one obscure in meaning through indefiniteness of expression or having a double meaning. *Tom v. Roberson* (Civ. App.) 182 S. W. 698.

5. — **Contracts of sale.**—A paragraph of a contract requiring each party to furnish to the other complete abstracts of title to each tract of land, each abstract to show a good record title thereto, held not of itself ambiguous. *Riggins v. Post* (Civ. App.) 172 S. W. 210.

7. — **Contracts of insurance.**—Where contract between its superintendent and an insurance company provided in a typewritten clause that it should remain in force for five years and in a printed clause that the company could discharge at pleasure, such contract was ambiguous, and parol evidence admissible to show intention. *American Nat. Ins. Co. v. Van Dusen* (Civ. App.) 185 S. W. 634.

9. **Patent ambiguity.**—If an alleged will, consisting of a writing asking B. and A. to accept "this," and a note to them, both signed by V., and inclosed in a sealed envelope, indorsed "Notes," was ambiguous on account of the use of the words "Notes" and "this," it was a patent ambiguity, which could not be explained by parol evidence. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

In a deed of land described as "420 acres out of the northeast portion of the Robert Hill survey," the uncertainty of description, if any, appeared upon its face, and extraneous evidence was inadmissible to supply what was lacking. *Diffie v. White* (Civ. App.) 184 S. W. 1065.

A patent ambiguity in an instrument is an uncertainty that arises at once on the reading; is one produced by the uncertainty, contradictoriness, or deficiency of the language of the instrument. *San Antonio Life Ins. Co. v. Griffith* (Civ. App.) 185 S. W. 335.

10. **Latent ambiguity.**—When the uncertainty in the description in a deed does not appear upon its face, but arises from extraneous facts, parol evidence is admissible to explain or remove it. *Young v. Gharis* (Civ. App.) 170 S. W. 796.

Where the general description of a deed recited an amount of land intended to be conveyed less than the specific boundaries given therein included, parol evidence was not admissible to alter the calls given in the description of the land to include only the recited amount, although it is admissible to explain a latent ambiguity. *Standefer v. Miller* (Civ. App.) 182 S. W. 1149.

Under assignment of lease and option to purchase requiring assignor to proceed at once to establish boundaries within three years from April 20, 1910, it cannot be determined whether he must proceed at once or within three-year period. *Corbin v. Booker* (Civ. App.) 184 S. W. 696.

A "latent ambiguity" arises when a deed expresses more than one method for identifying the lines or corners of a grant, and which do not harmonize when applied to the ground, or when the description is such that it may without contradicting or ignoring its terms, be applied to more than one tract of land. *Diffie v. White* (Civ. App.) 184 S. W. 1065.

Where there is no conflict in the terms of the description of a deed, and it fits one tract of land and no other, there is no "latent ambiguity" admitting extrinsic evidence. *Id.*

11. **Custom controlling construction.**—Contract for completion of school building in 90 working days held to exclude freezing weather in view of usage or custom as to meaning of "working days" where use of brick or cement enters into work. *General Bonding & Casualty Ins. Co. v. McQuerry* (Civ. App.) 191 S. W. 858.

Where a draft with bill of lading attached was negotiated through several banks, a custom among banks in accepting drafts with reference to charging bank to its immediate indorser or customer, amount of funds for which credit had been given on receipt of draft in event it is not finally paid would not change character of the transaction and destroy effect of successive deliveries of draft as constituting an assignment of funds. *West Texas Nat. Bank v. Wichita Mill & Elevator Co.* (Civ. App.) 194 S. W. 835.

13. **Meaning of words, phrases, signs or abbreviations.**—Parol evidence is not admissible to show that the parties to a contract used language in a sense different from its ordinary meaning. *O'Connor v. Camp* (Civ. App.) 158 S. W. 203.

It is not permissible to show that the word "estate" used in a contract purporting to sell land as agents of the estate of another was intended to be used for the word "heirs," or that heirs were included therein. *Id.*

In an action to rescind a contract of sale of a traction engine guaranteed to develop 20 horse power, parol evidence whether it was to develop such power at the belt or at the draw bar held admissible to explain what is meant by scientific or trade terms. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

It was not error to exclude testimony by defendant's bookkeeper, as to the meaning

of the entry in the corporate books, marking the note sued on as "paid." *Latham Co. v. Louer Bros.* (Civ. App.) 176 S. W. 920.

Parol evidence held admissible to explain the meaning of a provision in a written contract, employing a life insurance agent, that the company would "handle" premium notes. *San Antonio Life Ins. Co. v. Griffith* (Civ. App.) 185 S. W. 335.

Words in a contract will be given their ordinary meaning, unless used in a special sense, and parol evidence is frequently permitted to show they were so used. *General Bonding & Casualty Ins. Co. v. McQuerry* (Civ. App.) 191 S. W. 858.

As word "securities" used in subscription contracts is ambiguous only, in that it embraces different kinds of such evidences, parol evidence is admissible to explain what was intended by parties to the contract. *Mitchell v. Porter* (Civ. App.) 194 S. W. 981.

**15. Identification of parties.**—Where a contract recited that it was executed by M. and others, acting for a bank, "and hereinafter called the second party," and it was evident that the term "second party" sometimes referred to the bank and sometimes the individuals signing for the bank, there was an ambiguity authorizing parol evidence as to which was intended in a certain provision. *First State Bank of Archer City v. Power* (Civ. App.) 166 S. W. 382.

**19. Identification of subject-matter—In conveyances, contracts and writings in general.**—A writing executed by an express messenger in settlement of his claim against defendant railroad for personal injury releasing the company from the consequences of injury at A. and from all manner of actions, suits, debts, and sums of money was uncertain as to what causes of action were meant, so that parol evidence was admissible to establish the intention of the parties. *Atchison, T. & S. F. Ry. Co. v. Fiedler* (Civ. App.) 158 S. W. 265.

Evidence as to terms of a contract for construction of a dam across a creek to form a fishpond, held sufficient to sustain a finding that it did not require the contractor to build a foundation of such depth and nature as to prevent the water escaping below it. *Lattimore v. Puckett & Wear* (Civ. App.) 161 S. W. 951.

In an action for compensation due under a broker's contract which prohibited plaintiff from selling lands in the territory of any other agent but did not specify plaintiff's territory, parol evidence as to plaintiff's territory is admissible. *Denton v. Holbert* (Civ. App.) 184 S. W. 251.

**20. — Of real property in general.**—Where a vendor contracted to sell his place in a certain town, parol evidence was admissible to show that he owned but one place in that town, and also to show of what particular property that place consisted. *Beaton v. Fussell* (Civ. App.) 166 S. W. 458.

**21. — Application of description to subject-matter.**—In an action for a vendor's breach of contract, a letter offered to identify the land, but which added nothing to the description as contained in other letters which constituted the contract, was irrelevant. *Spaulding v. Smith* (Civ. App.) 169 S. W. 627.

Where a deed did not on its face identify with certainty the 160 acres of a survey claimed thereunder, the identification might be made by extrinsic evidence. *Brown v. Foster Lumber Co.* (Civ. App.) 178 S. W. 787.

**22. — Property or interest included.**—In an action by the buyer of land by the acre for a deficiency, the issue of whether such deficiency exists is, under appropriate pleading, a question of fact aliunde the deed for the determination of court or jury. *Ashley v. Holland* (Civ. App.) 180 S. W. 635.

Where the records of the probate court ordering and confirming a sale of infants' property were ambiguous, referring to different sections, held that parol evidence was admissible to identify the part of the section sold and to show that the infants owned only one parcel of property. *Shields v. Perrine* (Civ. App.) 181 S. W. 232.

Parol testimony held admissible to aid the written description of a chattel mortgage. *Conley v. Dimmit County State Bank* (Civ. App.) 181 S. W. 271.

**23. — Boundaries.**—Even though there is no apparent ambiguity upon the face of a grant, parol evidence is admissible to locate the calls upon the land, and to show whether they include the land in controversy. *Roberts v. Hart* (Civ. App.) 165 S. W. 473.

Where all the calls of a description lead to the same result, there is no ambiguity, but, if the calls lead to different results, there is a latent ambiguity, which requires the following of some calls and the rejection of others. *Id.*

Parol evidence held inadmissible to resolve any ambiguity in a deed, the descriptive calls of which were clear and unambiguous, identifying the land as a certain survey, though the field notes of such survey in fact did not place it within the calls. *McFaddin v. Johnson* (Civ. App.) 180 S. W. 306.

A conflict between the surveyor's maps and the field notes required the court to resort to parol evidence to ascertain if possible the footsteps of the surveyor. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

Where a call in field notes of a survey does not refer to objects on the ground indicating the surveyor's footsteps, such call cannot be controlled by parol evidence of such objects, except in actions to correct mistake; but evidence of facts extraneous to the call is admissible, in aid of a call found in field notes, to remove an ambiguity, and determine which of two or more conflicting calls shall prevail. *Goodrich v. West Lumber Co.* (Civ. App.) 182 S. W. 341.

Where the calls of a deed were made by mistake, correction of the instrument under the rules of pleading in such cases is the proper remedy, and not the introduction of parol evidence as to the correct calls in an action to recover part of the land conveyed. *Standefer v. Miller* (Civ. App.) 182 S. W. 1149.

**24. — Sufficiency of description to admit parol evidence.**—A description in a chattel mortgage held sufficiently definite to warrant foreclosure; parol evidence being admissible. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Civ. App.) 184 S. W. 1081.



25. — **Reference to other instruments.**—A sheriff's deed on execution for "two hundred acres off the south end of the eight hundred acres of land known as the Red Bluff League, being a part of tract sold by H. to H." is unambiguous, so that parol evidence of an intention to convey a different tract was not admissible. *Masterson Irr. Co. v. Foote* (Civ. App.) 163 S. W. 642.

Where deed offered in evidence fixed the starting point by reference to a tract called Forest Park, held, that a deed conveying land to city, and evidence that the land so conveyed was known as the Forest Park tract, should have been admitted to aid in the identification. *Young v. Gharis* (Civ. App.) 170 S. W. 796.

26. — **In sale of personal property.**—Parol evidence held admissible to explain a bill of sale which guaranteed defendant against all claims against the business. *Richardson v. Wilson* (Civ. App.) 178 S. W. 566.

Parol testimony was inadmissible to show that the subject-matter of a sale of personal property was other than that designated by the contract. *James v. Doss* (Civ. App.) 184 S. W. 623.

27. — **Of debt or obligation collateral to security.**—Parol evidence of surrounding circumstances is admissible in determining whether a written guaranty is continuing or affects merely a single credit. *Self v. Albany Nat. Bank of Albany* (Civ. App.) 187 S. W. 982.

28. **Showing intent of parties as to subject-matter.**—Where an assignment of part of a series of vendor's lien notes declares them to be prior incumbrances upon the land, parol evidence is inadmissible to show that the assignor did not intend to confer priority upon the assigned notes over the notes retained by her. *Martin v. Gray* (Civ. App.) 159 S. W. 118.

Evidence held to show that the contract of sale did not contemplate that the vendor should hold the amount paid as a forfeiture upon failure to pay the balance on a certain date. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

Where there was a dispute as to whether the contract price for pasturage was for the contract term of more than a year or at that rate per annum, evidence as to the reasonable value of the pasturage for the contract term was admissible. *Carver v. Power State Bank* (Civ. App.) 164 S. W. 892.

A chancery court will always refer a transaction to that construction, predicable upon the evidence, where there is serious doubt as to what the parties intended, which will lead to the more just results. *Rankin v. Rhea* (Civ. App.) 164 S. W. 1095.

Where a contract for the sale of land obligated the vendor to bore a well, guaranteeing water, parol evidence of the situation of the parties was admissible on the issue whether it was intended that the vendor should guarantee sufficient water to irrigate the land sold. *Zavala Land & Water Co. v. Tolbert* (Civ. App.) 165 S. W. 28.

Provisions of contract for the sale of land in respect to the indebtedness to be assumed held so ambiguous as to admit evidence as to what the parties thought was the legal meaning of their language. *Riggins v. Post* (Civ. App.) 172 S. W. 210.

Under a contract for sale of land, evidence whether the purchaser knew of a blanket lien and as to the time when the abstract showed that it might be paid held admissible as an aid in understanding the contract. *Id.*

Upon a contract providing that the vendor was to eliminate an indebtedness against east half of the four leagues, evidence that the purchaser knew of a blanket lien on the four leagues was admissible. *Id.*

Contract under which plaintiffs were to sell land for defendant held ambiguous as to adjustment of expenses upon cancellation of contract, and evidence as to the intention of the parties was admissible. *Plummer v. Simms* (Civ. App.) 177 S. W. 1037.

Practical interpretation by parties of contract of doubtful meaning is entitled to great, if not controlling, influence. *Corbin v. Booker* (Civ. App.) 184 S. W. 696.

Where language of instrument is ambiguous, intention of parties must be obtained by proof aliunde. *Id.*

In the absence of ambiguity in a written contract, and of fraud, accident, or mistake, evidence to establish preliminary negotiations for the contract or to show an intention of the parties thereto at variance with its terms is inadmissible. *Davis v. Wynne* (Civ. App.) 190 S. W. 510.

29. — **In construction of deeds in general.**—Where a conveyance which purported to fix the rights of the several grantors to the proceeds of the property was ambiguous, parol evidence is admissible to explain the intention of the parties. *Barnett v. Elliott* (Civ. App.) 160 S. W. 671.

When the legal meaning is not ambiguous, evidence as to the legal construction put upon a contract by the parties is inadmissible; but, when the legal meaning is ambiguous, oral testimony as to the intended legal effect is admissible. *Riggins v. Post* (Civ. App.) 172 S. W. 210.

30. — **In description of property.**—Where an oil lease merely gave plaintiffs such land as was necessary to operate wells, they cannot show an understanding that for each well opened they should be entitled to an acre of land. *Moore v. Decker* (Civ. App.) 176 S. W. 816.

In the absence of fraud, accident, or mistake, it is not permissible to prove by parol that other property than that described in a contract for the sale of personal property was intended to be conveyed, and thereby add to or contradict the contract. *James v. Doss* (Civ. App.) 184 S. W. 623.

33. **Showing purpose of writing.**—Where a deed of trust in favor of a bank is delivered to one of its officers, defendants claiming that it was to be held by him and never delivered, parol evidence is admissible to explain the purpose of depositing the instrument. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

**RULE 23. BLANKS IN WRITTEN INSTRUMENTS LEFT FOR NAMES MAY BE FILLED, AND THE TRUE DATES WHEN INCORRECT MAY BE SHOWN**

**Date of instrument.**—Where the date of a promissory note is left blank by the maker, the presumption is that any holder has implied authority to insert the true date. *Landon v. Foster Drug Co.* (Civ. App.) 186 S. W. 434.

**RULE 24. PAROL EVIDENCE IS ADMISSIBLE TO CONTRADICT THE RECITAL OF PAYMENT IN A DEED, RECEIPT, OR OTHER INSTRUMENT, AND TO SHOW THE AMOUNT ACTUALLY PAID OR THE REAL CONSIDERATION**

**What constitutes receipt in general.**—A certificate issued by a bank showing the deposit of drafts with bills of lading attached being merely a receipt, plaintiff could testify as to the arrangement on which the drafts were received. *First Nat. Bank of Gorman v. Mangum* (Civ. App.) 176 S. W. 1197.

**Deeds in general.**—Parol evidence to show the real consideration for a contract is admissible, though contradicting the recited consideration. *Watson v. Rice* (Civ. App.) 166 S. W. 106.

Oral testimony is admissible to explain or add to the consideration recited in a deed. *Ballard v. Fountain Bros.* (Civ. App.) 184 S. W. 289.

**Assumption or payment of debts or incumbrances.**—Parol evidence of grantees' agreement to assume and pay an incumbrance held admissible to explain the consideration of a deed, independent of the issue of mistake in omitting the covenant from the deed. *Alston v. Pierson* (Civ. App.) 158 S. W. 1165.

In suit by the original vendor of land against the purchaser and the latter's grantee whose deed recited that he bought "subject" to the vendor's lien notes, the testimony of the purchaser that his grantee assumed the debt as part consideration was not inadmissible as varying the deed. *Ballard v. Fountain Bros.* (Civ. App.) 184 S. W. 289.

**Acknowledgment of payment in deed.**—In action for rent against lessee and person claiming the rent by assignment from a former owner, plaintiff held properly permitted to testify as to the true consideration for his deed, though different from that recited in the deed. *Robinson v. Clymer* (Civ. App.) 170 S. W. 107.

As between the parties to a deed, parol evidence is admissible to vary or controvert recitals as to the nature or amount of the consideration. *Miller v. Poulter* (Civ. App.) 189 S. W. 105.

The recital of a paid consideration in a deed is not conclusive on the parties thereto, but may be disproved by parol. *Delano v. Delano* (Civ. App.) 189 S. W. 972.

In a deed conveying the fee-simple title to an heir of grantor, the recital of consideration of cash paid, and also that grantee's stepdaughter should receive the same interest in land as his own children, was not contractual, and for that reason conclusive against another heir of grantor of the fact that the conveyance was not an advancement within Rev. St. art. 2467. *Id.*

In suit for rescission of purchase of land, held, that defendant should have been required to answer question if it was not true that consideration mentioned in deed to him for land was not in fact paid by transfer of interest in maize header patented to him, in which the two other defendants had an interest. *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

Consideration recited in a deed may always be attacked, no matter by whom introduced in evidence. *Colgrove v. Falfurrias State Bank* (Civ. App.) 192 S. W. 580.

**Contracts in general.**—In an action for a partnership accounting, where the written partnership agreement stated the consideration to be furnished by the defendant, but not that to be furnished by the plaintiff, parol evidence was admissible on behalf of plaintiff to show the consideration furnished by him. *Ramsey v. Bird* (Civ. App.) 170 S. W. 1075.

Parol evidence of the real consideration of a written contract is admissible, although it contradicts the consideration named in the contract. *Blair & Hughes Co. v. Watkins & Kelley* (Civ. App.) 179 S. W. 530.

In a creditor's action against the debtor and his guarantor's executrix, it was competent to prove by parol evidence that, when the debtor delivered collateral to the creditor, it was in consideration that the creditor should discharge the guarantor. *Neblett v. Cooper Grocery Co.* (Civ. App.) 189 S. W. 1162.

**Contracts of sale or exchange.**—Where a guaranty of a vendor of water for irrigation was a part of the consideration for the purchase-money notes executed by the purchaser, the guaranty was a contractual one, and could not be proved by parol in a suit on the notes and for the foreclosure of the vendor's lien retained in the deed. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

A written contract for the sale of goods at the invoice price is not varied by parol evidence that the invoice price on one article was less than represented by the seller and paid by the buyer. *Midgley & Curtsinger v. Taylor* (Civ. App.) 171 S. W. 301.

A contract fixing the consideration for a conveyance of land cannot be varied by parol evidence of an additional consideration. *Matheson v. C-B Live Stock Co.* (Civ. App.) 176 S. W. 734.

Consideration in contract for sale of real estate may be shown by parol, and statute of frauds does not apply thereto. *Whaley v. McDonald* (Civ. App.) 194 S. W. 409.

**RULE 25. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A WRITTEN INSTRUMENT IS VOID FOR ILLEGALITY, WANT OR FAILURE OF CONSIDERATION, OR ON ACCOUNT OF FRAUD OR MISTAKE**

**Grounds for admission of extrinsic evidence.**—Where, through mistake, fraud, or negligence, a ticket agent failed, without the knowledge or consent of a passenger, to incorporate into a ticket the real agreement between the parties, parol evidence was admissible to show the true contract. *Chicago, R. I. & G. Ry. Co. v. Howell* (Civ. App.) 166 S. W. 81.

**Matters affecting validity in general.**—A map which is an archive of the land office may be shown by parol evidence to be incorrect. *Stevens v. Crosby* (Civ. App.) 166 S. W. 62.

**Want or failure of consideration.**—In a suit on a note, given for bank stock, by the payee, parol evidence showing that the note was conditional upon the payee's not electing to retain his stock within 30 days, and that he so retained it, was admissible to show that the note was without consideration. *Hawkins v. Johnson* (Civ. App.) 181 S. W. 563.

**Mistake.**—Where transfer of partner's interest in business was not intended to cover only part of the transaction, and omission of a transfer of claims resulted from mistake, held that such transfer could not be shown by parol. *City of Brownsville v. Tumlison* (Civ. App.) 179 S. W. 1107.

Omission of part of the oral agreement from the written contract is not by mistake where one of the parties at the time of signing knows that all the agreement is not embraced in the contract. *Tom v. Roberson* (Civ. App.) 182 S. W. 698.

**Fraud.**—Fraudulent representations need not be embodied in the contract in order to be ground for rescission, notwithstanding the rule that oral evidence is not admissible to vary the terms of a writing. *South Texas Mortgage Co. v. Coe* (Civ. App.) 166 S. W. 419; *South Texas Mortgage Co. v. Erwin* (Civ. App.) 166 S. W. 422.

The rule excluding parol evidence to vary written instruments has no application, where it is sought to avoid a contract, the execution of which is alleged to have been induced by false and fraudulent representations. *Hackney Mfg. Co. v. Celum* (Civ. App.) 189 S. W. 988.

— **In contracts in general.**—Evidence held not to show fraud or mutual mistake in the execution of the contract resulting in the omission of a provision for forfeiture of the sum paid, upon failure to pay the balance within a certain time. *Wright v. Bott* (Civ. App.) 163 S. W. 360.

A husband and wife relying on the invalidity of a mortgage by the husband alone may not, in the absence of fraud, show that he did not know that the mortgage recited that the property was not homestead. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

— **In contracts of sale.**—A buyer, who by false representations is induced to purchase machinery sold under a written contract containing certain warranties, is not restricted to action on written contract, but can sue on antecedent fraud by which it was procured. *Rumely Products Co. v. Moss* (Civ. App.) 175 S. W. 1084.

Statements by the seller's agent as to a guaranty in the written contract held such fraud as to render admissible parol evidence to show the real terms of the agreement. *Lummus Cotton Gin Sales Co. v. Farmers' Co-op. Gin Co.* (Civ. App.) 175 S. W. 894.

Parol evidence of fraudulent representations inducing an order for goods held admissible, although the order stipulates that all its conditions appear upon its face. *Blair & Hughes Co. v. Watkins & Kelley* (Civ. App.) 179 S. W. 530.

Written warranty of horse, executed as part of contract of sale, held to exclude any warranty not therein contained, as well as evidence of fraudulent representations. *Bolt v. State Savings Bank of Manchester, Iowa* (Civ. App.) 179 S. W. 1119.

Purchaser sued for purchase price, in support of plea of failure of consideration, held entitled to show by parol material misrepresentations. *Id.*

Buyer of 267 acres of land for \$65 an acre, the tracts being represented orally and in deed to contain so much, the seller knowing that such was not the case, could prove by parol and recover for a 9-acre deficiency. *Ashley v. Holland* (Civ. App.) 180 S. W. 635.

Evidence that plaintiff's agent had made false representations to defendant prior to the sale held properly admitted, notwithstanding a provision of the sale contract that the seller should not be bound by any undertakings, promises, or warranties of their agents beyond those expressed in the contract. *J. I. Case Threshing Mach. Co. v. Webb* (Civ. App.) 181 S. W. 853.

Where purchasers of automobile truck were deceived into believing it was new when it was secondhand, the fact that the contract of sale contained a written guaranty only of workmanship and materials would not, under the parol evidence rule, preclude them from recovering for the fraud. *Avery Co. of Texas v. Staples Mercantile Co.* (Civ. App.) 183 S. W. 43.

— **In bills and notes or indorsement thereof.**—Where fraud is alleged in the answer to an action on a note with respect to the plaintiff's representation as to the application of collateral, parol evidence of the agreement was admissible. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

— **In subscription to corporate stock.**—Where a stock subscription contract was obtained by fraud, evidence of the fraud was not objectionable as varying a provision of the contract that no conditions, representations, or agreements other than those printed

therein should be binding on the corporation. *Commonwealth Bonding & Casualty Ins. Co. v. Bomar* (Civ. App.) 169 S. W. 1060.

In action to cancel a contract for purchase of stock and a note given for the price, parol evidence showing untruth of recitals in the contract that defendant was selling stock in a life insurance company capitalized at \$1,000,000 held admissible. *Le Master v. Hailey* (Civ. App.) 176 S. W. 818.

In action to cancel note and recover money paid on a stock subscription contract, parol evidence of promises of defendant's agents inducing plaintiff's execution of the contract held inadmissible. *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Civ. App.) 180 S. W. 936.

**RULE 26. PAROL EVIDENCE IS ADMISSIBLE TO ESTABLISH A TRUST OR TO SHOW THAT A WRITTEN INSTRUMENT WAS INTENDED AS A MORTGAGE, TRUST OR CONDITIONAL SALE**

**Mortgage or conditional sale.**—Where a deed, absolute in form, was a mortgage at its inception, no subsequent parol agreement could change its character. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536.

Where it is sought to ingraft a parol trust on an absolute deed and show it is intended as a mortgage, the evidence must be clear and certain. *De Shazo v. Eubank* (Civ. App.) 191 S. W. 369.

**Trust.**—In an action to enforce a trust in land purchased by defendant, evidence held sufficient to sustain a finding of an oral agreement between plaintiff and defendant that if either bought the land it was to be for the benefit of both. *Sachs v. Goldberg* (Civ. App.) 159 S. W. 92.

A parol trust in lands may be established by the evidence of one witness, if it is such as to satisfy the conscience of the court that equitable relief should be administered. *Ellerd v. Ellison* (Civ. App.) 165 S. W. 876.

Where the trustee is dead, a parol trust should not be ingrafted on a deed to land without clear and satisfactory evidence thereof, and such evidence is not satisfactory where the party suing to establish a trust withholds the best evidence on the question. *Robson v. Moore* (Civ. App.) 166 S. W. 908.

In a suit to enforce a resulting trust, evidence held admissible to show that the consideration for the property was community property, though the deed recited that it was the separate property of complainant's wife. *Strickland v. Baugh* (Civ. App.) 169 S. W. 181.

Evidence of declarations of the grantor introduced to show a parol trust held admissible, though the witness could not give the exact language or exact date. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

While a parol trust may be ingrafted upon a deed, absolute on its face, the evidence must be clear and satisfactory. *Id.*

The feeling of a grantor towards her granddaughters, who claimed that they were entitled under a parol trust, held admissible. *Id.*

Testimony of the payment of bills of the grantee in New York and Hot Springs is not relevant to a claim that the land was subject to a parol trust. *Id.*

Evidence of what a grantee said she would do with land is not admissible to charge the property with a parol trust. *Id.*

Evidence of the grantor's intention, many years before conveyance of land, is admissible to show that a conveyance absolute on its face was subject to a parol trust. *Id.*

Evidence of the poverty of the alleged beneficiaries is inadmissible in a proceeding to establish a parol trust. *Id.*

A letter held admissible to rebut a claim of a parol trust. *Id.*

Evidence that the grantor made presents to one of the alleged beneficiaries is inadmissible to establish a parol trust upon a conveyance absolute on its face. *Id.*

Evidence that a grantor had supported the grantee is immaterial in a proceeding to charge the property conveyed with parol trust. *Id.*

Where plaintiff furnished money to agent with which to purchase lands, and agent took title in his own name, in action by plaintiff to restrain execution sale by creditor of agent, parol evidence was admissible to show facts leading up to and constituting entire transaction. *Hornbeck v. Barker* (Civ. App.) 192 S. W. 276.

**RULE 28. A WRITTEN INSTRUMENT, FAILING THROUGH FRAUD, ACCIDENT OR MISTAKE, EITHER OF MATTER OF LAW OR OF FACT, TO REPRESENT THE TRUE AGREEMENT, OR CONTAINING TERMS CONTRARY TO THE COMMON INTENTION, WILL BE CORRECTED OR REFORMED IN EQUITY**

**Fraud, accident or mistake in general.**—The rule that when a mistake is not mutual courts will not relieve the party making it, does not apply where the party accepting an offer knows of the mistake and seeks to take advantage of it. *Barteldes Seed Co. v. Bennett-Sims Mill & Elevator Co.* (Civ. App.) 161 S. W. 399.

Instrument will not be reformed for mistake of one of the parties unless superinduced by fraud of other. *Yantis v. Jones* (Civ. App.) 184 S. W. 572.

Before equity will change the terms of a written instrument as not expressing the real agreement, it must appear that they were inserted through accident, fraud, or mutual mistake, or, if the mistake be unilateral, it must be material going to the substance of the contract. *Arden v. Boone* (Civ. App.) 187 S. W. 995.

A mistake, to justify reformation of instrument or deed, must have been participated in by all parties in interest. *Darden v. Vanlandingham* (Civ. App.) 189 S. W. 297.

— **Deeds.**—A deed which, by mutual mistake of the parties, conveys the entire tract, while intended by the parties to convey only an undivided half interest will be reformed to express the intention of the parties. *Fallen v. Weatherford* (Civ. App.) 158 S. W. 1174.

In an action to reform a deed on the ground of mistake, whereby more land was conveyed than was intended, evidence held to show that a mutual mistake existed. *Harris v. Parr* (Civ. App.) 165 S. W. 42.

That a grantor did not read the deed, or did not know of the mistake in the description at the time of its execution, would not bar his right to a reformation of it on account of mistake or fraud. *Id.*

A deed cannot be reformed by the addition of a stipulation therein, unless the stipulation was omitted by fraud, accident, or mistake. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

It was not error to refuse to correct a deed of trust running to defendants as to a misdescription, where it did not appear that a mutual mistake as to such description had been made. *Memphis Cotton Oil Co. v. Gist* (Civ. App.) 179 S. W. 1090.

A correction of mutual mistake in description of property in a conveyance does not create a new contract, but merely makes the written evidence of the contract speak the truth and conform to the intention of the parties. *Hodges v. Moore* (Civ. App.) 186 S. W. 415.

Where party executed preliminary contract and accepted deed providing for his keeping open a permanent roadway, in the absence of showing of fraud or excuse for failure to read the two instruments, reformation thereof could not be had on the ground of accident, fraud, or mistake. *Arden v. Boone* (Civ. App.) 187 S. W. 995.

Where all heirs inheriting land are free from disability and join in a conveyance, proof that a single tract, for which they receive pay, and intend to convey, is by mistake omitted from their deed, authorizes a court of equity to reform it, or to grant such relief to purchaser as correction would confer. *Darden v. Vanlandingham* (Civ. App.) 189 S. W. 297.

Where 184.6 acres were conveyed instead of 157.3 as intended, the excess was such as equity will correct, if made by mutual mistake. *Seureau v. Frazer* (Civ. App.) 189 S. W. 1003.

Evidence held to sustain a jury finding that the parties to a deed made a mutual mistake regarding the source of grantor's title, although the grantors did not testify and the grantee read the deed before accepting it. *Smith v. Jones* (Civ. App.) 192 S. W. 795.

Where the parties to a deed make a mutual mistake regarding the source of the grantor's title, equity will reform the deed or grant other appropriate relief. *Id.*

— **Contracts in general.**—Where the parties to a contract discovered before its execution that a stipulation was omitted therefrom, but they believed, on the advice of an attorney, that the stipulation was binding, the contract would not be reformed to include the stipulation, unless either party was misled by the other, or by the intentional misrepresentation of the attorney. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

In the absence of fraud, mistake, or some special reason, the courts will not reform a binding contract. *Seidel v. Walker* (Civ. App.) 173 S. W. 1170.

Where, through mutual mistake, a chattel mortgage misdescribed the note securing the debt, equity will award reformation. *Bailey v. Culver* (Civ. App.) 175 S. W. 1083.

Where a release reciting payment of entire debt did not purport to release all of the lands subject to the deed of trust, held, that such recital could not overcome abundant other evidence showing that it was made through mutual mistake. *First State Bank of Amarillo v. Jones* (Sup.) 183 S. W. 874.

Where a release of a deed of trust through mutual mistake recited payment of the entire debt and erroneously released more of the land than was intended, the instrument will be reformed by a court of equity. *Id.*

Where through mutual mistake a chattel mortgage failed to include a debt which the parties agreed should be secured, the instrument will be reformed. *McLeod Bros. v. Kirkland* (Civ. App.) 184 S. W. 721.

Equity will reform a chattel mortgage in case of mutual mistake between the parties so as to make it express the true intent, and third parties cannot complain of the reformation unless they plead and prove that they are subsequent lienholders or purchasers in good faith. *Blount, Price & Co. v. Payne* (Civ. App.) 187 S. W. 990.

Equity will relieve from the terms of a contract for unilateral mistake only if it arises through no want of ordinary care or diligence on complainant's part. *Arden v. Boone* (Civ. App.) 187 S. W. 995.

— **Contracts of insurance.**—Evidence in an action for the reformation of an insurance policy, naming L. as the insured and K. as mortgagee and payee in case of loss, held sufficient to support a judgment reforming the policy by inserting plaintiff's name in the mortgage clause, on the ground of mistake. *Western Assur. Co. v. Hill-eyer-Deutsch-Jarratt Co.* (Civ. App.) 167 S. W. 816.

**RULE 29. PAROL EVIDENCE IS ADMISSIBLE TO ESTABLISH A SEPARATE ORAL AGREEMENT CONSTITUTING A CONDITION PRECEDENT TO AN OBLIGATION CLAIMED TO ARISE ON A WRITTEN AGREEMENT**

**Contracts in general.**—Evidence of a condition precedent to the liability of an obligee on a bond held admissible. *Francis v. Cornelius* (Civ. App.) 173 S. W. 947.

That a written contract of employment of a broker to procure a purchaser of land

was on a condition may be proved by parol to show it did not become operative. *Far-rar v. Holt* (Civ. App.) 178 S. W. 618.

**Contracts of sale and deeds.**—An obligation to convey lands, independent on its face, may be shown by parol evidence to be dependent upon a consideration not expressed in the obligation or instrument declared on. *Johnson v. Mansfield* (Civ. App.) 166 S. W. 927.

Parol evidence held inadmissible to show that a deed delivered directly to the grantee, and the notes given for the price, were intended to take effect only on conditions. *Holt v. Gordon* (Sup.) 174 S. W. 1097.

In an action on purchase-money notes and to foreclose the vendor's lien, parol evidence is not admissible to prove a previous agreement that the sale should become effective only on the happening of a condition. *Holt v. Gordon* (Civ. App.) 176 S. W. 902.

Vendor held entitled to show by parol that contract delivered to third party was not to take effect unless he was able to procure a conveyance of the land from another party. *Nelson v. Boggs* (Civ. App.) 177 S. W. 1005.

In an action for goods sold and delivered on the buyer's order to the seller's salesman, parol evidence was admissible to show that the written order was not to be delivered to the seller to be filled within 30 days. *National Novelty Import Co. v. Duncan* (Civ. App.) 182 S. W. 888.

**Bills and notes or indorsement thereof.**—A buyer of an interest in a machine, who seeks to recover from the seller the sum paid to bona fide indorsees of purchase-money notes, may prove by parol the agreement under which the notes were given and show that the seller agreed to return the notes if the buyer within 90 days expressed dissatisfaction with his purchase. *Watson v. Rice* (Civ. App.) 166 S. W. 106.

Parol evidence of the terms and conditions on which a negotiable instrument has been delivered to the payee and of the understanding between the parties is admissible. *Id.*

Where defendant executed a premium note, parol evidence that it was agreed that it should not be paid if defendant would assist in procuring other insurance, held inadmissible. *Security Life Ins. Co. of America v. Allen* (Civ. App.) 170 S. W. 131.

In a suit on a note, given for bank stock, by the payee, parol evidence was admissible to show that such note was conditional on the payee's not electing to retain his stock within 30 days, and that he so elected. *Hawkins v. Johnson* (Civ. App.) 181 S. W. 563.

As between the parties to a note, the oral condition on which it was delivered, that it should be payable only on the happening of a certain event, is valid. *Hamilton v. Han-nus* (Civ. App.) 185 S. W. 938.

#### RULE 30. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT A WRITTEN AGREEMENT HAS BEEN RESCINDED, MODIFIED, EXTENDED OR WAIVED BY A SUBSEQUENT VALID AGREEMENT

**In general.**—Evidence of a parol agreement, made after written authority to the broker to sell, that defendant should pay no commission on an exchange of properties, unless the exchange was fully consummated, held properly admitted. *Williams v. Phelps* (Civ. App.) 171 S. W. 1100.

A written contract may be abrogated or altered by a parol agreement subsequently made, and proof of such subsequent agreement is not inadmissible as an attempt to vary a written instrument by parol evidence. *Lone Star Canal Co. v. Broussard* (Civ. App.) 176 S. W. 649.

A local insurance agent, authorized to waive conditions and forfeitures contained in a fire policy, may waive them by parol. *New Jersey Fire Ins. Co. v. Baird* (Civ. App.) 187 S. W. 356.

The rule excluding parol evidence varying writings does not prevent the introduction of an oral modification of the written contract made subsequent to the execution of the written contract. *Ross v. Moore* (Civ. App.) 191 S. W. 853.

Written contract can be rescinded by parol. *Taylor v. Wentworth & Curtis* (Civ. App.) 193 S. W. 158.

The rule forbidding admission of parol evidence to alter or contradict a written instrument does not prohibit establishment by parol of an agreement between parties to a writing entered into subsequent to execution of written instrument changing or altogether abrogating written contract. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

#### RULE 32. A RECITAL IN A DEED BINDS THE PARTIES AND THEIR PRIVIES IN SUITS FOUNDED UPON SUCH INSTRUMENT OR GROWING OUT OF THE TRANSACTION IN WHICH IT IS GIVEN

##### *I. Creation and Operation of Estoppel in General*

**1. Nature and elements in general.**—To estop one by deed it must be proved that there was a consideration paid the grantor, or that he was guilty of fraud or gross negligence, and that the party relying on the estoppel did not know the facts. *Ford v. Warner* (Civ. App.) 176 S. W. 885.

A party relying on estoppel by deed is chargeable with knowledge of the state of the title shown by the record. *Id.*

A grantor in a deed, absolute in form but in fact a mortgage, signing as a witness a deed to a grantee of the mortgagee, was not estopped to assert that it was a mort-

gage; the subsequent grantee having notice. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536.

**2. Instruments operating as estoppel—Deeds.**—A grantor of land cannot assert title as against her grantee. *Raley v. D. Sullivan & Co.* (Civ. App.) 159 S. W. 99.

A conveyance by plaintiffs' brothers and sisters, who were tenants in common, of a particular tract of land, held to bar plaintiffs from recovering that parcel; the grantees having made improvements, and the whole tract being of similar character. *Ramirez v. Lasater* (Civ. App.) 174 S. W. 706.

Though before a husband's judgment creditor, who had levied on community lands, deeded them to the wife, the husband had executed a quitclaim deed to the lands to the wife, the judgment creditor's deed did not vest title in the separate estate of the wife. *Emery v. Barfield* (Civ. App.) 183 S. W. 386.

Where a deed to land was duly recorded and in the chain of title when a company concluded its contract to buy such land and accepted conveyance, the grantor in the deed, which was procured by fraud, was estopped from recovering her interest in the land from the company. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

A wife, having sold part of a tract of land subject to a lien, and consented to a release of the lien on that part, is estopped from asserting against the holder of the lien the right to have the land sold made subject to lien before the homestead. *Loe v. Bellgardt* (Civ. App.) 193 S. W. 714.

**4. — Defective, inoperative or invalid instruments and transactions.**—The rule that a tenant in common may recover possession of the entire tract as against a trespasser did not apply as against defendant, claiming under a deed which the grantors and their heirs for more than 50 years had recognized as valid, and which was insufficient only in the certificate of acknowledgment. *Houston Oil Co. of Texas v. Sudduth* (Civ. App.) 171 S. W. 556.

**5. Recitals in deeds, mortgages, and mechanic's liens as grounds of estoppel.**—The holder of a bond for title claimed to have been surrendered and canceled held not estopped by mortgages given vendor for supplies, describing the land as belonging to the vendor, though this was evidence to be considered with the other testimony. *Wofford v. Strickland* (Civ. App.) 160 S. W. 623.

Where a mechanic's lien on a homestead, executed to secure a building loan, recited that it was agreed that all work already done on the building and all material furnished had been paid for, the borrower was estopped to thereafter deny the truth of such statement in order to avoid the lien. *Melcher v. Higbee* (Civ. App.) 165 S. W. 478.

Mere declaration of one in a deed of land which is his actual residence that it is not his homestead will not estop him to claim it as such against execution of a third person. *Pierce v. Jones* (Civ. App.) 193 S. W. 1137.

**7. Persons estopped in general.**—Recital, in a deed to complainant's wife, that the consideration was her separate property did not preclude complainant, after her death, in a suit to reform the deed, from testifying that such recital was erroneous, and that the consideration was the community property of himself and wife. *Strickland v. Baugh* (Civ. App.) 169 S. W. 181.

**11. Persons acting in particular character or capacity.**—One who, as trustee of a lodge, executed a deed to certain lots, is estopped from claiming a portion thereof against the grantee by adverse possession for any period prior to the execution of the deed. *Crump v. Sanders* (Civ. App.) 173 S. W. 559.

**12. Matters precluded.**—In a suit to establish a disputed boundary line, plaintiff held not estopped, by certain deeds calling for the line as located by defendant, to claim that the line was not properly located. *Clemmons v. Johnson* (Civ. App.) 167 S. W. 1103.

A trustee joining cotrustees in executing a blanket deed of trust as trustees held not estopped from suing for the recovery of the property on offering to do equity by offering to pay the proper proportion of the money borrowed by the trustees. *Pryor v. Krause* (Civ. App.) 168 S. W. 498.

A surety upon a replevin bond in garnishment held estopped from asserting a lien upon moneys paid to one of the garnishees as attorney for the principal defendant. *Amarillo Nat. Bank v. Sanborn* (Civ. App.) 169 S. W. 1075.

Where an attorney purchases property adversely to his client, he cannot contend as against the client that his vendor's title was void. *Morris v. Brown* (Civ. App.) 173 S. W. 265.

## II. Estates and Rights Subsequently Acquired

**15. Instruments operating on title subsequently acquired—Conveyances with covenants.**—Where purchaser from state conveyed by warranty deed, and after forfeiture for nonpayment of interest again purchased from the state and procured a patent, title held not to pass by estoppel. *Houston Oil Co. of Texas v. Reese-Corriher Lumber Co.* (Civ. App.) 181 S. W. 745.

A general warranty deed conveys an after-acquired title. *Huling v. Moore* (Civ. App.) 194 S. W. 188.

**17. Grounds of estoppel.**—A chattel mortgage upon property not in existence may become operative if the property covered subsequently comes into the possession of the mortgagor, on the equitable principle of estoppel rather than on the principle that the execution of the mortgage then creates a valid lien upon the thing mortgaged. *Ivy v. Pugh* (Civ. App.) 161 S. W. 939.

**18. Persons to whom estoppel is available.**—A tenant in common's purchase of an outstanding hostile title inures to benefit of his cotenants. *Rogers v. White* (Civ. App.) 194 S. W. 1001.

**RULE 33. THE ADMISSIONS OF A PARTY OR HIS AGENT ARE ADMISSIBLE IN EVIDENCE WHEN OFFERED BY THE ADVERSE PARTY**

*I. Nature, Form and Incidents in General*

10. **Judicial admissions in general.**—In an action to rescind a contract alleged to have been induced by defendant's false representations that it had been held legal by the courts and might be sent in mail, it being alleged that defendant had been indicted and pleaded guilty for doing such things, the indictment and his plea of guilty held admissible. *Coons v. Lain* (Civ. App.) 168 S. W. 981.

In an action for the rent of grazing lands, the admissions of defendant as to the pasturage of his cattle thereon, made in another suit between him and another party, were admissible in evidence. *Warburton v. Wilkinson* (Civ. App.) 182 S. W. 711.

11. **Pleadings—Admissibility in same proceedings.**—In a suit for partition and accounting of rents and profits, the court properly permitted so much of defendant's answer as alleged a receipt for rent, to be admitted in evidence as an admission of defendant, but properly refused to permit the introduction of a further allegation with reference to expenses and indebtedness incurred and an agreement between defendant and the life tenant as self-serving. *Wauhup v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

13. — **Same or different parties.**—In an action for conversion of cattle by levy of attachment, a paragraph contained in a bill of equity between the same parties was admissible against the plaintiff as admission in another suit. *First Nat. Bank of Hereford v. Hogan* (Civ. App.) 185 S. W. 880.

Averments in a pleading are competent evidence in a subsequent suit against the party making them, and the fact that the averments are made on information and belief goes only to the weight, and not to their admissibility. *Id.*

16. — **Pleadings superseded, withdrawn or abandoned.**—Admissions in contestants' original answer for which an amended answer was substituted are not sufficient to identify the signer of a waiver of the right to administer where the original answer was not put in evidence. *Kimmons v. Abraham* (Civ. App.) 158 S. W. 256.

In an action for personal injuries to plaintiff's wife, defendant railroad company may introduce abandoned pleadings of plaintiff wherein he contended that part of the injuries were due to the negligence of other railroad companies. *St. Louis Southwestern Ry. Co. v. Duncan* (Civ. App.) 164 S. W. 1087.

Where a complaint in libel counted only on original publication and not on answer setting up truth, afterwards abandoned by amendment, held error to admit such answer in evidence. *Ft. Worth Pub. Co. v. Armstrong* (Civ. App.) 181 S. W. 554.

In action for libel, seeking only actual damages, answer setting up truth superseded by amendment held not admissible in evidence. *Id.*

In an action for fraternal insurance, defendant's original answer containing admissions of relevant issues, held admissible, but open to explanation or contradiction like other admissions. *Carr v. Grand Lodge, United Brothers of Friendship of Texas* (Civ. App.) 189 S. W. 510.

17½. **Declarations after execution of gift deed.**—In wife's suit to restrain sale on execution of land conveyed to her by husband, declarations of husband, made after execution of the gift deed, consisting of his confession, by suffering default, of the truth of allegations in the execution creditor's petition that the conveyance was void, were inadmissible as against the wife, who was not a party to the suit. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

19. **Testimony.**—In an action against two for the overflow of land, plaintiff's testimony as a witness that in his opinion the overflow was caused by the fill made by appellant's codefendant was not an admission of appellant's nonliability. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

20. **Offers of compromise or settlement.**—Where letters between attorneys and a client showed merely an effort to compromise a dispute as to the attorneys' compensation by accepting less than they thereafter sued for, they were all properly excluded. *Hunter v. Holt* (Civ. App.) 160 S. W. 608.

In trespass to try title, evidence that plaintiff offered to purchase a deed from defendants to the property held inadmissible, for that fact will not affect plaintiff's title, being a mere attempt to remove a possible cloud. *Zimmermann v. Baugh* (Civ. App.) 161 S. W. 943.

In an action for wrongful garnishment, it was not error for the court to permit an allegation in plaintiff's petition that he made an effort to compromise the debt before the garnishment was issued to remain, and to permit proof thereof. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

A letter from defendant's attorneys prior to suit on a note in question held not objectionable as a whole as an offer to compromise. *Sanford v. John Finnigan Co.* (Civ. App.) 169 S. W. 624.

When any fact stated in an offer of compromise can be separated from the offer and still convey the idea in the writer's mind, it is admissible. *Id.*

A mere offer to pay in compromise on a condition not accepted an item claimed to be owed is not an admission of such item being owed. *Tabet Bros. Co. v. Higginbotham* (Civ. App.) 170 S. W. 118.

An offer clearly one of compromise, involving no admission of liability, should not be admitted in an action on a note; the defense being that it was delivered on an oral condition of payment not satisfied. *Hamilton v. Hannus* (Civ. App.) 185 S. W. 938.

In a servant's action for injury, his unaccepted offer to compromise his claim was properly withdrawn from the jury. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.



In suit by vendors for specific performance of contract to purchase land, letter containing offer of compromise and making no statement of fact held properly rejected. *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

21. — **What constitutes offer.**—In action on accident policy to recover death claim, admission of draft or voucher for the amount of a disability claim, sent after the insurer knew that plaintiff was making claim for the death, held not to violate the rule against evidence as to offer to compromise. *Commonwealth Bonding & Casualty Co. v. Hendricks* (Civ. App.) 168 S. W. 1007.

A request for settlement, made before the other party had denied liability or there had been a disagreement as to the amount, is not inadmissible as an offer of compromise. *Texas & P. Ry. Co. v. Spann* (Civ. App.) 173 S. W. 600.

23. — **Admissions made without prejudice.**—In order to exclude distinct admissions of facts as offers of compromise, they must have been made without prejudice, and into which the party might have been led by the confidence of effecting a compromise. *Sanford v. John Finnigan Co.* (Civ. App.) 169 S. W. 624.

24. **Statements in writing.**—In servant's action for injury, where defendant claimed that plaintiff was a vice principal, declarations contained in plaintiff's proof made to the insurer might be considered on the issue of the capacity in which he was employed. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

25. — **Letters.**—In an action on a note, a letter from the president of the payee to one claiming to be a surety was admissible to show the payee's knowledge of the fact that the surety was a mere surety and not a principal. *Central Bank & Trust Co. of Houston v. Hill* (Civ. App.) 160 S. W. 1099.

A letter, written by a life insurance company to its agent, held competent as an admission of the meaning of its written agreement to handle premium notes. *San Antonio Life Ins. Co. v. Griffith* (Civ. App.) 185 S. W. 335.

27. **Oral statements.**—Statements of a party to a witness as to the matter in controversy are admissible against him. *Mendiola v. Gonzales* (Civ. App.) 185 S. W. 389.

In an action against livery stable keepers for value of horse, owner was properly permitted to testify that "defendant told him that in his (defendant's) opinion it was not necessary to have a veterinary surgeon to treat the horse for the injury." *Attaway v. Schmidt & Madigan Grocery Co.* (Civ. App.) 188 S. W. 1010.

In suit to rescind purchase of land for fraud, testimony that defendant stated in presence of another defendant that land was rich and good agricultural land, and was north of a certain town, which was not the case, was admissible as in nature of admission against interest. *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

28. **Acts or conduct.**—In an action for injuries to plaintiff's mule at a cattle guard, evidence that the railroad had substituted a different kind of guard at another place held admissible as an admission. *Stephenville N. & S. T. Ry. Co. v. Schrank* (Civ. App.) 175 S. W. 471.

Evidence of changes or repairs subsequent to an injury, or as to subsequent precautions to avoid recurrence of injury, is not admissible as showing negligence or as an admission of negligence, though there are several exceptions to the rule. *Winnsboro Cotton Oil Co. v. Carson* (Civ. App.) 185 S. W. 1002.

Where a railroad defended an intended passenger's action for injuries on the ground that it was necessary to operate its signal to maintain the rod which the passenger struck, at the height at which it was maintained, evidence that after the accident it was raised 1 foot is admissible to show that it was not necessary to maintain the rod where it was. *Texas Midland R. Co. v. Truss* (Civ. App.) 186 S. W. 249.

It is ordinarily the rule that evidence of repairs after an accident is not admissible to prove antecedent negligence. *Id.*

In action by buyer to recover excess of price paid for cotton, refusal of defendant to take back cotton sold by him at the same price he received for it, notwithstanding an advance of \$2.50 per bale, was competent as an admission, as bearing upon his claim that the grade and classification at which it was sold were the correct ones. *Townsend v. Pilgrim* (Civ. App.) 187 S. W. 1021.

In a boundary case in which defendant was claiming under a Mexican grant, a deed and patent to defendant from state dated after a former case concerning the land held not admissible as showing purchase of adverse title. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

29. — **Suppressing testimony.**—In an action for fraudulent misrepresentations, testimony of a witness for the plaintiff that defendant had induced him to leave the state in order to prevent his testifying was admissible. *Loftus v. Sturgis* (Civ. App.) 167 S. W. 14.

30. — **Compromise or settlement.**—In a personal injury action prosecuted to a conclusion by attorneys, assignees of one-half interest therein, after their client had compromised, evidence of the compromise with the client is admissible as tending, unexplained, to show an admission of negligence upon the part of the railway. *St. Louis, S. F. & T. Ry. Co. v. Thomas* (Civ. App.) 167 S. W. 784.

Agreement between holder of vendor's lien and certain defendants, in the nature of a compromise and admission, that the lien was valid as against such defendants held improperly excluded. *Zeigel v. Magee* (Civ. App.) 176 S. W. 631.

31. **Acquiescence or silence.**—In an action for injuries sustained by plaintiff's wife while a passenger on defendant's train, evidence that the plaintiff had made no demand for settlement before instituting suit is immaterial. *Houston & T. C. Ry. Co. v. Fox*, 166 S. W. 693, 106 Tex. 317, reversing judgment (Civ. App.) 156 S. W. 922.

Failure of railroad superintendent, discussing the widening of a subway, to assert street railroad's contract liability for burning bridge over it, held not an admission that the street railroad was not so liable. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Civ. App.) 171 S. W. 1103.

*II. By Parties or Others Interested in Event*

34. **Parties of record.**—In a will contest on the ground of contestee's undue influence over the testator, her husband, evidence that she had declared that contestant, his daughter, need not be looking to see what she could get out of testator, because declarant would see that she did not get any more than she had, was admissible as showing an intention to defeat contestant's rights in the estate. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

37. **Joint interest.**—While declarations of a legatee are inadmissible as against other legatees, to prove that the execution of the will was procured by undue influence, yet, declarations of a contestee, charged with undue influence, made in the absence of testator, her husband, and showing ill will toward contestant, were admissible in corroboration of the evidence showing conversations with her husband, amounting to attempts to influence the disposition of his property, which contestee denied. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

*III. By Grantors, Former Owners or Privies*

38. **Privies and former owners in general.**—In a lessee's action for an injunction, the lessor's declarations against interest held admissible against defendant, who claimed under him with full notice that plaintiff was in possession. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

Prior to an execution sale, the record owner told the purchaser that the judgment debtor owned the land and the debtor confirmed it. Held, the debtor's statement was admissible on the issue of title, where appellant claimed under a prior unrecorded deed of the record owner. *Alexander v. Conley* (Civ. App.) 187 S. W. 254.

40. **Grantors, vendors or mortgagors of real property—Before conveyance or transfer of possession.**—Declarations of a grantor, made before execution of the deed, that he did not claim the land, are admissible as against his grantee. *Rayner v. Posey* (Civ. App.) 173 S. W. 246.

Declarations of a grantor prior to sale in disparagement of his title, though admissible against the grantee, are not admissible against an innocent purchaser. *Id.*

41. — **After conveyance or transfer of title in general.**—The testimony of a grantor that before the execution of the deed he, with the grantee's agent, went on the ground, and pointed out the boundary, is inadmissible against a subsequent purchaser relying on the deed duly recorded. *Kirby Lumber Co. v. Stewart* (Civ. App.) 161 S. W. 372.

In an action for the conversion of cotton which a mortgagee claimed under a mortgage made by a landowner before he conveyed to defendants, a letter written by the landowner, explaining that he had sold the land and was renting from his grantee, on shares, and that defendants were to take the first cotton, is admissible only against the writer. *A. J. Birdsong & Son v. Allen* (Civ. App.) 166 S. W. 1177.

Where a purchaser of land sold all of his interest to defendants, who assumed payment of the unpaid purchase money, the purchaser's admissions that he did not rely upon his grantor's representations as to the quantity of land conveyed, etc., are binding only upon himself and not upon defendants. *Brown v. Yoakum* (Civ. App.) 170 S. W. 803.

Declarations of a grantor that he claimed the land and contemplated improving and living upon it, made after his conveyance, and not in grantee's presence, are inadmissible. *De Shazo v. Eubank* (Civ. App.) 191 S. W. 369.

In wife's suit to restrain sale on execution of land conveyed her by husband, declarations of husband made after his execution of the gift deed, were inadmissible. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

A purported will which apparently affected title to land was inadmissible where the land involved had been conveyed nine years before. *Jung v. Petermann* (Civ. App.) 194 S. W. 202.

43. — **Showing fraud.**—Declarations of one after taking title in his son's name of property bought with community funds, made in the son's absence, that he did so to defraud his wife, being against interest, are after his death admissible against the son. *Krenz v. Strohmair* (Civ. App.) 177 S. W. 178.

50. **Donors.**—Declarations by defendant subsequent to claimed gift of a note to his wife held not admissible to show his ownership of the notes. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

53. **Testators and intestates.**—A statement made by an injured engineer to an ambulance doctor on the way to the hospital absolving the railway from all blame is admissible in an action by the widow against the railroad for his wrongful death, as an admission against interest. *Hovey v. See* (Civ. App.) 191 S. W. 606.

Under arts. 4694, 4695, there is such privity between the injured servant and his survivors that an admission made by the injured servant is admissible in his survivors' action for wrongful death. *Id.*

*IV. By Agents or Other Representatives*

54. **Authority in general.**—Declarations by the children of the buyer of an automobile showing a delivery of the car to them as their mother's agents are inadmissible in an action against the buyer for the purchase price, in the absence of proof of the agency aside from the relationship and the declarations of the children. *Lange v. Interstate Sales Co.* (Civ. App.) 166 S. W. 900.

56. **Interest of party or representative.**—Garnishee company, whose general manager was acting for himself in buying judgment debtor's stock of goods in violation of Bulk Sales Law, was not bound by his declarations. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

57. **Agents or employes in general.**—In action for price of engine sold for defendants' cotton gin, statements of defendants' bookkeeper, present at a test of the engine with defendants' knowledge and consent, that the fuel consumed by it was less than that guaranteed, held admissible. *Feagins v. Texas Machinery & Supply Co.* (Civ. App.) 185 S. W. 961.

Testimony as to statement of defendant's managing agent in conversation with plaintiff's attorney held competent in rebuttal of manager's testimony offered by defendant on issue of plaintiff's abandonment of contract in suit. *Slayden v. Palmo* (Sup.) 194 S. W. 1103.

59. — **Scope and extent of agency or employment.**—An agent authorized merely to collect a note cannot bind his principal by a declaration that the note, which is secured by a lien on real estate, has been paid, and thereby estop the principal from foreclosing the lien, nor can any agreement by such agent to assume the payment thereof bind the principal. *Thompson v. Keys* (Civ. App.) 162 S. W. 1196.

60. — **Admissions before or after transaction or event.**—Where plaintiff selling feedstuff for defendants would wire orders to defendants' agent, who would write letters of confirmation to the purchasers—sending carbon copies to plaintiff and to defendants—such letters were acts and declarations of defendants through their agent, and admissible to bind them in an action for plaintiff's commissions. *E. R. & D. C. Kolp v. Brazer* (Civ. App.) 161 S. W. 899.

Agent's disclaimer to be admissible must be made concerning act within his authority, and if made before or after such act is not admissible. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Civ. App.) 171 S. W. 1103.

62. **Corporate officers, agents and employes.**—In an action for damages for injuries sustained in an automobile accident, where the machine was being driven by one furnished by the seller to instruct the buyer in its operation, evidence of declarations by the driver to the effect that he would remain until the buyer understood the operation of the machine held admissible. *Buick Automobile Co. v. Weaver* (Civ. App.) 163 S. W. 594.

In suit to enforce claim for materials against corporation, testimony of its lessee, to whom it was furnished, as to conversation with company's president, held inadmissible without predicate showing president's authority to authorize agent to give lien or an estoppel to deny such fact. *Cleburne St. Ry. Co. v. Barber* (Civ. App.) 180 S. W. 1176.

In garnishment proceedings to reach effects of judgment debtor which he sold to garnishee in violation of Bulk Sales Law, on showing that the general manager of garnishee corporation bought for his company what he said while negotiations were in progress, was admissible as part of transaction. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

64. — **Officers, agents or employes of carriers.**—Evidence of an agent of a terminal carrier that he delivered the goods not lost to plaintiff, and located the loss on the line of another railroad, was competent to show that witness' company handled the goods. *St. Louis, B. & M. Ry. Co. v. Gould* (Civ. App.) 165 S. W. 13.

In action for delay in transporting live stock, testimony of witness as to what conductor told him concerning the rules of the company held improperly admitted for failure to show that he had authority to bind the company. *Texas & P. Ry. Co. v. Cauble* (Civ. App.) 168 S. W. 369.

Declarations by an engineer the day following his striking with his engine a fellow employe were inadmissible. *Paris & G. N. R. Co. v. Lackey* (Civ. App.) 171 S. W. 540.

67½. **Guardian ad litem.**—In an action to set aside a judgment confirming a conveyance of community property by an insane surviving husband, the fact that the guardian ad litem of the children in the former proceeding testified at the subsequent trial that he was of the opinion that the grantor was sane does not affect the right of the children to have the deed set aside. *Pyle v. Pyle* (Civ. App.) 159 S. W. 488.

68. **Husband or wife.**—Admissions of divorced wife in pleadings and evidence that goods purchased during marriage were necessities held not conclusive against the husband. *Trammell v. Neiman-Marcus Co.* (Civ. App.) 179 S. W. 271.

In an action to try title by wife, with her husband, against vendees claiming more land conveyed than grantors claim was intended, admissions by the husband, not in the wife's presence, after the conveyance, as to the acreage deemed conveyed, do not bind her. *Qualls v. Fowler* (Civ. App.) 186 S. W. 256.

69. **Partners.**—In action against promoters for services in surveying railroad, statement of one of defendants and plaintiff to another defendant concerning agreements between other defendants and prospectus showing a third defendant as officer of road, held admissible against the first two defendants. *Vaughn v. Morris* (Civ. App.) 180 S. W. 954.

In a broker's action for commission against the seller, the court properly rejected statements made by partner of purchaser, which could not bind plaintiff. *Black v. Wilson* (Civ. App.) 187 S. W. 493.

70. **Principal or surety.**—An account prepared by the principal, showing his liability and being admissible against him, may be received to establish prima facie the surety's liability. *Commonwealth Bonding & Casualty Ins. Co. v. Harper* (Civ. App.) 180 S. W. 1156.

72. **Insured or beneficiary.**—Under art. 4832, evidence that deceased, when asked by witness to pay his July assessment, said that he would not keep it up, or did not want to keep it up, held admissible against the beneficiary. *Cole v. Knights of Maccabees of the World* (Civ. App.) 188 S. W. 699.

73. **Conspirators and persons acting together.**—Where, in an action for fraud inducing plaintiff to become a lessee of a business, the petition charged a conspiracy between the owner and a third person, in possession under a prior lease for a term which had not expired and the conspiracy was shown, statements by the third person as to the reason for ceasing to operate under the lease were admissible against the owner. *Loftus v. Zier* (Civ. App.) 162 S. W. 476.

In suit to recover automobile wrongfully attached and sold as property of another, upon prima facie showing of conspiracy between plaintiff and such other so that plaintiff might hold it, such other's acts or statements would be admissible. *Taylor Bros. Jewelry Co. v. Kelley* (Civ. App.) 189 S. W. 340.

#### V. Proof and Effect

75. **Preliminary evidence—Existence and extent of agency or authority.**—Testimony of plaintiff as to a conversation which he heard between the conductor of his train and some employes of the road's receivers, relative to the cause of the wreck which delayed the shipment of live stock, was inadmissible, where the conductor was not shown to be authorized to make such statements. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

77. **Explanation or limitation.**—On second trial of an action for personal injuries, where defendant introduced plaintiff's abandoned pleadings as an admission conceding the liability of others, plaintiff may introduce evidence to explain such admissions, but cannot introduce the charge of the court directing a finding in favor of the other defendants to minimize the effect of the admission. *St. Louis Southwestern Ry. Co. v. Duncan* (Civ. App.) 164 S. W. 1087.

An admission by a party in an ex parte deposition is not as binding as an admission in pleading, but may be explained by showing that the witness was insane when his answers were taken, without raising the issue of insanity by any pleading, or first moving to suppress the deposition, etc. *Kellner v. Randle* (Civ. App.) 165 S. W. 509.

In an action for fraternal insurance, defendant's original answer containing admissions of relevant issues, held admissible, but open to explanation or contradiction like other admissions. *Carr v. Grand Lodge United Brothers of Friendship of Texas* (Civ. App.) 189 S. W. 510.

80. **Construction.**—In action on note, admission by defendant to secure privilege of opening and closing held to carry with it proof of all of the facts to support a recovery for the amount of the note, with interest and attorney's fees, except as defeated by plea in reconvention. *Russell v. Rhone* (Civ. App.) 173 S. W. 611.

81. **Conclusiveness and effect.**—Testimony of witnesses as to declarations of an agent of admissions of his principal is admissible as to the weight to be given testimony of the principal. *Newsom v. Langford* (Civ. App.) 174 S. W. 1036.

Admissions of a party as to a transaction are specially valuable in evidence. *Lester v. Hutson* (Civ. App.) 184 S. W. 263.

There is no rule which prevents a party from denying testimony of admissions alleged to have been made by him. *Id.*

82. — **As to particular facts in general.**—Statements in stock condition reports signed by a shipper as an accommodation to the conductor, and without having been read, and only to indicate that the shipment had reached the terminus of the carrier's line, are not binding on the shipper. *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925.

In a suit for injuries to crops because of defendant's breach of a contract to furnish water to irrigate same, plaintiff's admission that the crops raised were of the value of \$637.75, while precluding him from showing that the value was less, did not prevent defendant from showing that the crop raised was of greater value. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 168 S. W. 28.

83. — **As to indebtedness.**—The mere fact that the plaintiff in selling goods entered an account on the books as against a partnership did not change the liability of the defendant to whom in fact credit was alone extended, that being a mere circumstance explainable and not conclusive as against the plaintiff. *Daggett v. Avis Hardware Co.* (Civ. App.) 183 S. W. 20.

The introduction of an admission by defendant to show an agreement to make advances does not preclude plaintiff from showing an agreement to make larger advances than admitted. *San Antonio Life Ins. Co. v. Griffith* (Civ. App.) 185 S. W. 335.

Where the tenant claimed a set-off of certain amounts against the landlord, who admitted payment on an item of \$4.50, instead of \$4.97, as claimed by the tenant, the court should have allowed the amount so admitted as a credit in favor of the tenant. *Harris v. McGuffey* (Civ. App.) 185 S. W. 1024.

84. — **As to title or possession.**—In trespass to try title to land conveyed by deed claimed to be a mortgage, evidence as to declarations by defendant that plaintiffs' father bought the land held insufficient to support a verdict for plaintiffs. *Yates v. Caswell* (Civ. App.) 169 S. W. 1104.

In trespass to try title, defendant's admission held to warrant directed verdict in favor of plaintiff; it overcoming the defense set up in the answer. *Workman v. Ray* (Civ. App.) 180 S. W. 291.

Although plaintiff alleged that the defendant had used a way for telephone lines across plaintiff's land for more than two years, that was not such an admission of plaintiff's acquiescence as to establish the prescriptive right in defendant. *American Cement Plaster Co. v. Acme Cement Plaster Co.* (Civ. App.) 181 S. W. 257.

86. — **Judicial admissions.**—Buyer of gasoline engine, sued on note given for part of price, held not precluded from having a rescission and cancellation of the contract of

sale by admissions in his cross-bill relative to his having retained the engine after he discovered its defects. *Bruns Kimball & Co. v. Amundsen* (Civ. App.) 188 S. W. 729.

**RULE 34. DECLARATIONS ARE GENERALLY INADMISSIBLE, BUT MAY BE SHOWN AS A PART OF THE RES GESTÆ WHERE MADE BY A PARTY OR BY THIRD PERSONS AT THE TIME WHEN AN ACT IS PERFORMED AND AS PART OF THE TRANSACTION**

*I. Declarations in General.*

**1. Nature and grounds for admission in general.**—Declarations held incompetent to show invalidity or nonexistence of a marriage. *Adams v. Wm. Cameron & Co.* (Civ. App.) 161 S. W. 417.

Evidence as to acts and statements of president of corporation, when bill for repairs was presented, held admissible on the question of an alleged agent's authority to contract for the repairs. *Texas Mfg. Co. v. Fitzgerald* (Civ. App.) 176 S. W. 891.

**3. Statements showing physical or mental condition.**—In a will contest on the ground of contestee's undue influence, whereby contestant was excluded from any material participation in her father's estate, declarations of testator indicative of affection for contestant held admissible, as tending to show the state of his mind at the time of making his will. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 166 Tex. 322, 166 S. W. 1138.

Declarations of testator after the execution of a will, showing affection toward contestant, were admissible to show that but for the efforts of contestee he would have revoked it. *Id.*

Evidence that testator had declared that contestee desired him to make a will was not within the hearsay rule, but was admissible as showing his state of mind and the effect of contestee's influence. *Id.*

Testimony that, long after the alleged accident the alleged injured party stated she had been hurt, is inadmissible as a self-serving declaration. *Northern Texas Traction Co. v. Nicholson* (Civ. App.) 188 S. W. 1028.

**5. Statements showing intent, motive or nature of act**—Statements by persons since deceased.—Where one of the parties claimed under a purported deed which stated in the habendum clause, "delivery hereof not to occur until my death," evidence was admissible by the scrivener that the grantor said he did not wish to make a will, but preferred to convey by deed in such a way that he could retain control of the property during his lifetime, and did not say anything about delivery of the deed. *Stevens v. Haile* (Civ. App.) 162 S. W. 1025.

**6. — Statements by persons transferring property.**—Where plaintiffs and G., who were interested in property held in trust for G. for life, remainder to one of the plaintiffs, conveyed the property, declarations by G. as to what was to be done with that part of the proceeds kept in trust for her benefit are admissible, where it was shown that these statements were brought to the knowledge of plaintiffs before they signed the conveyance. *Barnett v. Elliott* (Civ. App.) 160 S. W. 671.

Evidence of declarations made by the grantor after conveyance, is inadmissible to establish a parol trust. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

**8. Self-serving declarations in general.**—Evidence that plaintiff complained of suffering a good deal more when on his side held admissible. *Missouri, O. & G. Ry. Co. of Texas v. Love* (Civ. App.) 169 S. W. 922.

In action on note claimed to have been forged, admission of notice from bank as to maturity and testimony that defendant in conversation with cashier denied signing the note held error. *Lockney State Bank v. Bolin* (Civ. App.) 184 S. W. 553.

In will contest, contestant's declaration to proponent when she first saw will that it did not look like her mother's handwriting was not evidence that it was not her handwriting, as contestant could not prove that fact by self-serving declarations at some other time or place. *Rounds v. Coleman* (Civ. App.) 189 S. W. 1036.

**9. — Statements by partners, joint contractors or codefendants.**—Declarations in a contract of sale of a business, drawn up and signed by B., in the absence of W., that they were partners, are inadmissible against W. *Eagle Drug Co. v. White* (Civ. App.) 182 S. W. 378.

**11. — Statements as to intent, motive or nature of act.**—A declaration by a husband that he intended to move back on a homestead was self-serving on the issue of whether there was an abandonment. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

**12. — Statements as to terms or meaning of contract.**—Statements between plaintiff and his attorney in defendants' absence are inadmissible on the question of the agreement of the parties. *Eagle Drug Co. v. White* (Civ. App.) 182 S. W. 378.

In suit against realty broker by owner of land to recover difference between selling price and price at which he accounted, testimony that broker stated when he deposited \$1,000 in bank, and on same day, that he had just bought property from owner, etc., held inadmissible as self-serving. *Barton v. McGuire* (Civ. App.) 189 S. W. 317.

In action against realty broker by owner of land to recover difference between price at which broker sold and price for which he accounted, conversation between broker and attorney, wherein broker told latter he had made telephone contract with owner to buy land himself, held self-serving. *Id.*

**13. — Statements as to title.**—In trespass to try title, in which defendant claimed under a lost deed, statements by defendant's grantor, claiming that he had a deed, offering to produce the same, held admissible to show the existence of his claim to own

Texas land, if properly limited, though not admissible as direct evidence of title. *Hutcheson v. Massie* (Civ. App.) 159 S. W. 315.

A statement of a husband prior to the incurring of a debt that certain personal property belonged to his wife was admissible in a contest between the creditor and the wife to determine the ownership of the property. *Wofford v. Lane* (Civ. App.) 167 S. W. 180.

In a proceeding to enforce a claim to property attached as the property of claimant's brother, W., evidence of an agreement between the claimant, W., and another that the cotton in controversy should belong to the claimant when grown, made when defendant was not present, held inadmissible, as being the unsworn declarations of interested parties in their own favor. *Taylor v. Butler* (Civ. App.) 168 S. W. 1004.

14. — **Time of making statement in general.**—A statement by plaintiff, suing for a personal injury, made several hours after the accident to a night watchman in explanation of his having a lamp burning, that he had been injured, that his injuries were paining him, and he kept the lamp burning to apply a liniment, is inadmissible as self-serving. *Gulf, T. & W. Ry. Co. v. Culver* (Civ. App.) 168 S. W. 514.

The testimony of a witness that plaintiff, suing a railroad company for a personal injury, told her a few days after the accident that he was hurt on the railroad, was inadmissible as self-serving. *Id.*

Where letter from G. concerning note which defendant claimed G. forged was introduced by defendant, his subsequent statements to G. that he never signed the note and knew nothing about it held self-serving and incompetent. *Lockney State Bank v. Bolin* (Civ. App.) 184 S. W. 553.

16. — **Statements by agents.**—Declarations of agent are not competent to prove existence of agency. *Alamo Live Stock Commission Co. v. Heimer* (Civ. App.) 192 S. W. 591; *Sargent v. Barnes* (Civ. App.) 159 S. W. 366; *Bray-Robinson-Curry Woolen Mills v. W. F. Walker & Son* (Civ. App.) 165 S. W. 107; *McConnon & Co. v. McCormick* (Civ. App.) 179 S. W. 275; *Loop Land & Irrigation Co. v. Ogburn* (Civ. App.) 180 S. W. 914; *Eardley Bros. v. Burt* (Civ. App.) 182 S. W. 721; *Knodel v. Equitable Life Ins. Co.* (Civ. App.) 193 S. W. 1133.

Agency cannot be established by the declarations of the agent alone, but they will be considered in connection with other evidence, including proof of like acts ratified by the principal, for the purpose of establishing agency. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

Where alleged agents of railroads were found transacting business where such agents usually are, their statements that they were agents were admissible. *Missouri, K. & T. Ry. Co. v. Brown* (Civ. App.) 155 S. W. 979.

The acts and statements of an alleged agent made while negotiations are pending for the sale of land are admissible in an action to rescind the contract for misrepresentations by the agent in connection with direct testimony of the acts and statements of the principal and direct testimony establishing agency. *Sargent v. Barnes* (Civ. App.) 159 S. W. 366.

In an action by the indorsee of a premium note, a letter written to defendant by its state agent seeking such indorsement held admissible to show that the agreement between the parties was that the note should be indorsed without recourse. *Security Trust & Life Ins. Co. v. Stuart* (Civ. App.) 163 S. W. 396.

In action on note given insurance agent and transferred by him to plaintiff, in which defendant asked judgment over against the insurance company, the agent's declarations that he was the company's agent held admissible; this being proved by other evidence and, in effect, admitted by the company in its answer. *Reserve Loan Life Ins. Co. v. Benson* (Civ. App.) 167 S. W. 266.

In an action for the purchase price of coal claimed to have been delivered to defendant's agent, testimony by the agent as to conversations with defendant's husband which fixed his status held admissible. *Kohlberg v. Awbrey & Semple* (Civ. App.) 167 S. W. 828.

Evidence as to M.'s conversation over telephone with person answering it in response to request for company's president, held admissible on question of M.'s agency for the company. *Texas Mfg. Co. v. Fitzgerald* (Civ. App.) 176 S. W. 891.

In action on account, a declaration of plaintiff's agent that he did not intend to release defendant by accepting notes of other parties was not inadmissible as self-serving, where it was part of a conversation wherein defendant's attorney admitted defendant did not claim a release by acceptance of such notes. *Wilson v. J. W. Crowds Drug Co.* (Civ. App.) 190 S. W. 194.

17. — **Statements by husband or wife.**—In a consolidated action for the probate of a will and to set aside a deed by testatrix and her husband to the proponent, the testimony of proponent's husband as to what he told a third person, not in the presence of the grantor in the deed, as to what the latter meant by a statement held self-serving. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581, judgment reversed 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136.

In an action for personal injuries to plaintiff's wife while a passenger on defendant's train, declarations by plaintiff to others that his wife had been injured on a trip were hearsay. *Houston & T. C. Ry. Co. v. Fox*, 166 S. W. 693, 106 Tex. 317, reversing judgment (Civ. App.) 156 S. W. 922.

20. — **Statements by persons since deceased as to title or possession.**—In an action to recover an interest in land, self-serving and hearsay declarations of plaintiff's intestate contained in a letter to a third person held incompetent as against the defendant. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

21. — **Written statements in general.**—An ancient deed, although containing self-serving declarations in favor of the grantor, held admissible in evidence to show

that he had received a conveyance to the land in question. *Houston Oil Co. of Texas v. Drumwright* (Civ. App.) 162 S. W. 1011.

Where petitioners, in mandamus to compel a tax collector to deliver to them poll tax receipts, had paid their taxes through an agent appointed by sworn powers of attorney, containing recitals alleged to show that petitioners were qualified voters, such powers were inadmissible as evidence to prove that petitioners were qualified voters, and so entitled to receive receipts. *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

22. — **Letters.**—A letter written by plaintiff, in which he stated that defendant had made the promise sued on, held admissible when limited to the purpose of rebutting defendant's claim of recent fabrication by plaintiff. *Grant v. Alfalfa Lumber Co.* (Civ. App.) 177 S. W. 536.

In an action on an award of arbitrators, and on the merits of the original controversy, arising upon a building contract, letters of plaintiff to defendant and defendant's architect held self-serving declarations, and inadmissible. *Slaughter v. Crisman & Nesbit* (Civ. App.) 178 S. W. 1.

An insurer sued on a life policy may not introduce a letter written by its officers stating that insured committed suicide. *De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.* (Civ. App.) 180 S. W. 153.

A letter written by an owner revoking a broker's authority to make a sale to one whom the broker had interested in the land, is a self-serving document, and is inadmissible to show that the broker had withdrawn from that transaction. *White v. Holman* (Civ. App.) 180 S. W. 286.

25. **Declarations against interest in general.**—In a servant's action for injuries, if offered testimony is against the interest of the party making the statement, its exclusion is error. *Hovey v. See* (Civ. App.) 191 S. W. 606.

26. **Declarations of person in possession or control as to title or possession.**—Declarations of tenants as to the character of title under which they held were not binding on one claiming title under adverse possession through the tenants, especially where the declarations were made after ten years from the commencement of adverse possession. *Harris v. Wagnon* (Civ. App.) 162 S. W. 2.

Where one of the parties claimed under a deed providing for delivery on grantor's death, evidence of grantee's daughter that she heard her mother mention the deed on the night her father, grantor, died, or the next night, held admissible to show that grantee knew of the existence of the deed before grantor's death together with testimony tending to show where the deed was kept and possession of it by grantee. *Stevens v. Haile* (Civ. App.) 162 S. W. 1025.

In an action for damages and to enjoin a breach of contract of sale of livery stable and its good will, statements of defendant in his answer to action of a third person that a certain building was to be used as a livery held admissible as a declaration that the building was his. *Kennedy v. Winfrey* (Civ. App.) 163 S. W. 1013.

In an action in the nature of trespass to try title, where the issue was whether the possession of plaintiff's intestate was that of owner or tenant, the fact of his possession and claim of ownership and his declarations with reference to improvements, to his effort to borrow money on security of the land, though self-serving and hearsay, were admissible, but his declarations as to his purchase, the balance due, etc., were not admissible to show an equitable title. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

A bailee's declarations to a sheriff, coming to serve an execution, as to who the bailor was, were admissible. *First Nat. Bank of Ft. Wayne, Ind., v. Howard* (Civ. App.) 174 S. W. 719.

A statement made by the possessor of land that his possession was held in subordination to real title held admissible upon issue of whether or not possession was adverse. *Nerio v. Christen* (Civ. App.) 189 S. W. 1038.

Constructive possession may always be restricted by the acts and declarations of the occupant indicating that he does not make his claim coextensive with the boundaries of his color of title. *Walker v. Knox* (Civ. App.) 191 S. W. 730.

28. **Declarations of testator respecting will.**—In a proceeding for the probate of a will, testimony that the testatrix in a suit brought before her death stated, in giving her deposition, that the proponent was the custodian of her will is admissible, although the deposition is not. *Rucker v. Carr* (Civ. App.) 163 S. W. 632.

31. **Decedent against interest—Statements as to fact or nature of transfer or gift.**—Declarations made by a donor to a third party that she had that day given the land to the donee, and was going to deliver possession, held admissible to prove the gift. *Sockwell v. Sockwell* (Civ. App.) 166 S. W. 1188.

In a suit to establish a parol trust upon land apparently conveyed absolutely, evidence of declarations of the grantor not made in the grantee's presence is admissible. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

33½. **Dying declarations.**—Evidence that naming of deceased's younger brother as beneficiary in insurance policy, claimed to show that he would not have contributed to his father's support, was requested by his mother on her deathbed, held not admissible as a dying declaration. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 172 S. W. 984.

A statement that would not be admissible if declarant were living is not admissible as a dying declaration, and the declarant must have knowledge of the transaction. *Id.*

35. **Conclusiveness and effect.**—An admission by possessor of land that his possession was held in subordination to the real title, if made during period relied upon, should be given conclusive effect, but, if subsequent to such period, is to be considered with other evidence in determining whether possession was adverse. *Nerio v. Christen* (Civ. App.) 189 S. W. 1038.

*II. Res Gestæ*

36. **Nature of doctrine in general.**—A statement as a part of the *res gestæ* is not rendered inadmissible because it contains a profane expression. *Missouri, O. & G. Ry. Co. v. Boring* (Civ. App.) 166 S. W. 76.

In a servant's action for injuries, if offered testimony is a part of the *res gestæ*, its exclusion was error. *Hovey v. See* (Civ. App.) 191 S. W. 606.

37. **Facts forming part of same transaction.**—In an action to recover money paid under a contract for feeding cattle, evidence that plaintiff when contracting, knew the feeding price at another place, and gave defendant a telegram showing the price at that place, held admissible as original evidence, part of the transaction, or "*res gestæ*." *Memphis Cotton Oil Co. v. Goode* (Civ. App.) 171 S. W. 284.

38. **Acts and statements accompanying or connected with transaction or event.**—Physical suffering, intentions, ill feelings, affections, and other emotions, when they are material circumstances to establish an issue, may be established by proof of declarations contemporaneous with such intentions or feelings as a part of the *res gestæ*. *Scott v. Townsend* (Civ. App.) 159 S. W. 342, judgment reversed 106 Tex. 322, 166 S. W. 1138.

Evidence that naming of deceased's younger brother as beneficiary in insurance policy, claimed to show that he would not have contributed to his father's support, was requested by his mother on her deathbed, held not admissible as *res gestæ*. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 172 S. W. 984.

In action against telephone company for slander uttered by its manager, response of plaintiff to slanderous words held competent as part of *res gestæ*. *Southwestern Telegraph & Telephone Co. v. Wilkins* (Civ. App.) 183 S. W. 429.

In action against realty broker by owner to recover difference between price for which broker sold land and that for which he accounted, statements of broker held not so connected with his alleged buying of land from owner as to be *res gestæ*. *Barton v. McGuire* (Civ. App.) 189 S. W. 317.

39. — **By agents or employés.**—Statements and representations made by an agent of a corporation, acting within the scope of his authority, are admissible as *res gestæ*. *Texas Mfg. Co. v. Fitzgerald* (Civ. App.) 176 S. W. 891.

In shipper's action for damages to stock, declarations of initial carrier's conductor offered to fix liability on defendants, receivers of connecting carrier and incompetent therefor, held not admissible as part of *res gestæ*. *Hovey v. Arledge* (Civ. App.) 176 S. W. 896.

Where a telegraph company constituted a telephone company its agent to discover the addressee, conversations between employés of the telephone company, and between the employés of that company and the agent of the telegraph company, are admissible as part of the *res gestæ*. *Western Union Telegraph Co. v. Oakley* (Civ. App.) 181 S. W. 507.

40. — **Writings.**—Field notes of surveys made at the same time by the same surveyor are admissible as *res gestæ*. *State v. Dayton Lumber Co.* (Civ. App.) 159 S. W. 391.

41. — **Motive and intent in general.**—In a suit to set aside a conveyance and will executed by the parents of one of the parties, evidence of a declaration by the husband of another of the parties as to what one of the parents meant by remarks as to the preparation of the instruments in question held not part of the *res gestæ*. *Holt v. Guerguin*, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136, reversing judgment (Civ. App.) 156 S. W. 581.

42. — **Ownership or possession of property.**—Testimony of a wife that when land was purchased her husband told her that it would be their home, and that when they left he said they would return as soon as she was able, held *res gestæ*. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

Statements, by the driver of an automobile which struck plaintiff, that as long as he had purchased the car he would like to drive it, held admissible as *res gestæ* on issue of ownership. *Olds Motor Works v. Churchill* (Civ. App.) 175 S. W. 785.

43. — **Existence or nature of contract and relation of parties.**—In a lessee's action for an injunction, statements of the lessor as to leasing the premises and delivering possession thereof in so far as *res gestæ* as to the delivery of possession held admissible. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

46. — **Personal injuries.**—A statement by one of the parties to an occurrence resulting in injury, made at the time of the occurrence, with reference to the cause of the injury or the conduct of the parties is admissible as a part of the *res gestæ*. *Missouri, O. & G. Ry. Co. v. Boring* (Civ. App.) 166 S. W. 76.

49. **Acts and statements before transaction or event.**—In an action to cancel deed from husband to wife, declarations of deceased grantor, made just prior to its preparation and execution, that he would "have no peace" unless he made it, held admissible as part of *res gestæ* to prove a condition of mind. *McKay v. McKay* (Civ. App.) 189 S. W. 520.

50. **Acts and statements after transaction or event.**—In an action on an accident policy for death of insured, alleged to have resulted from a fall on the ice of a skating pond, his declaration to witness a very few moments after the fall that he hurt his head, and at the same time raising his hand near or to his head, when properly qualified, was admissible as *res gestæ*. *Order of United Commercial Travelers of America v. Roth* (Civ. App.) 159 S. W. 176.



Statement by insured, after calling office of insurer's agent on the telephone and informing some one there of a transfer of the policy, that the policy was transferred, and that the agent would agree thereto, held not hearsay, but a part of the res gestæ. Northern Assur. Co., Limited, of London v. Morrison (Civ. App.) 162 S. W. 411.

In an action on a benefit certificate issued by a fraternal insurance association, evidence as to declarations by one of the parties who was present when insured was killed, made immediately after the killing, held admissible as part of the res gestæ. Sovereign Camp Woodmen of the World v. Bailey (Civ. App.) 163 S. W. 683.

The statement of a section foreman, an instant after the happening of an accident to a section hand under his control, as to the cause of the accident was properly received as a part of the res gestæ when material on the issues as then disclosed by the pleadings and the evidence. Missouri, O. & G. Ry. Co. v. Boring (Civ. App.) 166 S. W. 76.

A statement by a foreman of a section railroad crew, made two or three hours after an injury to a member of the crew, is not a part of the res gestæ. Gulf, T. & W. Ry. Co. v. Culver (Civ. App.) 168 S. W. 514.

Statement of a railroad employé to the occupants of an automobile immediately after its wreck by a train, "What in the hell are you doing here anyhow," is not part of the res gestæ. Ft. Worth & D. C. Ry. Co. v. Alcorn (Civ. App.) 178 S. W. 833.

In an action for personal injuries caused by making a "flying switch," statement, made immediately after accident by foreman of the switching crew, that he might lose his job, because he had an accident before in making a flying switch, was part of the res gestæ. Pecos & N. T. Ry. Co. v. McMeans (Civ. App.) 188 S. W. 692.

**52. Acts and statements of person sick or injured—Statements as to cause of injury.**—In an action for injuries to a passenger by being assaulted by a trainman, statements made by him immediately after getting up from the ground, that the trainman, conductor, and baggageman all jumped on him, and pushed him off the platform backward, was admissible as res gestæ. St. Louis, B. & M. Ry. Co. v. Fielder (Civ. App.) 163 S. W. 606.

Statement of railway employé three or four minutes after an accident, to foreman of switching crew as to his injury, and that the foreman ought not to kick cars so hard, held admissible as res gestæ. St. Louis Southwestern Ry. Co. of Texas v. Moore (Civ. App.) 173 S. W. 904.

**53. — Statements as to and expressions of personal injury or suffering.**—In an action for damages for personal injuries, statements of plaintiff as to his pain and suffering held admissible. Pecos & N. T. Ry. Co. v. Coffman (Civ. App.) 160 S. W. 145.

In a personal injury action, it was not error to permit a witness to testify that, since the accident, plaintiff had complained that his ankle and wrist pained him; it being for the jury to determine whether such expressions were real or feigned. Missouri, K. & T. Ry. Co. of Texas v. Graham (Civ. App.) 168 S. W. 55.

One suing for a personal injury may not testify to statements made several hours after the injury to third persons as to his injuries and the pain suffered in consequence thereof. Gulf, T. & W. Ry. Co. v. Culver (Civ. App.) 168 S. W. 514.

Evidence of declarations of present pain and suffering in the nature of verbal acts is admissible to show that a party suffered personal injuries. Missouri, O. & G. Ry. Co. v. Plemmons (Civ. App.) 171 S. W. 259.

In an action for personal injuries, declarations of plaintiff to his physician held not admissible as complaints of present pain and suffering. Gulf, C. & S. F. Ry. Co. v. McKinnell (Civ. App.) 171 S. W. 1091.

In an action against a carrier for personal injury, testimony that when witnesses called pending the suit, and in the absence of any of defendants' agents, plaintiff complained of her head, hip, and thigh, held admissible. Texas Cent. R. Co. v. Claybrook (Civ. App.) 178 S. W. 580.

A statement, "I am nearly killed," by a passenger injured on a train made at the time of the injury and in answer to an inquiry, is admissible as res gestæ. Fox v. Houston & T. C. Ry. Co. (Civ. App.) 186 S. W. 852.

**54. — Statements to physicians.**—Declarations of intent to return to a homestead, if admissible as res gestæ, should be proven by those to whom made, and not by the declarant. Parker v. Schrimsher (Civ. App.) 172 S. W. 165.

Testimony of a physician as to plaintiff's complaints of tenderness in the body held admissible as res gestæ; but testimony of complaints of becoming tired when standing, and inability to sleep as well, was inadmissible. Gulf, C. & S. F. Ry. Co. v. McKinnell (Civ. App.) 173 S. W. 937.

## **RULE 35. HEARSAY IS GENERALLY INADMISSIBLE, BUT IT IS COMPETENT EVIDENCE TO PROVE PEDIGREE, RELATIONSHIP, MARRIAGE, DEATH, AGE AND BOUNDARIES**

### *I. Admissibility of Hearsay Evidence in General*

**1. Nature of hearsay evidence and admissibility in general.**—Where there was no evidence that defendants, who purchased land in which plaintiff had an equitable interest, were parties to a scheme to defraud her, evidence of communications between the holder of the legal title and his agent, showing a fraudulent scheme, was inadmissible as against defendants. Meador Bros. v. Hines (Civ. App.) 165 S. W. 915.

Where the members of a firm, at a conference, agreed that one partner should order machinery, a partner present at the conference may testify that the machinery was ordered for the firm; the matter being within his own knowledge and not hearsay. Owens v. First State Bank of Bronte (Civ. App.) 167 S. W. 798.

In an action for a seller's misrepresentations as to soundness of animals bought, the testimony of a witness that no complaint as to disease among the animals had been made by packing houses purchasing them was properly excluded as hearsay. *George W. Saunders Live Stock Commission Co. v. Kincaid* (Civ. App.) 168 S. W. 977.

Evidence that naming of deceased's younger brother as beneficiary in insurance policy, claimed to show that he would not have contributed to his father's support, was requested by his mother on her deathbed, is hearsay. *St. Louis, B. & M. Ry. Co. v. Jenkins* (Civ. App.) 172 S. W. 984.

In action against railroad receivers for damages to shipment of stock, testimony of plaintiff and initial carrier's conductor that the receivers' connecting road would not accept shipment held hearsay and inadmissible. *Hovey v. Arledge* (Civ. App.) 176 S. W. 896.

Except in cases of pedigree, relationship, marriage, death, age, and boundaries, hearsay evidence is inadmissible. *Pulkrabeck v. Griffith & Griffith* (Civ. App.) 179 S. W. 282.

In explaining the absence of a material witness, testimony of defendant's agent that his subagent telephoned that he had located the witness, who refused to attend, was inadmissible because hearsay. *Galveston, H. & S. A. Ry. Co. v. Reinhart* (Civ. App.) 182 S. W. 436.

In action for injuries to passenger while alighting from defendant's car by means of a box under the step which overturned, testimony of witness who learned of the accident from another, and so fixed its date with reference to time when he saw a box there, held not objectionable as hearsay. *Wichita Falls Traction Co. v. Berry* (Civ. App.) 187 S. W. 415.

**3. Oral statements by persons other than parties or witnesses.**—A witness cannot testify to declarations by the alleged husband that he quarreled with his first wife, and left the country with the woman the validity of whose marriage to him was in issue. *Adams v. Wm. Cameron & Co.* (Civ. App.) 161 S. W. 417.

A statement by plaintiff's agent, not having been made in the presence of plaintiff, was hearsay as to defendant. *Camden Fire Ins. Ass'n of Camden, N. J., v. Puett* (Civ. App.) 164 S. W. 418.

Evidence of an agent of a terminal carrier that he delivered the goods not lost to plaintiff, and located the loss on the line of another railroad, was not hearsay. *St. Louis, B. & M. Ry. Co. v. Gould* (Civ. App.) 165 S. W. 13.

Conversations between defendant, his attorney and the payee of the note sued on held hearsay and inadmissible, where the payee was not a party to the suit and such conversations were not had in plaintiff's presence. *Sands v. Curfman* (Civ. App.) 177 S. W. 161.

In action against brokers for share of commission, defendant's testimony that party who brought in purchaser stated plaintiff had not sent him held hearsay and inadmissible. *Pulkrabeck v. Griffith & Griffith* (Civ. App.) 179 S. W. 282.

The defendant buyer's testimony as to what his wife told him relative to statements made by her to plaintiff seller's agents held hearsay and inadmissible. *J. I. Case Threshing Mach. Co. v. Webb* (Civ. App.) 181 S. W. 853.

In action for damages by assignee of contract for delivery of cotton seed, evidence as to a material issue held hearsay and inadmissible. *Cherbonnier v. Shirley* (Civ. App.) 185 S. W. 641.

In suit for dissolution and accounting by partner in firm selling realty, testimony as to conversation between witness and federal district attorney, who came to investigate firm's manner of doing business, held immaterial to any issue. *Tyler v. McChesney* (Civ. App.) 190 S. W. 1115.

Conversation between third parties, outside hearing of plaintiff, ordinarily would not be admissible against him. *Id.*

Testimony by plaintiff and wife as to receipt of money by defendant, based solely upon report of third party, was inadmissible as hearsay. *Marks v. Williams* (Civ. App.) 192 S. W. 1161.

**4. — Bodily and mental conditions.**—The testimony of one as to what physicians had stated to him, or in his presence, as to the advisability of an operation on him, was inadmissible as hearsay. *Texas Power & Light Co. v. Burger* (Civ. App.) 166 S. W. 680.

Where defendant introduced evidence that plaintiff made no complaint of the injury received, the rule, that statements made by plaintiff to others at or near the same time are admissible in rebuttal, does not permit the introduction of hearsay statements made by others in reference to plaintiff's injury. *Fox v. Houston & T. C. Ry. Co.* (Civ. App.) 186 S. W. 852.

**5. — Writings, contracts, agreements and transactions.**—In an action for wrongful garnishment arising out of plaintiff's signing notes for the price of corporate stock sold to A., evidence that F. told plaintiff that L., who was negotiating the transaction, was to receive \$1,000 of the stock as a commission for making the sale, was objectionable as hearsay. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

In an action to cancel an exchange of land for fraudulent representations as to improvements on it, evidence as to what another had told witness after the exchange as to the price such other had once offered to take for the land was incompetent. *Maddox v. Clark* (Civ. App.) 163 S. W. 309.

Evidence as to negotiations between broker and purchaser and lessee held admissible, over the objection that it was hearsay, to show that the broker was the procuring cause. *Saunders v. Thut* (Civ. App.) 165 S. W. 553.

In broker's action involving dispute as to value at which land was taken in payment, conversation between attorney and purchaser held hearsay and *res inter alios acta*. *Crass v. Adams* (Civ. App.) 175 S. W. 510.

In action to restrain the obstruction of an alley, testimony of a plaintiff as to statement of his grantor selling premises that alley would be kept open held not inadmissible as hearsay. *Miles v. Bodenheim* (Civ. App.) 184 S. W. 633.

In a broker's action for commission for effecting a lease, evidence of conversation between broker's employé and lessee, not in presence of lessor, that the lessee had made a bad lease and the lessor a good one was inadmissible. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

In suit against realty broker by owner of land to recover difference between selling price and price at which he accounted, testimony that broker stated, when he deposited \$1,000 in bank, and on same day, that he had just bought property from owner, etc., held inadmissible as hearsay. *Barton v. McGuire* (Civ. App.) 189 S. W. 317.

In action against realty broker by owner of land to recover difference between price at which broker sold and price for which he accounted, conversation between broker and attorney, wherein broker told latter he had made telephone contract with owner to buy land himself, held hearsay. *Id.*

In an action by a wife on a policy on her husband's life, her statement as to what the husband said when he delivered the policy to her as to the time when the premium would be due was hearsay and incompetent. *Illinois Bankers' Life Ass'n v. Dodson* (Civ. App.) 189 S. W. 992.

6. — **Ownership and possession.**—In suit to recover automobile wrongfully attached and sold as property of another, statement of such other out of plaintiff's presence and before any controversy as to title, that it did not belong to plaintiff, was hearsay and inadmissible. *Taylor Bros. Jewelry Co. v. Kelley* (Civ. App.) 189 S. W. 340.

7. — **Value and price.**—In trover by a wife for grass seed seized for her husband's debts, evidence by plaintiff as to the value of such seed, based upon information received by her through others, was inadmissible as hearsay. *First Nat. Bank of Plainview v. McWhorter* (Civ. App.) 179 S. W. 1147.

In an action by contractor for materials used in school building, testimony of value thereof by expert, admitting that information was given him by a traveling man to whom he had submitted specifications one week before trial, held erroneously admitted. *Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County* (Civ. App.) 182 S. W. 386.

8. — **Indebtedness.**—In action on convict bond, conflicting statements of convict as to whether he had paid his fine and costs held not objectionable as hearsay because not made in defendants' presence. *Harris v. Taylor County* (Civ. App.) 173 S. W. 921.

9. — **Cause.**—Plaintiffs' testimony as to what they were told in regard to the cause of damage to a car of oats shipped by them is incompetent, and its admission is error in their suit against the carrier for such damage. *Missouri, K. & T. Ry. Co. of Texas v. Wilson* (Civ. App.) 186 S. W. 432.

10. — **Due care and nature of act.**—In an action for delay in transporting a shipment of live stock, evidence that the conductor told the witness that he sent a message to the dispatcher asking permission to make his train a through freight, and that the dispatcher refused such permission, was hearsay, and should have been excluded. *Texas & P. Ry. Co. v. Cauble* (Civ. App.) 168 S. W. 369.

In action by employé of lumber company for personal injuries, testimony of what engineer of defendant's log train said after accident held inadmissible as hearsay. *Kirby Lumber Co. v. Youngblood* (Civ. App.) 192 S. W. 1106.

11. — **Condition or sufficiency of things.**—The statements of persons not in the employ of a railroad company as to the exits open on a passenger train which misled a passenger as to the exits open were not admissible to show negligence by the company. *Ft. Worth & D. C. Ry. Co. v. Taylor* (Civ. App.) 162 S. W. 967.

The statements of persons not in the employ of a railroad company as to the exits open on a passenger train which misled a passenger as to the exits open were admissible to show contributory negligence. *Id.*

In action on notes given for engine for cotton gin, defended on the ground that it failed to develop the speed guaranteed, testimony that defendants' former customers had stated to witness that the power of defendants' engine was insufficient held hearsay and properly excluded. *Feagins v. Texas Machinery & Supply Co.* (Civ. App.) 185 S. W. 961.

12. — **Weight, amount and quality.**—Where a shipper did not accompany cattle, his testimony that they brought him a certain amount, that the commission company stated they weighed a certain amount, and that one animal killed in transit weighed a certain amount at destination, was inadmissible as hearsay. *Panhandle & S. F. Ry. Co. v. Curtis* (Civ. App.) 190 S. W. 837.

In action against carrier for injuries to goods, plaintiff held improperly permitted to reproduce statements made to him by the prospective buyer of the goods concerning their damaged condition. *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804.

17. — **Statements by persons since deceased.**—Declarations of a deceased grantor showing a parol trust are not hearsay. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

Where there is no proof of agent's authority to accept a conveyance of land securing a debt in payment of the debt, testimony of one to whom the agent conveyed such land that the agent, who had since died, stated that the land had been taken in payment of the debt, is inadmissible as hearsay. *Peck v. Loux* (Civ. App.) 185 S. W. 955.

Where there is no proof of an agent's authority to accept a conveyance of land securing a debt in payment of the debt, testimony of the debtor of a conversation with

the agent, who has since died, in which they agreed to have the debt paid by conveyance of the land, is inadmissible as hearsay. *Id.*

**18. Writings.**—Field notes made by a subsequent surveyor calling for lines and corners of prior surveys are hearsay, unless he was acting in an official capacity, and is dead when the evidence is offered. *State v. Dayton Lumber Co.* (Civ. App.) 159 S. W. 391.

In an action involving a disputed boundary, the testimony of a witness that on a survey he found the corner of the survey by trees called for in the field notes was not hearsay, but related to knowledge gained by him on the ground. *Denton v. English* (Civ. App.) 171 S. W. 248.

Where a material witness is absent and his absence is not satisfactorily explained, it is not error to exclude his sworn statement made before the trial. *Galveston, H. & S. A. Ry. Co. v. Reinhart* (Civ. App.) 182 S. W. 436.

**20. — Records.**—A watchman's record made by punching a box making marks on a tape, and an operator putting down the time they came in, held hearsay as to the time, without testimony of the operator. *Texas Glass & Paint Co. v. Reese* (Civ. App.) 187 S. W. 721.

**23. — Certificates and affidavits.**—*Ex parte* affidavits on file in the Land Office, made to procure the issuance of a duplicate land certificate, are inadmissible as hearsay to prove the facts recited therein. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

On an issue as to the priority of rights of a purchaser of land at an execution sale as against the holder of a prior unrecorded deed from the debtor, the *ex parte* affidavit from the creditor that his wife purchased and paid for the land out of her separate funds was inadmissible. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

Affidavits as to limitation in connection with land contracted to be sold are *ex parte* and hearsay and inadmissible as evidence of merchantable title. *Cline v. Booty* (Civ. App.) 175 S. W. 1081.

Under a contract by which the vendor agrees to convey marketable title, a showing of title by limitation, made only by *ex parte* affidavit, is wholly insufficient; such an affidavit being purely hearsay and inadmissible as evidence. *Adkins v. Gillespie* (Civ. App.) 189 S. W. 275.

In an action by the beneficiary of an accident insurance policy, the certificate of the cause of death given by the attending physician is an *ex parte* declaration not admissible in evidence. *North American Accident Ins. Co. v. Miller* (Civ. App.) 193 S. W. 750.

**27. Evidence founded on hearsay—Reputation as to persons.**—The scope of an agency cannot be proven by general reputation. *Mann v. Bell* (Civ. App.) 184 S. W. 320. Agency cannot be proven by general reputation. *Id.*

**28. — Market value shown by sales or market quotations.**—Evidence of an unaccepted offer for the property was inadmissible on the issue of market value. *Stanley v. Sumrell* (Civ. App.) 163 S. W. 697.

Where newspaper market quotations were offered as evidence of market value and it was shown that the quotations were based upon information furnished by one dealer, the quotations should have been rejected as mere individual hearsay. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

Letters from two commission merchants were not admissible as evidence of market value. *Id.*

**29. — Repute as to facts in general.**—In action against railroad for damage to land from floods caused by embankments retarding flood waters of a river, hearsay testimony concerning former floods, reputed to have been greater than those involved, was admissible to show history of stream. *Missouri, K. & T. Ry. Co. of Texas v. Stearnes* (Civ. App.) 185 S. W. 646.

**30. — Ownership.**—Evidence as to talk in the family that defendant's grantor had acquired the title of his brothers held admissible as bearing upon the knowledge of the grantor's claim on the part of the brothers' heirs. *Le Blanc v. Jackson*, (Civ. App.) 161 S. W. 60.

Plaintiff's testimony that, if one of the defendants had any property, he had never heard of it was not objectionable as hearsay, where plaintiff was in a position to have known if such defendant owned any property. *Senter v. Teague* (Civ. App.) 164 S. W. 1045.

In a will contest, testimony of witnesses that a son of testator was the purchaser and reputed owner of real estate described in the will, reciting that the same had been advanced to the son, held incompetent. *Kell v. Ross* (Civ. App.) 175 S. W. 752.

## II. Pedigree, Relationship, Marriage, Death, Age and Boundaries

**32. In general.**—Evidence as to result of inquiries made by witness in the counties where a certain person once lived and was last heard of, with reference to whether he was dead, etc., was inadmissible as hearsay. *Wells v. Margraves* (Civ. App.) 164 S. W. 881.

Evidence, in an action for a legatee's interest, that a certain person who was not a witness had written letters inquiring about an alleged deceased legatee, and found no one who remembered that such legatee had ever lived in the place to which the letters were addressed, was incompetent. *Id.*

**34. General and family reputation.**—Relationship of one person to another cannot be proved by declarations of neighbors. *Gibson v. Dickson* (Civ. App.) 178 S. W. 44.

36. **Declarations by members of family—By deceased members.**—An illegitimate child may testify that her mother, since deceased, told her the name of her father. *Coker v. Cooper's Estate* (Civ. App.) 176 S. W. 145.

44. **Declarations as to boundaries—Declarations by third persons in general.**—In trespass to try title in which plaintiff claimed that defendant was estopped from claiming the land in controversy by his grantor having recognized and acquiesced in the establishment of a certain line as a boundary line, evidence was not admissible to support such claim that a witness after examining the title to the property for plaintiff's vendor advised him that title was good. *Beebe v. Sweeney* (Civ. App.) 158 S. W. 235.

45. — **Declarations by former owners.**—In a suit to determine a boundary, testimony of plaintiff's predecessor that, when he sold to plaintiff's grantor, the fence, which plaintiff claimed was the agreed boundary, was pointed out by the witness as the boundary line, defendant and his predecessor, not being present, was inadmissible. *Talley v. Bailey* (Civ. App.) 181 S. W. 230.

49. — **General reputation.**—Reputation as to the location of the lines and corners of original surveys, beginning 40 years after they were located, and appearing to have originated from one not shown to have had knowledge of the location, is inadmissible. *State v. Dayton Lumber Co.* (Civ. App.) 159 S. W. 391.

Testimony that a surveyor told persons for whom he surveyed land that a mound was an established corner is inadmissible as hearsay, not being evidence of general reputation. *McSpadden v. Vannerson* (Civ. App.) 169 S. W. 1079.

Testimony that the witness knew where people living around surveys recognized the boundaries thereof to be, did not show that the witness knew where the corners were and was inadmissible. *Thatcher v. Matthews* (Civ. App.) 183 S. W. 810.

Evidence as to where corner of survey was located by reputation, held inadmissible for indefiniteness. *Maddox v. Dayton Lumber Co.* (Civ. App.) 188 S. W. 958.

To establish general reputation as to the location of lines and corners of a survey, surveys made 20 and 42 years later, which called for bearing trees not mentioned in the field notes of the original survey, are inadmissible. *Id.*

Evidence of common reputation of the location of a boundary must be general, concurrent, and certain as to the subject-matter, and must be reputation, and not individual assertion. *Id.*

Common repute relied upon in support of a line in a survey, having its inception 47 years after original survey, held inadmissible. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**RULE 36. ON QUESTIONS OF SCIENCE OR SKILL OR TRADE, PERSONS OF SKILL OR POSSESSING PECULIAR KNOWLEDGE IN THOSE DEPARTMENTS ARE ALLOWED TO GIVE THEIR OPINIONS IN EVIDENCE**

*I. Mere Conclusions Generally not Admissible*

1. **In general.**—The statement of a witness that the foreman in a sawmill never put any man back on the carriage against the sawyer's wishes only means that the witness never heard of such an occurrence. *Kirby Lumber Co. v. Williams* (Civ. App.) 159 S. W. 309.

In an action against a carrier for injuries to cattle, certain testimony held not to be opinion evidence, but merely a statement of the facts as they appeared to the witness. *Atchison, T. & S. F. Ry. Co. v. Word* (Civ. App.) 159 S. W. 375.

Testimony of a witness that just before a boy was run over by a train he saw him standing on the depot platform swinging his foot towards a train as it passed by was not inadmissible as opinion evidence, as the testimony indicated that the witness was giving his recollection of his personal observation. *Heflin v. Eastern Ry. Co. of New Mexico* (Civ. App.) 159 S. W. 499.

Testimony by a witness for the defendant that the statements by defendant as to the expense of conducting such theaters were correct held not conclusions of the witness. *Loftus v. Sturgis* (Civ. App.) 167 S. W. 14.

Statement of a witness that the section whose boundary was involved had never been actually surveyed upon the ground held clearly speculative. *Harkrider v. Gaut* (Civ. App.) 167 S. W. 164.

Evidence by plaintiff that there had been friction between himself and certain witness, who had testified against him, held not objectionable as a conclusion or opinion. *Missouri, O. & G. Ry. Co. of Texas v. Love* (Civ. App.) 169 S. W. 922.

A witness should state facts, as it is for the jury to draw conclusions and deductions. *Missouri, K. & T. Ry. Co. v. Gilcrease* (Civ. App.) 187 S. W. 714.

Ordinarily the conclusion of a witness or his understanding of the facts is not admissible, but he should be restricted to testifying as to the facts. *Shaller v. Johnson-McQuiddy Cattle Co.* (Civ. App.) 189 S. W. 553.

Plaintiff's testimony that he could not get any responsible person to be with him for less than \$2 per day was not objectionable as a conclusion. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

A witness' testimony that he would not have signed paper had he known it was release for his injuries is not conclusion, but a statement of fact. *Texas City Transp. Co. v. Winters* (Civ. App.) 193 S. W. 366.

2. **Conversations in general.**—Admission of portion of answer of witness, which, taken alone, appeared to be opinion as to meaning of a third person's statements, but which, in view of the entire answer, merely stated what such third person had said, was proper. *Postal Telegraph Cable Co. of Texas v. De Krekko* (Civ. App.) 179 S. W. 525.

The statement of a witness that he had been advised by counsel that plaintiff had a claim to the property involved in an action of trespass to try title is not his conclu-

sion, but a statement of fact, and admissible. *Buchanan v. Houston & T. C. R. Co.* (Civ. App.) 180 S. W. 625.

**3. Conversations concerning contracts.**—In broker's action for commission for effecting a lease, the lessee was required to testify to the facts with regard to what occurred between himself and the broker's employé, instead of his conclusion. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

**4. Knowledge of other person.**—Promoter of corporation may, over objection that it was his conclusion, testify that defendant corporation understood the plan of organization; the promoter having organized two allied companies in one of which plaintiffs bought stock. *Commonwealth Bonding & Casualty Ins. Co. v. Curry* (Civ. App.) 183 S. W. 1.

Testimony that one of the ways in which bankers discovered that checks had been forged was that their customers afterwards would come in and state that they had given no such checks was incompetent. *Lockney State Bank v. Bolin* (Civ. App.) 184 S. W. 553.

**5. Motive and intent.**—In an action for fraudulent misrepresentations as to the receipts from theaters which plaintiffs leased from defendants, testimony by plaintiffs' manager that he had quit plaintiffs' employ because of the improper management by plaintiffs held not a conclusion of the witness. *Loftus v. Sturgis* (Civ. App.) 167 S. W. 14.

Testimony by insured as to the purpose for which a room inside of another was built held admissible being a statement of fact. *Hanover Fire Ins. Co. of New York v. Huff* (Civ. App.) 175 S. W. 465.

**6. Ability to see or hear.**—Railroad employé accustomed to heeding railroad signals, and who testified that he was not many cars from the engine, held properly permitted to testify that he could have heard the engine whistle had it been blown. *St. Louis S. W. Ry. Co. of Texas v. Brown* (Civ. App.) 163 S. W. 383.

**9. Bodily appearance or condition.**—In a personal injury action, testimony that witness had seen plaintiff using crutches when they were of no assistance to him held the conclusion of the witness and properly excluded. *Ft. Worth Belt Ry. Co. v. Cabell* (Civ. App.) 161 S. W. 1083.

An answer that the health of one of defendants was in a precarious condition, and that he probably could not attend the trial, was objectionable as a conclusion. *Jines v. Astle* (Civ. App.) 170 S. W. 1081.

Testimony of plaintiff's companion to condition of plaintiff's health held not opinion. *Missouri, K. & T. Ry. Co. of Texas v. Dellmon* (Civ. App.) 171 S. W. 799.

Where a passenger claimed that exposure on a train resulted in a cold and tuberculosis, a witness may testify that since the trip the least exertion tired him out. *Id.*

In an action for personal injuries received by a railroad employé in a derailment, his testimony that he could never run an engine again, though he had been able to before the injury, is admissible. *Texas & P. Ry. Co. v. Rasmussen* (Civ. App.) 181 S. W. 212.

**9½. Mental condition or capacity.**—The mere general declaration of a witness as to the correctness or incorrectness of another's ideas of values, without further testimony as to the conditions, was not proper testimony to prove such other's insanity. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

Testimony of persons who knew plaintiff before and after his injury that thereafter they noticed a changed condition in his ability to talk connectedly, relating what they observed, is not opinion evidence as to his mental condition. *Memphis Cotton Oil Co. v. Tolbert* (Civ. App.) 171 S. W. 309.

**11. Due care and proper conduct.**—Testimony of a hostler's helper that a freight train "was moving pretty fast," and that it stopped "unusually hard," considered with other testimony as to the fall and death of a brakeman, held a statement of fact. *Ft. Worth & D. C. Ry. Co. v. Stalcup* (Civ. App.) 167 S. W. 279.

Where a witness testified that he knew the ordinary running time made with cattle shipments between two points and that if a shipment took a given time the run was a bad one, such testimony did not involve conclusion of law. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

The statement of deceased to an ambulance surgeon on the way to the hospital from the place of the accident that he himself was to blame, and not the railroad, was not such an expression of opinion as warranted its exclusion. *Hovey v. See* (Civ. App.) 191 S. W. 606.

**12. Customs and usages.**—Evidence that a railroad engine was throwing more sparks at a particular time than was usually thrown by other engines passing in that direction held not objectionable as a conclusion. *Missouri, O. & G. Ry. Co. of Texas v. Browning* (Civ. App.) 166 S. W. 34.

The usual or customary time required for the run may be testified to directly by a witness as matter of fact, which the question of reasonable time is not. *Gulf, C. & S. F. Ry. Co. v. Bogy* (Civ. App.) 178 S. W. 577.

**13. Nature, condition and relation of objects.**—Evidence that, in coupling an engine to a car, it was necessary to push the drawhead over so as to make the coupling by impact held not objectionable as a conclusion. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

It was not error to permit witnesses in an action for injury to furniture who described its condition and appearance, in doing so, to state, in effect, that they considered it ruined. *International & G. N. Ry. Co. v. Davis* (Civ. App.) 175 S. W. 509.

In action against a railroad company for killing of cattle, witness familiar with locality may, though not an expert as to operation of trains, testify that place where cattle were killed had not for several years been used for switching of cars. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 193 S. W. 392.

14. **Value.**—A question, asking plaintiff from the management of his business his experience, etc., what would be his reasonable income for the next three years, held objectionable as calling for a conclusion. *Bennett v. Foster* (Civ. App.) 161 S. W. 1078.

In an action for damages to a stock of shoes by water, testimony of a witness fixing value held to fix value at the place where the shoes were. *Ara v. Rutland* (Civ. App.) 172 S. W. 993.

16. **Time.**—In an action against carrier for delay in transporting cattle, testimony of plaintiff as to reasonable time for the run held inadmissible. *Gulf, C. & S. F. Ry. Co. v. Bogy* (Civ. App.) 173 S. W. 577.

Testimony by experienced brakeman as to the time it would have taken a competent brakeman to stop a car rolling down incline, held admissible over objection that it was conclusion on law and facts. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

17. **Cause and effect.**—In an action for injuries caused by fire set by defendant's locomotive, a question to a witness, "Was there any other means known to you by which the fire could have caught, except from that passing train?" called for a statement of fact. *Arey v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 170 S. W. 802, judgment affirmed *St. Louis Southwestern R. Co. of Texas v. Arey* (Sup.) 179 S. W. 860.

Where plaintiff's land was inundated by flood waters and fills under the railroad trestles retarded the escape of the waters, testimony that plaintiff would have lost only part of his crops had there been no fills is improperly received, being a conclusion of the witness. *Galveston, H. & S. A. Ry. Co. v. Vogt* (Civ. App.) 181 S. W. 841.

Evidence of statements by brakeman who was killed, as to hurts and as to the cause of the accident, held not objectionable as conclusions of deceased. *San Antonio, U. & G. R. Co. v. Galbreath* (Civ. App.) 185 S. W. 901.

In action for injuries alleged to have resulted from severe cold contracted while waiting in defendant's station, testimony of plaintiff that she caught cold in depot held admissible, where she gave facts upon which she based such opinion. *Chicago, R. I. & G. Ry. Co. v. Faulkner* (Civ. App.) 194 S. W. 651.

17½. **Performance or breach of contract.**—In an action for broker's services, testimony for defendant that plaintiff did not carry out his contract was inadmissible as an opinion. *Putnam Land & Development Co. v. Elser* (Civ. App.) 159 S. W. 190.

18. **Title and ownership.**—Declarations of both husband and wife since deceased that real property in controversy was the separate estate of the husband held incompetent as mere legal conclusions. *Wauhop v. Sauvage's Heirs* (Civ. App.) 159 S. W. 185.

A question whether witness' husband had obtained a conveyance of the interests of his brothers and sisters in the land in controversy, which conveyances were claimed to have been lost, held not objectionable as calling for a conclusion. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 171 S. W. 537.

Testimony in a suit to establish a parol trust that the grantor controlled the property until her death held inadmissible, being the conclusion of the witness. *Hambleton v. Southwest Texas Baptist Hospital* (Civ. App.) 172 S. W. 574.

Statements as to who is the owner of property are not necessarily legal conclusions, but are statements of facts. *Campbell v. Peacock* (Civ. App.) 176 S. W. 774.

The testimony of officers of defendant corporation that it owned the land in controversy was their opinion, and inadmissible. *Lawson v. Port Arthur Canal & Dock Co.* (Civ. App.) 185 S. W. 600.

In trespass to try title by plaintiff claiming under forfeiture and award of lands to him by general land office, certificate of acting commissioner that lands "were forfeited" held inadmissible. *Speed v. SADBERRY* (Civ. App.) 190 S. W. 781.

In a boundary case, where a witness was permitted to testify to facts concerning his occupancy and possession of land, court properly refused to let him state his conclusion that such possession was exclusive. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

18½. **Ownership and sale in due course.**—A statement of a witness that he became the owner of an original land certificate in due course as a dealer in land certificates for value, and that he sold the certificate to a third person in due course for value received at the time of the delivery of the certificate, is objectionable as the opinion and legal conclusion of the witness. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

19. **Contractual relation.**—In an action for broker's commissions, a statement of a witness that plaintiff sold certain parties was not objectionable as an opinion. *E. R. & D. C. Kolp v. Brazier* (Civ. App.) 161 S. W. 899.

On issue whether a witness bought a piano from plaintiff or a third person, testimony of witness that she bought from third person, and that a representative of plaintiff delivered the piano, held not a conclusion. *J. W. Carter Music Co. v. Evans* (Civ. App.) 177 S. W. 1014.

In an action on a note, where one of the issues of fact and law was whether one M. was a principal or a surety, his statement that he was a surety involved a legal conclusion. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

A question inquiring of defendant whether he had any agreement with plaintiff whatever, or gave him any right to the property in controversy, was not objectionable as calling for a conclusion. *Hall v. Ray* (Civ. App.) 179 S. W. 1135.

20. **Construction and effect of contracts or instruments.**—In trespass to try title, testimony of son that conveyances by his father to his brothers and sisters of the parents' community property were intended as gifts, and were not accepted in settlement of children's interests in estate, held inadmissible as merely conclusion of witness. *Nowlin v. Clary* (Civ. App.) 178 S. W. 571.

21. **Agency in general.**—The testimony of a witness that an employé hired employés and discharged employés is a statement of fact. *Kirby Lumber Co. v. Williams* (Civ. App.) 159 S. W. 309.

The testimony of a corporation's agent to the effect that he had full authority to contract with any person with respect to the company's titles, which in his judgment was best for the company's interest, and that he represented the company in Texas as though he were the sole officer, etc., were not conclusions of the witness, but statements of fact. *Houston Oil Co. of Texas v. Payne* (Civ. App.) 164 S. W. 886.

It was error to permit the general manager of a corporation to testify that the duties of his office were such as the title signified, and as were usually exercised by the manager of a corporation, because a conclusion. *Id.*

Pledgor's testimony that he did not authorize pledgee to transfer or deal with pledged certificate of stock in any other way than as collateral security held a statement of fact, and not a mere conclusion. *Featherston v. Greer* (Civ. App.) 169 S. W. 912.

Where the issue was whether a maker whose name was signed by the comaker was liable as maker or surety, the question whether comaker had only authority to make the maker a surety held to call for a conclusion. *Connor v. Uvalde Nat. Bank* (Civ. App.) 172 S. W. 175.

Testimony that it was a matter of common knowledge that defendant's agent had no authority save to buy spot cotton, is inadmissible as a conclusion in a suit to recover on a contract to purchase cotton for future delivery. *Mann v. Bell* (Civ. App.) 184 S. W. 320.

**22. Partnership.**—In partner's suit for dissolution and accounting, held, that court properly excluded general question to a defendant as to what book of firm's accounts he would look to to ascertain amount of cash received and paid out. *Tyler v. McChesney* (Civ. App.) 190 S. W. 1115.

**26. Damages.**—In an action for breach of contract between plaintiff and defendant for joint purchase of cattle, in which defendant's cross-action alleged damages by reason of annoyance by plaintiff while defendant was selecting the cattle, his testimony that he had suffered loss of \$1 per head was a conclusion of the witness, and not a statement of a fact. *Eubank v. Bostick* (Civ. App.) 194 S. W. 214.

## *II. Subject of Opinions of Nonexperts*

**30. Matters directly in issue.**—The opinion of a witness in proceedings for the custody of a child, as to which of two places was the better for the child to be reared, was properly excluded. *Long v. Smith* (Civ. App.) 162 S. W. 25.

Evidence was not admissible, in garnishment proceedings, that the garnishee did not have actual possession of the live stock garnished where that was the principal issue. *McClung v. Watson* (Civ. App.) 165 S. W. 532.

A party cannot testify that he owned certain property where the ownership of the property is in issue. *Id.*

In a proceeding to enforce a claim to property attached as the property of another, held, that claimant's statement that he was the owner of the property in controversy was inadmissible, since his ownership was a conclusion for the jury. *Taylor v. Butler* (Civ. App.) 168 S. W. 1004.

In an action on a note, where one of the issues of fact and law was whether one M. was a principal or a surety, his statement that he was a surety invaded the province of the jury. *First State Bank of Amarillo v. Cooper* (Civ. App.) 179 S. W. 295.

**33. — Due care and proper conduct.**—A question asked witnesses as to the safety of the place in which a deceased employé was working, held objectionable as calling for a conclusion as to the fact which the jury was to determine. *Hodges v. Swastika Oil Co.* (Civ. App.) 185 S. W. 369.

In action for destruction of property by fire communicated from boarding cars on defendant's siding, testimony as to whether everything was done to save the property was properly excluded, as invading province of jury. *San Antonio & A. P. Ry. Co. v. Moerbe* (Civ. App.) 189 S. W. 128.

In action for damage to live stock in transit, shipper's testimony as to how cars were bedded, what would have been proper bedding, etc., held not inadmissible as expression of opinion on mixed question of law and fact. *Texas & P. Ry. Co. v. Timberlake* (Civ. App.) 192 S. W. 356.

**34. — Mental condition or capacity.**—The opinion of a family physician as to mental capacity to make a will or deed is inadmissible. *Milner v. Sims* (Civ. App.) 171 S. W. 784.

**35. — Nature, condition and relation of objects.**—In an action by a servant for injuries resulting from the collapse of a building, a witness who saw the building and the walls a few hours after the accident may testify as to their condition. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

**36. — Value.**—Plaintiff's wife, in an action for injury to their household furniture, after a showing that there was no market price for any of it, could testify as to what she regarded its value to herself and husband before its injury, and how much, in her judgment, it had been damaged. *International & G. N. Ry. Co. v. Davis* (Civ. App.) 175 S. W. 509.

In action for damages to shipment of live stock, plaintiff's testimony as to their value at destination when they should have arrived if handled in the usual ordinary time and with due dispatch invaded the province of the jury. *Kansas City, M. & O. Ry. Co. of Texas v. Corn* (Civ. App.) 186 S. W. 807.

In a broker's action for commission, testimony of witness that he considered 2 or 3 per cent. to be a reasonable commission for effecting a lease for a term, relating to the direct issue in the case, was inadmissible. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.



37. — **Cause and effect.**—Where plaintiff claimed fills under a railroad trestle prolonged the inundation of his farm and resulted in the destruction of his crops, testimony that the water was backwater, is admissible, but the witness cannot testify that such backwater was caused by the fills, that being a question for the jury. *Galveston, H. & S. A. Ry. Co. v. Vogt* (Civ. App.) 181 S. W. 841.

Opinion of witness on the ultimate issue for the jury, the cause of the fall of a building, is improper. *Da Moth & Rose v. Hillsboro Independent School Dist.* (Civ. App.) 186 S. W. 437.

In action for injuries to bulls in transit, shipper's testimony that he believed that not having any bedding and standing on hard floors caused cattle's feet to swell held not inadmissible as expression of opinion on mixed question of law and fact. *Texas & P. Ry. Co. v. Timberlake* (Civ. App.) 192 S. W. 356.

38. **Inferences or impressions from collective facts.**—The conclusion of a common observer, testifying as to the result of observation made at the time in regard to the common appearance of facts and conditions of things which cannot be reproduced by description, is admissible. *Missouri, K. & T. Ry. Co. v. Gilcrease* (Civ. App.) 187 S. W. 714.

41. **Special knowledge as to subject-matter—Bodily condition.**—After testimony of a witness as to his observation of the effect of labor upon plaintiff in personal injury suit, he could give his opinion whether the plaintiff could perform light or heavy labor continuously. *Missouri, K. & T. Ry. Co. v. Gilcrease* (Civ. App.) 187 S. W. 714.

One who had known deceased for 15 years was competent to testify that after injury he "did not appear natural." *Texas & P. Ry. Co. v. Hughes* (Civ. App.) 192 S. W. 1091.

43. — **Quantity.**—In action for damages for failure to deliver telegram addressed to plaintiff relating to offer of cattle, evidence of one who saw them two weeks later as to what they would have weighed held admissible. *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925.

Plaintiff, who had shipped hogs a number of times, may testify as to the normal shrinkage of hogs resulting from shipment. *Southern Kansas Ry. Co. of Texas v. Hughey* (Civ. App.) 182 S. W. 361.

A witness held prima facie qualified to give his opinion as to the weight of cattle killed. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 193 S. W. 392.

45. — **Railroading.**—A shipper of live stock, demanding recovery for injuries for insufficiency in size of pens, after testifying to the facts, held competent to give his opinion as to insufficiency. *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708.

One having an experience of 15 or 20 years of shipping live stock, may testify that it is customary to bed cars with sand or hay to enable stock to stand. *Missouri, K. & T. Ry. Co. of Texas v. Ryon* (Civ. App.) 177 S. W. 525.

In action for delay in transporting live stock, testimony of experienced witness, who knew distance of shipment, and had traveled with it, as to what he considered a reasonable time for transport, was inadmissible as opinion on mixed question of law and fact. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

49. — **Cause and effect.**—A witness familiar with the operation of machinery and who saw its movement on the happening of an accident to an employé may state that the employé's fall from the machinery was caused by a sudden and unexpected reverse movement of the machinery. *Kirby Lumber Co. v. Williams* (Civ. App.) 159 S. W. 309.

In an action for damages for the flooding of land, held that it was not an abuse of discretion for the trial court to permit plaintiff to testify as to the cause of the overflow. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

A witness who was present at an accident and has described in detail the facts leading up to the fall of a shed may give his conclusions as to the cause of the falling. *Southern Pac. Co. v. Gordon* (Civ. App.) 193 S. W. 471.

51. — **Handwriting.**—A witness who knew the handwriting of an official held competent to testify that the official's signature on papers was not genuine without producing the papers. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

55. — **Value of real property.**—Where witness had testified that he did not know market value of cattle, his estimate, that if they had arrived in good condition they would have been worth more on the market than in the condition they arrived, held a mere guess, and inadmissible. *St. Louis Southwestern Ry. Co. of Texas v. Kerr* (Civ. App.) 184 S. W. 1058.

Witness held competent to testify as to value of land which in vicinity was computed on revenue, where he was conversant with revenue derived from such property. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

56. — **Value of personal property.**—In an action for the firing of plaintiff's household goods, plaintiff is competent to testify as to the value of their use, where the goods had no market value at the place of loss. *St. Louis Southwestern Ry. Co. of Texas v. Benjamin* (Civ. App.) 161 S. W. 379.

A witness having no knowledge of any sale of such cattle as were injured at place of delivery within a year prior to shipment is not competent to testify as to market value. *Galveston, H. & S. A. Ry. Co. v. Patterson* (Civ. App.) 173 S. W. 273.

Plaintiff who testified to his familiarity with conditions and knowledge of the market value held competent to testify as to the market value of his property, though he became confused on cross-examination as to difference between market and actual value. *Houston Belt & Terminal Ry. Co. v. Vogel* (Civ. App.) 179 S. W. 268.

In action for delay in transporting cattle, testimony of cattleman who had inspected stock at destination, as to difference between their value and what it would have been had they been brought on without delay, was inadmissible as opinion on mixed question of law and fact. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

Plaintiff in an action against a carrier for failure to deliver goods could not testify as to their market value at point of destination in the absence of testimony showing his qualification. *Gulf, C. & S. F. Ry. Co. v. McKie* (Civ. App.) 191 S. W. 576.

In garnishment suit against purchaser of stock of goods in bulk, held that, in view of circumstances, general knowledge of values might render witness competent to give opinion testimony thereon, and court was justified in being more liberal in admission of such testimony than in case where amount of recovery or decision would depend on exact valuation. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545.

A witness who stated that he was familiar with the market value of cattle at the place where they were killed is competent to testify as to the value, unless further interrogation developed facts showing that he did not know the value of the cattle. *Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co.* (Civ. App.) 193 S. W. 392.

57. — **Damages.**—In action for breach of contract to furnish electric current for plaintiff's theater building, plaintiff, in testifying to his loss of profits, was not bound to estimate his loss for each night separately. *City of Brownsville v. Tumlinson* (Civ. App.) 179 S. W. 1107.

64. **Bodily appearance or condition.**—In an action against a carrier for personal injury, testimony that when witnesses called pending the suit, and in the absence of any of defendants' agents, plaintiff "looked awful bad, that she was down in bed," held admissible. *Texas Cent. R. Co. v. Claybrook* (Civ. App.) 178 S. W. 580.

Question asked nonexpert witness as to the apparent health or sickness of the injured person at the time of trial held not objectionable. *Yeatts v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 184 S. W. 636.

In action against carrier for injuries to plaintiff's wife, plaintiff's testimony, in answer to question whether from her appearance she was getting better or worse, that she was getting worse, was not improper. *Northern Texas Traction Co. v. Nicholson* (Civ. App.) 188 S. W. 1028.

66. **Mental condition or capacity.**—A witness who was negotiating with a foreigner through an interpreter may, where it appears that the negotiations had been continued for a considerable length of time, give his opinion whether the foreigner made intelligent replies to his inquiries. *Guerra v. San Antonio Sewer Pipe Co.* (Civ. App.) 163 S. W. 669.

A witness may give his opinion as to the mental or physical condition of a party after relating the facts upon which such opinion is based. *Missouri, K. & T. Ry. Co. v. Gilcrease* (Civ. App.) 187 S. W. 714.

68. **Due care and proper conduct.**—Testimony that there was no danger for a line-man to go upon a pole after hearing the foreman say that it was all right, or that this statement would satisfy witness that there was no danger, held inadmissible. *Tweed v. Western Union Telegraph Co.* (Sup.) 166 S. W. 696, judgment affirming *Western Union Telegraph Co. v. Tweed* (Civ. App.) 138 S. W. 1155, and rehearing denied *Tweed v. Western Union Telegraph Co.* (Sup.) 177 S. W. 957.

In action for delay in transporting cattle, it was error to permit shipper, a veterinary surgeon, and another to testify that the cattle should not have been held sidetracked in cars for more than an hour while cars were being repaired. *Ft. Worth & D. C. Ry. Co. v. Gatewood* (Civ. App.) 185 S. W. 932.

69. **Nature, condition and relation of objects.**—A nonexpert may testify that the engines of a railroad company throw out more or less sparks. *Texas & N. O. R. Co. v. Cook* (Civ. App.) 167 S. W. 158.

70. **Quantity.**—In garnishment proceedings on account of goods sold by judgment debtor to garnishee in violation of Bulk Sales Law, testimony of experienced witnesses as to amount of goods left after auction sale, held admissible. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

73. **Value—Real property.**—Evidence as to the value of real property must necessarily be a matter of opinion. *Day v. Hunnicutt* (Civ. App.) 160 S. W. 134.

74. — **Personal property.**—Plaintiff's opinion as to the value of the loss of the use of wearing apparel constituting his baggage is admissible, in an action against a carrier for delay in delivery. *Houston & T. C. Ry. Co. v. Hirsch* (Civ. App.) 160 S. W. 426.

In an action for injuries to cattle, an opinion by the plaintiff as to the reasonable value of the cattle if they had been transported to their destination within a reasonable time and with ordinary handling involves both a question of law and fact and is inadmissible. *Houston & T. C. R. Co. v. Hawkins & Nance* (Civ. App.) 167 S. W. 190.

Question as to what shipment of cattle would have been worth if handled in the usual manner and with customary diligence held improper as involving mixed question of law and fact, since the witness could give no intelligent answer without giving an opinion as to what would constitute diligence. *International & G. N. Ry. Co. v. Hamon* (Civ. App.) 173 S. W. 613.

Where defendant's breach of contract delayed plaintiff in opening her millinery business, she may give opinion evidence as to amount for which she could have disposed of her stock had it not been for the delay, and its value after change in style. *Texas Power & Light Co. v. Roberts* (Civ. App.) 187 S. W. 225.

A witness' competency to testify regarding the actual value of goods rests largely in the trial court's discretion. *Fire Ass'n of Philadelphia v. Powell* (Civ. App.) 188 S. W. 47.

In garnishment proceedings on account of goods sold by judgment debtor to garnishee in violation of Bulk Sales Law, testimony of experienced witnesses as to value thereof, held admissible. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

In action for negligent carriage of cattle, testimony that the difference in value of the cattle was \$5 a head on account of their actual appearance on arrival compared with what their appearance would have been if they had arrived after a run in reasonable time was inadmissible, being an answer on a mixed question of law and fact. *Kansas City, M. & O. Ry. Co. of Texas v. James* (Civ. App.) 190 S. W. 1136.

In action for damage to bulls in transit, shipper held properly allowed to state market value of crippled bulls on arrival at market, his testimony showing he was apparently qualified, and his qualification not being challenged. *Texas & P. Ry. Co. v. Timberlake* (Civ. App.) 192 S. W. 356.

**76. Time.**—It is improper for one not qualified as an expert to testify as to what was a reasonable time for a shipment of fruit and vegetables to arrive at its destination. *Missouri, K. & T. Ry. Co. of Texas v. Gray* (Civ. App.) 160 S. W. 434.

Plaintiff's testimony as to the usual time of transportation of live stock between certain places, in the absence of objection as to his qualification to express such opinion, held admissible, not coming within the rule forbidding the opinion of a witness on a mixed question of law and fact. *Gulf, C. & S. F. Ry. Co. v. Drahn* (Civ. App.) 163 S. W. 330.

In an action for delay of a shipment of cattle, testimony by a witness that he thought the run was a "very slow run" is not objectionable as opinion evidence. *St. Louis, S. F. & T. Ry. Co. v. Gilliam & Jackson* (Civ. App.) 166 S. W. 706.

In action for damages due to a delayed shipment of live stock, a witness qualified might testify as to the time it usually took to make the trip between the point of shipment and destination. *International & G. N. Ry. Co. v. Mudd* (Civ. App.) 194 S. W. 960.

**78. Cause and effect.**—It is within the common knowledge of a layman that a run-down, weakened, and nervous condition resulting from a severe injury could produce certain physical consequences. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 172 S. W. 1129.

A landlord, having testified to depreciation in rental value, held entitled to testify that the proximity of the railroad interfered with the renting of his houses. *Houston B. & T. Ry. Co. v. Lewis* (Civ. App.) 176 S. W. 68.

### *III. Subjects of Expert Testimony*

**83. Matters directly in issue.**—Evidence by the motorman, whose car struck deceased's automobile, that, after he saw deceased was about to turn his automobile across the track, the street car could not have been stopped, by the use of any means within the motorman's power, in time to have avoided the accident was not admissible; that being the question for the jury's determination. *El Paso Electric Ry. Co. v. Davidson* (Civ. App.) 162 S. W. 337.

In an action against a corporation for the price of its own stock purchased from plaintiff, where the defense was *ultra vires*, opinion of counsel for defendant, that it had no authority to purchase the stock, held inadmissible. *W. R. Case & Sons Cutlery Co. v. Folsom* (Civ. App.) 170 S. W. 1066.

In an action for injuries to live stock in shipment, testimony by the shipper as to the ordinary shrinkage of cattle under proper shipment, if they were properly handled, is not an opinion on a mixed question of law and fact. *Chicago, R. I. & G. Ry. Co. v. Core* (Civ. App.) 176 S. W. 778.

In an action for injuries to cattle in shipment, an expert witness cannot give his conclusion as to the unusual depreciation suffered by rough handling; that being a question for the jury. *Pecos & N. T. Ry. Co. v. Holmes* (Civ. App.) 177 S. W. 505.

**84. Matters of common knowledge or observation.**—The testimony of a brakeman that a car door came open because part of the lever used in fastening it had broken off, based on an inspection following an accident resulting from its being open, was a mere opinion upon a matter of which one man could judge as well as another, and did not call for the opinion of an expert. *Kansas City Southern Ry. Co. v. Carter* (Civ. App.) 166 S. W. 115.

Whether a person is well treated by his wife and family does not call for the opinion of an expert. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

The opinion of a witness, although he may be competent to testify as an expert, is inadmissible as to matters in the ordinary experience of men. *Great Eastern Casualty Co. v. Kelley* (Civ. App.) 194 S. W. 172.

**86. Bodily condition.**—In an action upon an accident policy, the court properly refused to allow a physician to state that, in his opinion, the insured had not lost the entire sight of his eye. *International Travelers' Ass'n v. Rogers* (Civ. App.) 163 S. W. 421.

In a personal injury action, a medical expert may testify that plaintiff's burned leg was susceptible to infection and probably subject to blood poisoning or erysipelas. *Texas & P. Ry. Co. v. Rasmussen* (Civ. App.) 181 S. W. 212.

Testimony of doctors as to what was found by their first examination of plaintiff, as well as what they found in last examination to make comparisons, not based on statements or voluntary acts of plaintiff, was admissible. *Kansas City, M. & O. Ry. Co. of Texas v. Durrett* (Civ. App.) 187 S. W. 427.

In action for personal injuries, evidence by a physician that there was such a thing as exaggeration of injuries, especially where they occurred as a result of railroad accidents, held properly excluded. *Kansas City, M. & O. Ry. Co. of Texas v. Finke* (Civ. App.) 190 S. W. 1143.

**87. Mental condition or capacity.**—On an issue as to contracting capacity, an expert's opinion that he does not believe the party was ever capable of making a good

trade because of his mental condition and his implicit confidence in people is admissible. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

On an issue as to contracting capacity an expert's opinion that he does not believe the party was ever capable of making a good trade because of his mental condition and implicit confidence in people, did not state a legal conclusion. *Id.*

**89. Due care and proper conduct in general.**—Whether, in tearing down a wall, it was safe to do the work by means of a man standing on the wall with a crowbar and hammer held not a subject of expert testimony. *Gordon Jones Const. Co. v. Lopez* (Civ. App.) 172 S. W. 987.

In servant's action for injury, testimony of chemical engineer that conditions found on his examination did not afford a safe place for work, etc., held admissible, where conditions at his inspection were the same as at time of accident. *Southwestern Portland Cement Co. v. Moreno* (Civ. App.) 181 S. W. 221.

In a servant's action for injury from explosion of coal dust, etc., in defendant's cement plant, testimony of chemical engineer as to conditions which made an unsafe place to work, and as to means that would have rendered it safer, held admissible. *Id.*

**90. Construction and repair of structures, machinery and appliances.**—In an action to compel construction of railroad through county seat, as required by Const. art. 10, § 9, experienced civil engineer, who had gone over the ground and examined the maps and profiles filed with the Railroad Commission, could testify that there were no natural obstacles preventing such construction, and that no such obstacles were shown by the maps and profiles. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561, judgment modified 106 Tex. 249, 163 S. W. 582.

Where a brakeman was struck by a switch stand while mounting a switch engine, the testimony of an experienced railroad man that everything should clear the line six feet to protect employes was admissible on the issue of negligence in placing the stand too close to the track. *Atchison, T. & S. F. Ry. Co. v. Bryant* (Civ. App.) 162 S. W. 400.

Witness being a carpenter familiar with the strength of lumber, and having qualified as an expert thereon, his testimony that, had a good piece of ship-lap been used in the construction of the column, it would not have broken with a man of plaintiff's weight was admissible. *Corrigan, Lee & Halpin v. Heubler* (Civ. App.) 167 S. W. 159.

An experienced builder may testify as to defects he discovered in the walls of the building which collapsed upon the injured servant. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 178 S. W. 607.

Whether water-closets are within a reasonable and convenient distance of a depot as required by Rev. St. 1911, art. 6592, is not a subject for expert opinion. *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 194 S. W. 462.

**91. Management and operation of vehicles, machinery and appliances.**—Expert testimony is admissible on the question whether a shipment of live stock was made in the usual time. *International & G. N. Ry. Co. v. Parke* (Civ. App.) 169 S. W. 397.

In an action for death of plaintiff's decedent at a railroad crossing, evidence is admissible as to the reasonable distance in which the train might have stopped upon the occasion of the accident under the conditions and speed shown. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

**95. Nature, condition and relation of objects.**—In an action by a shipper for injuries to two horses due to alleged rough handling, a railroad man who had handled many similar shipments was properly permitted to testify whether the horses were in a condition that horses would be in if properly transported, witness having testified in detail as to their condition. *International & G. N. Ry. Co. v. Sharpe* (Civ. App.) 167 S. W. 814.

**96. Quantity or capacity.**—In an action for breach of contract to buy cattle, opinion evidence of one qualified in experience as to what such cattle would have weighed at a certain place held admissible. *Houston Packing Co. v. Dunn* (Civ. App.) 176 S. W. 634.

In action by buyer of engine to cancel purchase-money notes, opinion testimony of an expert as to the capacity and power of the engine, sold subject to trial, held admissible. *Street v. J. I. Case Threshing Mach. Co.* (Civ. App.) 188 S. W. 725.

In action for damages due to a delayed shipment of live stock, the evidence of an expert as to the weight of the cattle was properly admitted. *International & G. N. Ry. Co. v. Mudd* (Civ. App.) 194 S. W. 960.

**97. Value.**—A farmer, raising and handling sweet potatoes for 20 years, was qualified to testify as to the value for eating purposes of sweet potatoes after going through a heat. *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804.

**98. Cause and effect.**—Ordinarily even an expert witness cannot state what in his opinion might possibly ensue from a given state of facts, but is confined to those things which are reasonably probable. *Houston & T. C. Ry. Co. v. Fox* (Civ. App.) 156 S. W. 922, judgment reversed 106 Tex. 317, 166 S. W. 693.

**99. — Injuries to the person.**—Evidence that a hernia produced by traumatism could have been, and that the witness expected it was, caused by the injury was properly admitted over objection that it was not a subject of expert testimony. *St. Louis S. W. Ry. Co. of Texas v. Brown* (Civ. App.) 163 S. W. 383.

Physicians who had examined an injury were properly permitted to testify whether, in their opinion, the injury was such as would be caused by the accident as described. *St. Louis, S. F. & T. Ry. Co. v. Overturf* (Civ. App.) 163 S. W. 639.

Testimony by a physician as to the effect of a partial dislocation of the hip is improper, where there is no evidence that plaintiff has such injury. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 171 S. W. 1091.

In a personal injury action, a medical expert may testify that plaintiff's irregular heart-beat might have been caused by the injury. *Missouri, O. & G. Ry. Co. of Texas v. Webb* (Civ. App.) 178 S. W. 728.

In action on life policy, witnesses' testimony that they were familiar with motorcycles, and that decedent's accident and death could or could not have occurred from colliding with a yearling calf, was inadmissible. *Great Eastern Casualty Co. v. Kelley* (Civ. App.) 194 S. W. 172.

**101. Damages.**—A shipper of cattle of long standing was properly permitted to testify what the shrinkage in the weight of cattle would be on an ordinary run as usually made, without any bad treatment. *St. Louis & S. F. R. Co. v. Rich* (Civ. App.) 162 S. W. 1194.

A witness, who had long experience and who was familiar with defendants' locomotives, may testify as an expert whether defendants' locomotives were equipped with proper spark arresters. *Texas Midland R. R. v. Ray* (Civ. App.) 163 S. W. 1013.

In an action for damages to a stock of shoes by water, plaintiff to recover held entitled to show by expert testimony the amount of depreciation. *Ara v. Rutland* (Civ. App.) 172 S. W. 993.

An expert on the condition of shipments of vegetables held properly allowed to testify that when he opened the car in question he found it had been roughly handled. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 172 S. W. 1116.

Testimony of a witness qualified to express an opinion as to the amount of shrinkage per animal in a shipment of live stock caused by delay held not a conclusion. *Texas & P. Ry. Co. v. Martin Bros.* (Civ. App.) 175 S. W. 707.

The damage to a crop by failure of an irrigation company to supply water therefor was a proper subject for expert testimony. *Lone Star Canal Co. v. Broussard* (Civ. App.) 176 S. W. 649.

#### IV. Competency of Experts

**103. Knowledge, experience and skill in general.**—It is not always necessary to show that a doctor is a graduate from an institution of learning in order to qualify him as an expert. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

**106. Machinery and mechanical devices and appliances.**—In an action for the death of a servant, killed by an explosion of a "T" joint in a steam pipe, a witness who was not an expert as to the tensile strength of iron was competent to testify, from his observation and experience with such joints, as to the comparative safety of one fastened with bolts and one screwed into the main pipe. *Texas Power & Light Co. v. Bird* (Civ. App.) 165 S. W. 8.

**107. Construction and operation of railroads.**—Plaintiff, a railroad brakeman, held qualified to testify, as an expert, that at the time of his injury, while coupling an engine to a car, it was necessary to push the drawhead over in order that the coupling might be made by impact. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

Where an injured engineer testified to an experience with engines covering more than 35 years, it is not error to permit him to testify that he did not believe a sand pipe could be displaced with a blow of the foot, since in so testifying he might be regarded as an expert. *Missouri, K. & T. Ry. Co. of Texas v. Pace* (Civ. App.) 184 S. W. 1051.

In an action for injuries to a shipment of peanuts, claimed confined too long in an unventilated car, testimony that the shipment could be made in a given length of time, if diligently handled, held inadmissible. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070.

**109. Physical facts.**—Testimony by experienced dealers in peanuts, though not of that locality as to the time shipments would remain uninjured, held admissible in action against carrier for injuries. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070.

In action for negligent carriage of cattle, an experienced cattleman may qualify to testify what the condition of cattle would be if confined in cars from 40 to 43 hours without unloading, although such witness has never accompanied a shipment of cattle. *Kansas City, M. & O. Ry. Co. of Texas v. James* (Civ. App.) 190 S. W. 1136.

In action on accident and health policy, where deceased met his death by gunshot wound, one who had made experiments with pistols in determining how far weapon would have to be from object to powderburn it, may testify as to that fact, having tested a number of pistols of different calibers. *First Texas State Ins. Co. v. Burwick* (Civ. App.) 193 S. W. 165.

In a boundary dispute, testimony of a witness that during the years he had been an abstractor in county he had become familiar with the old land titles in county should have been excluded. *Dunn v. Land* (Civ. App.) 193 S. W. 698.

**110. Value.**—Witnesses engaged in buying, feeding, and selling cattle and familiar with the market value of cattle generally could give their opinion as to the value of a shipment of cattle which was damaged, although they testified that they had never known of sales of cattle injured as they were, and did not know just what such cattle would have brought on the market. *Chicago, R. I. & G. Ry. Co. v. Swaggerty* (Civ. App.) 163 S. W. 317.

In an action for breach of a contract of sale of cattle, plaintiff was properly permitted to express an opinion as to market value of cattle in Houston, where he had full knowledge of the market at Ft. Worth and had made comparison of the two markets. *Houston Packing Co. v. Griffith* (Civ. App.) 164 S. W. 431.

Where a witness had no knowledge of the local market except the market quotations in the newspapers, he was not qualified to express an opinion as to such value, yet, as he was experienced in the cattle business, he was qualified to express an opinion of the comparative value of the class of steers in controversy and the class referred to in the market quotations. *Id.*

The knowledge necessary to qualify one to testify, as to market value need not be derived from his personal transactions on the market or from sales made in his presence and hearing. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Civ. App.) 164 S. W. 878.

In an action for the overflowing of his land and destruction of his crops, plaintiff held to have sufficient expert knowledge to testify as to the value of the crops destroyed *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

A witness engaged in wholesale buying and selling of horses and mules held qualified to testify that value of a shipment of live stock was greater at destination than at the point of origin of the shipment. *Texas & P. Ry. Co. v. De Long* (Civ. App.) 176 S. W. 874.

In an action for the wrongful death of a manager of a newspaper, a witness held qualified to testify as an expert to the market value of deceased's managerial services. *Southern Traction Co. v. Hulbert* (Civ. App.) 177 S. W. 551.

A practicing physician was improperly allowed to testify as to the market value of bananas at the shipping point, where he could not say he had ever seen the bananas and did not know how many were in a car or their grade. *Illinois Cent. R. Co. v. Freeman* (Civ. App.) 182 S. W. 369.

A skilled witness who is familiar with services connected with some particular profession, trade, or calling may estimate their value, and it is not required that he should be intimately acquainted with the nature of the services which he is appraising but he may know them in a very general way. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

In action for value of a lost picture, witness held not qualified sufficiently to make her opinion admissible. *Wells Fargo & Co. v. Long* (Civ. App.) 190 S. W. 530.

In action for value of lost water color painting, witness with experience in selling such paintings held qualified to testify as to its value. *Id.*

In action by consignee for damages to potatoes shipped, his testimony that they had no market value when received was not open to objection that he knew nothing about the market value of damaged potatoes at that place, it appearing he had been shipping potatoes for 20 years. *Houston, E. & W. T. Ry. Co. v. Brackin* (Civ. App.) 191 S. W. 804.

**111. Damages.**—A witness who knew the market value of cattle, and who was qualified by reason of his wide experience to give his opinion of the rate of decline in value of cattle because of their stale and drawn condition, caused by a delay in their transportation, was competent to give his opinion of the aggregate amount of damages to cattle delayed in transportation. *St. Louis, S. F. & T. Ry. Co. v. Armstrong* (Civ. App.) 166 S. W. 366.

A witness held competent to testify to the depreciation in the value of land because of a turf fire. *Ft. Worth & D. C. Ry. Co. v. Firestone* (Civ. App.) 173 S. W. 919.

A shipper of cattle held competent to give his opinion as to the amount of extra shrinkage of cattle by delay in transportation. *Texas & P. Ry. Co. v. Martin Bros.* (Civ. App.) 175 S. W. 707.

An experienced shipper of cattle held competent to testify as to their condition at destination due to delay and rough handling. *Houston & T. C. R. Co. v. Lindsey* (Civ. App.) 175 S. W. 708.

In an action for damages for depreciation of real estate, testimony of a witness who had bought and sold real estate in the vicinity was admissible. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 183 S. W. 829.

**112. Cause and effect.**—Opinion of physician as to cause of injured person's condition held admissible, notwithstanding his difficulty in determining whether that was his opinion or merely a suspicion. *Galveston, H. & S. A. Ry. Co. v. Roemer* (Civ. App.) 173 S. W. 229.

Experience in use of dynamite held to qualify witness as an expert as to effect of exploding dynamite on a human body. *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619.

An expert civil engineer held entitled to testify as to the cause of an overflow. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

Witnesses held qualified as experts to testify to the general fact of injury to cattle by dipping in crude oil. *Missouri, K. & T. Ry. Co. of Texas v. Cauble* (Civ. App.) 174 S. W. 880.

A civil engineer who was a railway expert was competent to express his opinion as to whether condition of tracks and ties would cause derailment. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

#### V. Examination of Nonexperts

**113. Determination of question of competency.**—The exercise of the trial court's discretion in admission of evidence of the opinion of a nonexpert witness will not be disturbed unless it clearly appears that such discretion has been abused. *Guerra v. San Antonio Sewer Pipe Co.* (Civ. App.) 163 S. W. 669.

The question of the admission of evidence of the opinion of a nonexpert witness rests largely in the discretion of the trial court. *Id.*

**114. Examination in general.**—In action for delay in shipment of live stock, question to plaintiffs as to difference in market on Thursday and on Tuesday "when you should have gotten there" held improper as calling for expression of opinion and conclusion on mixed question of law and fact. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

**115. — Facts forming basis of opinion.**—While a nonexpert witness cannot ordinarily give opinion testimony which does not rest upon facts stated by him, or is not acquired through the use of his senses, the witness need not always state the facts upon which his opinion rests; it being sufficient that he had the means and opportunity for knowledge, for many matters of evidence are incapable of expression except in terms of opinion. *Guerra v. San Antonio Sewer Pipe Co.* (Civ. App.) 163 S. W. 669.

Where, in an action upon a benefit certificate, defendant had shown that insured had had an attack of malaria, contradicting her statement to the contrary, in her application, plaintiff, her husband, was properly permitted to testify that, in his opinion, she recovered in a few days; he stating the facts upon which the opinion was based. *Modern Brotherhood of America v. Jordan* (Civ. App.) 167 S. W. 794.

To qualify the owner to testify to the value of his wearing apparel and household goods, lost by defendant, he need not state their cost and the period of their use and their condition. *Pecos & N. T. Ry. Co. v. Grundy* (Civ. App.) 171 S. W. 318.

In action for balance due on a construction contract, opinion of witness as to the amount of damages plaintiff suffered because of facts which may or may not have existed was inadmissible. *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Conleton* (Civ. App.) 172 S. W. 739.

A nonprofessional witness cannot give his opinion as to sanity unless he states the facts on which the opinion is based. *Jones v. Nix* (Civ. App.) 174 S. W. 685.

In action for damages for the failure to deliver telegram addressed to plaintiff, published representative sales held admissible to show on what plaintiff based his opinion as to market value of cattle. *Western Union Telegraph Co. v. Gorman & Wilson* (Civ. App.) 174 S. W. 925.

Testimony of a witness as to contracting capacity of a party that in talking to him he would pause, look off in a staring way, and continue to do so, reach in his pocket for tobacco, and again begin conversation, and that he saw him do things seemingly uncalled for and unreasonable, held not basis for an opinion. *Smith v. Guerre* (Civ. App.) 175 S. W. 1093.

In action for damages from fire, facts testified to by plaintiff held sufficient as a basis for his opinion that the fire was burning away from and not towards a railroad track. *Galveston, H. & S. A. Ry. Co. v. Brune* (Civ. App.) 181 S. W. 547.

A witness, though he be not an expert, may give his opinion when he also states the facts upon which his opinion is based. *Id.*

Where it was claimed that fills under railroad trestles caused flood waters to inundate plaintiff's land, testimony that the water was higher on the upper side of the fills than it was on the lower, is not subject to objection that the witnesses attributed the depth of water solely to the fills. *Galveston, H. & S. A. Ry. Co. v. Vogt* (Civ. App.) 181 S. W. 841.

Opinion as to mental or physical condition may be given before or after testimony of the witness as to the facts upon which his opinion is based. *Missouri, K. & T. Ry. Co. v. Gilcrease* (Civ. App.) 187 S. W. 714.

In action for delay in shipping cattle, plaintiffs held properly allowed to testify as to difference in market value of cattle on Thursday and Tuesday, rather than stating what the market value was on such dates, and leaving to jury question of difference. *St. Louis Southwestern Ry. Co. of Texas v. Miller & White* (Civ. App.) 190 S. W. 819.

116. — **Cross-examination and re-examination.**—One testifying to the genuineness of a signature from his knowledge of the signer's handwriting cannot be cross-examined as to the genuineness of signatures of another. *Cow Boy State Bank & Trust Co. v. Roy* (Civ. App.) 174 S. W. 647.

## VI. Examination of Experts

117. **Preliminary evidence as to competency.**—Where a witness' capacity as an expert regarding insanity had not been attacked, evidence to prove him capable was irrelevant. *Tweed v. Western Union Telegraph Co.* (Sup.) 166 S. W. 696, affirming judgment *Western Union Telegraph Co. v. Tweed* (Civ. App.) 138 S. W. 1155, and rehearing denied *Tweed v. Western Union Telegraph Co.* (Sup.) 177 S. W. 957.

Witnesses testifying as experts must show their qualification to so testify, or their testimony may be disregarded. *Blackwell v. St. Louis, B. & M. Ry. Co.* (Civ. App.) 168 S. W. 52.

The admission of opinion evidence cannot be held erroneous, though the witness did not qualify on direct examination, where his cross-examination showed that he was qualified. *Southwestern Portland Cement Co. v. Kezer* (Civ. App.) 174 S. W. 661.

Where two witnesses testified to oculist's reputation as a first-class specialist, and the doctor testified that he had been an oculist for eight years, sufficient predicate was laid to admit his testimony as an expert. *Southwestern Telegraph & Telephone Co. v. Clark* (Civ. App.) 192 S. W. 1077.

118. **Determination of question of competency.**—Decision of preliminary question of qualification of expert is usually within discretion of trial court. *Studebaker Harness Co. v. Gerlach Mercantile Co.* (Civ. App.) 192 S. W. 545; *Kansas City, M. & O. Ry. Co. of Texas v. Starr* (Civ. App.) 194 S. W. 637.

A stenographer's transcript of the testimony of a physician in another case could not be used as a basis of the physician's competency to testify in the case on trial. *San Antonio & A. P. Ry. Co. v. Wagner* (Civ. App.) 166 S. W. 24.

Whether a witness is qualified as an expert is a question for the trial court, within its sound discretion. *Hovey v. Sanders* (Civ. App.) 174 S. W. 1025.

119. **Mode of examination in general.**—In an action for delay in transportation of a shipment of live stock, evidence as to the effect of a 24-hour delay was improperly admitted, where there was no evidence of such delay. *Texas & P. Ry. Co. v. Cauble* (Civ. App.) 168 S. W. 369.

A question asked a physician, which assumes a fact not shown by any testimony, is improper. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Civ. App.) 173 S. W. 937.

The opinion of a medical expert as to pain suffered by plaintiff, in a suit for personal injuries, must be predicated on the evidence introduced. *Gulf, C. & S. F. Ry. Co. v. Loyd* (Civ. App.) 175 S. W. 721.

Testimony as to the time for transportation in action for injuries to peanuts damaged in unventilated car, not based on the witness' knowledge of operation of defendant's trains, is inadmissible. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 184 S. W. 1070.

In broker's action for commission for effecting a lease, it was not error to permit him to embrace, in question as to reasonable value of such services, his construction of terms of lease, upon which defendant might inquire thereon upon his construction. *Brady v. Richey & Casey* (Civ. App.) 187 S. W. 508.

On issue of attorney's fees allowed by art. 4746, upon failure of insurance company to pay loss after demand, in absence of proof of services performed by attorneys, held improper, in interrogating expert witnesses, to recite what was done by counsel in preparation of case. *American Nat. Ins. Co. v. Hollingsworth* (Civ. App.) 189 S. W. 792.

Question propounded to expert that "this track \* \* \* was thoroughly adequate, nothing in the condition \* \* \* to cause the same (train) to be derailed," held leading. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 193 S. W. 728.

120. **Questions and answers based on personal knowledge of expert.**—Testimony by physicians, relative to an examination of plaintiff made subsequent to his injury and for the purpose of testifying as witnesses as to his condition, and based on objective and subjective examinations, was admissible. *International & G. N. Ry. Co. v. Williams* (Civ. App.) 160 S. W. 639.

122. **Questions and answers based on testimony of others.**—A physician, who had never seen plaintiff after he was injured, but based his testimony on the depositions of two other experts, was improperly allowed to testify that a competent masseur in treating plaintiff would be able to observe symptoms of paralysis or grave physical defects; the witness not having himself observed plaintiff's condition. *Pecos & N. T. Ry. Co. v. Coffman* (Civ. App.) 160 S. W. 145.

In a railroad employe's action for injuries, testimony of a medical expert that, if plaintiff fell from the top of the car and struck the ground on his back, the blow would have been sufficient to result in paralysis, was properly admitted, in view of other testimony, though plaintiff testified he did not know how he struck the ground. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

123. **Hypothetical questions and answers.**—If witnesses as to difference in market value of corn before and after the injury are experts, they may give their opinions upon hypothetical questions. *Houston & T. C. Ry. Co. v. Lewis* (Civ. App.) 185 S. W. 593.

124. — **Form and sufficiency of questions.**—Counsel may embody in their hypothetical questions the facts which, in their judgment, the evidence proved, and are not compelled to embrace therein facts which the opposing litigant contends to be established. *Order of United Commercial Travelers of America v. Roth* (Civ. App.) 159 S. W. 176.

A hypothetical question must embrace and be based upon the facts in evidence relating thereto. *Sargent v. Barnes* (Civ. App.) 159 S. W. 366.

A hypothetical question is properly excluded where based upon a premise contrary to the evidence. *Missouri, K. & T. Ry. Co. of Texas v. Dellmon* (Civ. App.) 171 S. W. 799.

Opinion evidence elicited upon a hypothetical question which made a slightly erroneous assumption of fact held not inadmissible. *Decatur Cotton Seed Oil Co. v. Belew* (Civ. App.) 173 S. W. 607.

A hypothetical question embracing counsel's theory of case is not objectionable because it does not cover full range of evidence and embrace facts contended by opposing counsel to be established by evidence. *Merchants' Ice Co. v. Scott & Dodson* (Civ. App.) 186 S. W. 418.

A hypothetical question having basis in the evidence of the party propounding it is warranted, though it disregards the evidence of the adversary party. *City of Ft. Worth v. Burton* (Civ. App.) 193 S. W. 228.

125. — **Scope and sufficiency of answers.**—The answer of an expert that plaintiff's injury "could" have necessitated a mastoid operation, which he had undergone, held not objectionable as stating a possibility as distinguished from a probability. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 172 S. W. 1129.

In an action for injuries, testimony of a medical witness, when asked if he could give any definite opinion as to whether or not plaintiff's injuries were permanent, that the unexpected might happen, but that there was no authentic history of any case of the nature recovering, was not improper as argumentative and involving extraneous matters. *Texas & P. Ry. Co. v. Sherer* (Civ. App.) 183 S. W. 404.

129. **Cross-examination and re-examination.**—In an action against a railroad company for damages for injuries to a female plaintiff, certain questions to an expert held proper to test his skill and knowledge. *Houston & T. C. Ry. Co. v. Fox* (Civ. App.) 156 S. W. 922, judgment reversed, 106 Tex. 317, 166 S. W. 693.

Question asked a physician who had testified frequently for plaintiff in personal injury suits as to his custom relative to proportioning his fees to the amount of recovery held properly excluded as immaterial. *Gulf, C. & S. F. Ry. Co. v. Stewart* (Civ. App.) 164 S. W. 1059.

Cross-examination as to the means of knowledge of an expert witness goes to the credibility of his testimony. *Pecos & N. T. Ry. Co. v. Holmes* (Civ. App.) 177 S. W. 505.

129½. **Evidence as to reputation.**—Where the professional skill or reputation of physicians who testified was not sought to be impeached, evidence was not admissible to show that they had the reputation of being skillful physicians. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 162 S. W. 457.

130. **Contradiction.**—Where, in an action for a stock of goods set on fire and burned by a passing train, experts had testified that cinders, escaping from locomotive equipped



as defendants' was would not go beyond the right of way, plaintiff was properly allowed to show, in rebuttal, that cinders had, on several different occasions, started fires beyond the right of way. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 164 S. W. 442.

### VII. Comparison of Handwriting

131. **Competency of expert.**—Witness, who had worked as bank clerk and had taught in writing schools and commercial and business schools, held a handwriting expert for the purpose of testifying to the genuineness of the signature to a note. *Rhea v. Cook* (Civ. App.) 174 S. W. 892.

132, 133. **Standard of comparison.**—Persons who are experts on the question of handwriting may not testify to the genuineness of a signature of an officer to papers submitted to them for comparison with signatures on other papers not filed in the case. *Robertson v. Talmadge* (Civ. App.) 174 S. W. 627.

### VIII. Effect of Opinion Evidence

135. **Opinions of witnesses in general.**—Plaintiff's opinion as to the value of the loss of the use of wearing apparel constituting his baggage in an action against a carrier for delay in delivery may be disregarded by the jury if unreasonable. *Houston & T. C. Ry. Co. v. Hirsch* (Civ. App.) 160 S. W. 426.

The mere opinion of witness as to damages suffered by defendant from plaintiff's defective performance of construction work would not be a sufficient basis for a finding for defendant on that issue. *Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton* (Civ. App.) 172 S. W. 739.

A jury are not concluded by opinion evidence, but may apply their own experience and knowledge in solving the question. *Houston Belt & Terminal Ry. Co. v. Vogel* (Civ. App.) 179 S. W. 268.

That plaintiff's attending physician qualified his statement that the reasonable charge for his services was \$25 by the clause, "if the patient were able to pay it," would not necessarily limit or destroy its weight as a statement of their reasonable value. *Tarrant County Traction Co. v. Bradshaw* (Civ. App.) 185 S. W. 951.

136. **Testimony of experts.**—The testimony of a lawyer of the territory of New Mexico as to the course a case would take under the laws of the territory, and what, in his opinion, was the court of final resort, is not binding on the trial court, when the matter depends on federal statutes. *Western Union Telegraph Co. v. White* (Civ. App.) 162 S. W. 905.

Where the Mexican Civil Code and evidence of an alleged expert were introduced to prove a matter of Mexican law, the trial judge was not bound by the expert's opinion, but could construe the Code provisions himself. *Banco Minero v. Ross*, 172 S. W. 711, 106 Tex. 522.

The weight of the testimony of an expert is for the court on a trial without a jury. *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Civ. App.) 173 S. W. 619.

The jury is not in all cases bound by the opinion testimony of experts. *Ft. Worth & R. G. Ry. Co. v. McMurray* (Civ. App.) 173 S. W. 929.

The weight of expert testimony is for the jury. *Fidelity & Casualty Co. v. Joiner* (Civ. App.) 178 S. W. 806.

In an action by an inexperienced shipper of live stock for damages in transit, where he was permitted to testify as an expert as to the shipment, his inexperience went only to the weight of his testimony. *Panhandle & S. F. Ry. Co. v. Curtis* (Civ. App.) 190 S. W. 837.

A court can construe a county building contractor's bond, and Acts 1911 Ark. p. 462, under which it was given as not requiring suit thereon in Arkansas, notwithstanding testimony of an attorney from that state that the law of that state contained such a requirement. *American Surety Co. v. Huey & Philp Hardware Co.* (Civ. App.) 191 S. W. 617.

The jury is not confined to the estimates of value of property by experts, where facts are established from which the jury may reach a reasonable conclusion tested by common knowledge and experience. *City of Ft. Worth v. Burgess* (Civ. App.) 191 S. W. 863.

**RULE 37. A PARTY IS ESTOPPED FROM DENYING A FACT WHICH HE HAS DIRECTLY AND WILLFULLY, BY HIS WORDS OR CONDUCT, INDUCED ANOTHER TO BELIEVE, AND TO ACT ON THE BELIEF SO AS TO ALTER HIS OWN PREVIOUS CONDITION, AND WHO WOULD BE PREJUDICED IF THE ADMISSION OF THE FACT WAS RETRACTED**

#### *I. Nature and Essentials of Equitable Estoppel in General*

1. **Nature and elements of estoppel in pais.**—Where the president of a corporation without authority executed two notes without consideration, and later the notes were produced to secure a debt partly owed by him, there was no element of estoppel against the corporation. *El Fresnal Irrigated Land Co. v. Bank of Washington* (Civ. App.) 182 S. W. 701.

The essential elements of an estoppel are a false representation or concealment of a material fact, made with the knowledge of the fact to one ignorant of the truth of the matter with intent that he should act upon it and which induces him to act upon it. *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

2. **Intent.**—If the owner of real estate should put in circulation a letter reciting a conveyance of the land, intending that a purchaser from a third person should rely thereon, he would be estopped to assert his title. *Dillard v. State* (Cr. App.) 177 S. W. 99.

3. **Knowledge of facts.**—Where, in an action for breach of a lease, made by plaintiffs' agent as their attorney in fact, defendants had no knowledge of any limitation on his authority, they were not estopped to claim that the plaintiffs were bound by the agent's misrepresentation that the lease at the time defendants signed it contained a prohibition defeasance clause. *Taber v. Eyer* (Civ. App.) 162 S. W. 490.

Husband, though in plaintiff's store when wife purchased alleged necessities, held not estopped from defeating liability, if he did not know the goods were being charged to him. *Trammell v. Neiman-Marcus Co.* (Civ. App.) 179 S. W. 271.

4. **Reliance on adverse party.**—Where an attachment creditor did not change its position to its detriment in any way in consequence of the attachment debtor's statement that property was not his, but took such property under the attachment, the debtor was not estopped by his statement, and could bring suit for the wrongful attachment of such property. *Carroll v. First State Bank of Denison* (Civ. App.) 160 S. W. 632.

In a suit to recover land, defendants were not estopped to assert that they had not conveyed the land, by establishment of lines and plats, where the purchase was not made in reliance thereon. *Ware v. Perkins* (Civ. App.) 178 S. W. 846.

Statement by secretary of investment company to county attorney to effect that company had been dissolved and that he did not know who held the title to lots, not wholly relied upon by the attorney in instituting tax sale proceeding, held not to estop subsequent purchaser from the company from claiming that record title was then in company. *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

5. **Acts done or omitted, and change of position.**—In trespass to try title, a finding that intervener would have purchased the property anyway, as appeared from plaintiff's concealment of the fact that it was not a corner, eliminated the essentials of an estoppel in pais in favor of intervener. *West v. City of Houston* (Civ. App.) 163 S. W. 679.

Where it did not appear that defendant held out an independent contractor as her agent, or that plaintiffs were induced to extend him credit for that reason, defendant cannot be held liable for his debts on the theory of estoppel. *Kohlberg v. Awbrey & Semple* (Civ. App.) 167 S. W. 828.

An assumption by one of the parties to an exchange of lands of an indebtedness of the other does not preclude rescission by the debtor, where the creditor has not agreed to accept the undertaking. *Boles v. Aldridge* (Sup.) 175 S. W. 1052, reversing judgment (Civ. App.) 153 S. W. 373; *Maddox v. Clark* (Sup.) 175 S. W. 1053, affirming judgment (Civ. App.) 163 S. W. 309.

That one buying an automobile was not damaged by false statements that the buyer's wife desired him to make the purchase held not to prevent the buyer from setting up such misrepresentations as a defense in the seller's action. *J. I. Case Threshing Mach. Co. v. Webb* (Civ. App.) 181 S. W. 853.

Buyer held not entitled to rescind contract for purchase of a motor truck, unless he was injured by fraud, if any, in seller's representations as to its capacity. *Alamo Auto Sales Co. v. Herms* (Civ. App.) 184 S. W. 740.

A carrier will not be required on the ground of estoppel to perform its part of a contract, illegal as giving a rebate, because of the shipper having performed his part. *St. Louis, I. M. & S. Ry. Co. v. Landa & Storey* (Civ. App.) 187 S. W. 358.

Waiver being founded largely upon the doctrine of estoppel, it would require a finding, in an action to recover damages for injuries to a shipment of cattle, that the conduct of defendants relied upon as a waiver must have misled plaintiff and prevented him from giving the notice required by the contract of shipment. *International & G. N. R. Co. v. Hudson* (Civ. App.) 188 S. W. 277.

7. **Prejudice to person setting up estoppel.**—A carrier, not misled nor induced to refrain from doing any act, the performance of which would have placed it in a better condition, cannot rely on estoppel to bind a shipper of live stock to condition reports signed by him. *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925.

Where a surety on a cropper's note for supplies agreed that, if the creditor would furnish additional supplies, the debt therefor should be first paid from the proceeds of the crop, the surety would be estopped to deny the validity of the agreement. *Ward & Co. v. Wemack* (Civ. App.) 168 S. W. 433.

An equitable estoppel cannot be invoked except to protect the party claiming its benefit from some loss resulting if the true facts control. *McLemore v. Bickerstaff* (Civ. App.) 179 S. W. 536.

8. **Default or wrongful act of person setting up estoppel.**—When fraudulent misrepresentations are shown by which a person was induced to enter into a contract, it is no answer to his claim for damages to assert that he might have known the truth by further inquiry; the defendant being estopped from so asserting want of caution. *Benton v. Kuykendall* (Civ. App.) 160 S. W. 438.

Where defendants, who were indebted to a bank, executed a deed of trust to secure their indebtedness, in compliance with a demand of the directors of the bank for security, but agreed with the vice president that he should retain the deed and never deliver it to the bank, they are estopped from setting up their fraudulent agreement, and the court may properly treat the deed as delivered. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

One who undertakes to discover the truth of representations made to him is charged with the knowledge of everything which a proper investigation would disclose, and would not be justified in acting upon fraudulent representations merely because they were made to him. *Newman v. Lyman* (Civ. App.) 165 S. W. 136.

One induced by fraudulent representations to enter into a contract is not barred from

relief therefrom, because had he made further inquiry he would have known the truth. *Fidelity & Deposit Co. of Maryland v. Anderson* (Civ. App.) 189 S. W. 346.

10. **Estoppel against public government or public officers.**—Where the commissioners' court, after illegally appointing commissioners to sell school land, ratified the commissioners' sale by accepting the proceeds and passing the commissioners' accounts, the county was estopped to deny the validity of the sale. *Brazoria County v. Padgitt* (Civ. App.) 160 S. W. 1170.

Where a commissioners' court attempted by a void order to fix the county treasurer's salary at \$600 per annum, the fact that defendant when elected knew that it was not intended that he should receive the compensation specified by Rev. St. 1911, art. 3875, did not estop him from retaining such amount. *Montgomery County v. Talley* (Civ. App.) 169 S. W. 1141.

A resurvey by plaintiff county of its school lands, relied upon by lessees of such lands of defendant counties, as well as by one defendant county in a suit, held not to estop plaintiff to claim a location for the lands other than that fixed by such resurvey. *Colorado County v. Travis County* (Civ. App.) 176 S. W. 845.

City, which purchased lands for reservoir, used only part, and failed to pay part of price, could not retain the lands, while repudiating its obligation to pay on ground that its promise was illegal, because no provision was made for payment, as required by Const. art. 11, §§ 5, 7. *City of Ft. Worth v. Reynolds* (Civ. App.) 190 S. W. 501.

## II. Grounds of Estoppel

11. **Inconsistency of conduct and claims in general.**—Signers of the supersedeas bond on condition that other signatures should be obtained before it was filed, having delivered the bond to the appellants without notifying the clerk of the condition, held estopped to deny the validity of the bond because it was filed without performing the condition. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 160 S. W. 337.

A trustee who wrongfully purchased the title to land of the cestui que trust cannot claim that he is not estopped to assert such title unless he be reimbursed for the money paid for the land in his efforts to deprive his beneficiary of title. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

Where the deed to land which they had contracted to purchase was rejected on account of alleged defects in the title, the purchasers cannot thereafter claim specific performance of the contract. *Marshall v. Beason* (Civ. App.) 165 S. W. 75.

Plaintiffs held not estopped to claim one-half of land purchased by O. under a parol trust agreement, which land O. alone mortgaged to defendants, by subsequent transactions between plaintiffs and third persons or by a deed from O., in which plaintiffs covenanted that the deed was subject to the mortgage debt. *Ellerd v. Ellison* (Civ. App.) 165 S. W. 876.

Under a contract for the sale of orange trees above two feet in height in the seller's nursery, held, that the buyer's instruction to the seller not to sell to another any trees over two feet high did not estop the buyer from denying that title passed by the contract. *Alsworth v. Reppert* (Civ. App.) 167 S. W. 1093.

A person may, by acts or omissions, waive a right which he might otherwise have asserted under the Constitution. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

An affidavit reciting a conveyance of land held to estop the deponent; hence a forgery of such instrument falls within the statute denouncing forgery of instruments affecting title to land. *Dillard v. State* (Cr. App.) 177 S. W. 99.

Acquiescence by cestuis in trust deed for proper school purposes under Rev. St. 1879, arts. 3711, 3771, 3777, providing therefor, held to estop their assertion of uses unexpressed in deed. *McLeod v. McCall* (Civ. App.) 180 S. W. 293.

12. **Assumption of capacity or authority.**—An agent delivering a deed, executed by his principal, in violation of instructions, and with a design to defraud, held estopped to deny that title passed, and was liable to the principal for damages. *Tyler Building & Loan Ass'n v. Biard & Scales*, 171 S. W. 1122, 106 Tex. 554, reversing judgment (Civ. App.) 165 S. W. 542, and rehearing denied 171 S. W. 1200, 106 Tex. 554.

13. **Assertion of title or right in general.**—A contract to convey real estate may be specifically enforced at the suit of the purchaser, though, subsequent to the contract, he obtained an outstanding title. *Groves v. Whittenberg* (Civ. App.) 165 S. W. 889.

14. **Possession or acts of ownership under title or claim.**—Where a railroad company accepted and recorded a conveyance restricting the location of its depot and purchasers of other land from the same grantor bought in reliance on such restriction, the railroad company was estopped to set up a prior unrecorded conveyance, containing no restrictions. *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 180 S. W. 1138.

15. **Claim or position in judicial proceedings.**—Election of remedies, see *Bull v. Bearden* (Civ. App.) 159 S. W. 1177; *McLane v. Haydon* (Civ. App.) 160 S. W. 1146; *Stinson v. Sneed* (Civ. App.) 163 S. W. 989; *Rahe v. Yett* (Civ. App.) 164 S. W. 30; *Sanford v. Cobe* (Civ. App.) 172 S. W. 584; *Wright v. Chandler* (Civ. App.) 173 S. W. 1173; *City of Brownsville v. Kinder* (Civ. App.) 180 S. W. 623.

Allowance against estate of deceased maker of claim on a note secured by a lien on certain land, held not to preclude plaintiff from asserting superior title to such land subsequently acquired. *Wiseman v. Cottingham* (Sup.) 174 S. W. 281, affirming judgment (Civ. App.) 141 S. W. 817.

Insurance company sued on a policy, which, after judgment in its favor, failed to deny jurisdiction of the trial court and voluntarily consented to a retrial, held estopped to deny the court's jurisdiction to retry the case. *Ætna Ins. Co. v. Dancer* (Civ. App.) 181 S. W. 772.

16. — **Claim inconsistent with previous claim or position in general.**—Action of defendant in garnishment in instructing garnishee not to set up the exemption that the credit was the proceeds of a homestead, and to let the claim go to judgment, held to

estop such defendant from recovering such credit against the garnishee. *Russell v. Hamilton* (Civ. App.) 174 S. W. 705.

19. — **Position inconsistent with previous assertion of title in another In general.**—Where defendant replevied a bank deposit, which had been garnished under art. 279, held, that he and a surety on the replevy bond were estopped to claim that title to the deposit was in the surety and not in the defendant. *Davis v. McFall* (Civ. App.) 168 S. W. 453.

Judgment defendant and sureties on his bond to obtain the release of the garnishment lien on a garnished debt held estopped to assert the indebtedness was owing, not to the judgment defendant, but the firm of which he was a member. *Sellers v. Puckett* (Civ. App.) 180 S. W. 639.

That a surviving husband, as guardian of his children, inventoried an interest in the community property as their property, does not estop him to appropriate it to reimburse himself for payment of community debts. *Kidd v. Prince* (Civ. App.) 182 S. W. 725.

Plaintiff's acquisition of a vendor's lien note, given her grantor by defendants, who received a quitclaim deed to land which was previously conveyed to plaintiff, held not, despite her foreclosure of the same, to estop her from asserting her superior title to the land. *Barksdale v. Benskin* (Civ. App.) 194 S. W. 402.

21. — **Pleadings.**—Where plaintiff, after exceptions had been sustained to some items of damage laid in its original petition, filed an amended petition, alleging greater damages, defendant could then plead in abatement that plaintiff fraudulently misstated the amount of the damage to give the court jurisdiction, notwithstanding its previous answer to the original petition.—*L. Grief & Bro. v. Texas Cent. R. Co.* (Civ. App.) 163 S. W. 345.

Where a deed of trust was invalid for want of written authority of the attorney in fact executing it, an answer of the landowner that it was given for a valuable consideration and was ratified was effective to create an estoppel of record which validated the deed, not only as against the landowner, but as against the holder of a subsequent deed taken with notice. *Texas Moline Plow Co. v. Klapproth* (Civ. App.) 164 S. W. 399.

In action against attorney in fact and one to whom he wrongfully conveyed, petition held not to show election to claim the property deeded to the attorney's wife, so as to require plaintiff to take it burdened with a vendor's lien. *White v. Love* (Civ. App.) 174 S. W. 913.

Citizens' committee of subscribers to railroad by its pleadings repudiating liability upon any of its aid notes held not entitled to recover for any further failure of performance on part of railroad. *Crawford v. Wellington Railroad Committee* (Civ. App.) 174 S. W. 1004.

22. — **Stipulations.**—A stipulation between senior and junior patentees held not to estop the senior patentee from claiming the land within his patent. *Kelly v. Kelly* (Civ. App.) 178 S. W. 686.

23. **Failure to assert title or right.**—Where a defendant, a purchaser of land, who knew that his vendor had defrauded plaintiff in a sale of the land by plaintiff to said vendor, asked plaintiff immediately before the purchase if she objected to his buying, and plaintiff gave her consent, plaintiff was estopped to question defendant's good faith. *Neff v. Heimer* (Civ. App.) 163 S. W. 140.

In an action to recover the amount of a policy on plaintiff's homestead, in which the insurance company alleged that such amount had been garnished, evidence held not to show an estoppel to claim the money by showing that plaintiff knew of the garnishment proceedings in time to have objected to the garnishment of the fund on the ground that it was the proceeds of his homestead. *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

Plaintiff's failure to assert his claim by intervention in the receivership proceedings coupled with slight delay thereafter, held not to prevent subsequent assertion against the railroad company after discharge of the receiver. *Kansas City, M. & O. Ry. Co. of Texas v. Latham* (Civ. App.) 182 S. W. 717.

Any right of the vendor to declare an option contract forfeited because of failure to promptly make a payment was waived where negotiations were continued for several months. *Slade & Bassett v. Crum* (Civ. App.) 193 S. W. 723.

25. **Clothing another with apparent title or authority—Agency.**—Where the president and cashier of a bank undertook to deal for it in sale of notes indorsed in blank, and the buyer thereof understood that he dealt with the officers on behalf of the bank, and delivered a check for the price to the bank, it was estopped to deny that the officers acted for it, and it was liable for their fraudulent representations. *Washington County State Bank v. Central Bank & Trust Co. of Houston* (Civ. App.) 163 S. W. 456.

Defendant by its acts and conduct, in connection with the sale of an automobile, held estopped against the purchaser to deny that dealer was its agent, and assert that there was a sale of the car to the dealer, and a resale to the purchaser. *Half Co. v. Jones* (Civ. App.) 169 S. W. 906.

Agency by estoppel of manager of defendant's store to draw a draft for defendant could not be established by showing that such manager had previously issued two checks in defendant's name, unknown to and unauthorized by defendant. *Simon v. Temple Lumber Co.* (Civ. App.) 178 S. W. 681.

Acceptance of draft, drawn by manager of defendant's store, by plaintiff lumber company, who parted with nothing, merely depositing it, in payment of debt from another concern in which the manager had formerly been interested, held not to result in defendant's liability on the draft by estoppel. *Id.*

Liability of principal for act of servant based upon estoppel arises when a third person relies in good faith on words or conduct of the principal indicating authority in the agent to do such act. *Holmes v. Tyner* (Civ. App.) 179 S. W. 887.

Where the owner of land directed his agent to exchange it to go to a third person to point out the boundaries, which was done, though the owner did not authorize such third person to act for him, the third person's act in pointing out the boundaries was a binding representation by the agent and the owner. *Lofland v. Greenwood* (Civ. App.) 181 S. W. 517.

Where the owner of land sent one wishing to exchange his own lands for it to a third person for information as to the boundaries, the third person pointed them out, and the party dealing with the owner acted on such information, the owner is liable for damages occasioned by any false indication of the boundaries. *Id.*

A vendor held to make a surveyor his agent, and so bound by his representation, by referring the purchaser to him for statement as to the acreage. *Taylor v. Hill* (Civ. App.) 183 S. W. 836.

26. — **Real property.**—Where joint owners deal with common property so as to create inference of an agreement for division, a purchaser from one will be given the benefit of the inference. *Broom v. Pearson* (Civ. App.) 180 S. W. 895.

Occupant of lands sold for taxes, by agreement with county attorney, held estopped from asserting any title by limitation against one claiming under the purchaser at the sale. *Woods v. Moore* (Civ. App.) 185 S. W. 623.

27. — **Personal property.**—Holder of bills of lading for cotton by intrusting them to another for a particular purpose held not to have estopped itself to deny his right to sell the cotton. *B. W. McMahan & Co. v. State Nat. Bank of Shawnee* (Civ. App.) 160 S. W. 403.

Where a principal, with knowledge, actual or constructive, of a rule of the Cotton Exchange, consigns cotton to a factor to sell, he is estopped to deny the binding effect of such rule. *Wm. D. Cleveland & Sons v. Jamison* (Civ. App.) 182 S. W. 1175.

The owner of a note, who allowed it to be taken in the name of a third person and permitted such third person to exercise dominion, is estopped from setting up his rights as against one who in good faith without notice took the note after maturity. *Western Nat. Bank of Hereford v. Laughlin* (Civ. App.) 184 S. W. 1101.

Part owner of claim, who assigned with other owners for collection, the assignee transferring to a bank, which sued the debtor and the assignee, held not estopped to claim his portion of the proceeds because he did not protest or ask to be made a party to the bank's suit. *West Texas Bank & Trust Co. v. Rice* (Civ. App.) 185 S. W. 1047.

28. — **Relying and acting on apparent title or authority.**—Under rule that, when one of two innocent parties must suffer, he who placed wrongdoer in a position to defraud must suffer, a wife, who allowed her husband to take title to land in his own name, thus enabling him to dispose of it to bona fide purchasers without knowledge of her equity, must suffer. *Hines v. Meador* (Civ. App.) 193 S. W. 1111.

29. **Dealing with person asserting title or exercising authority.**—Agreement of vendors with defaulting purchasers that they would act as agents of the purchasers in selling to other parties held a waiver of vendors' right to rescind and to retain liquidated damages previously paid. *O'Neal v. Bush & Tillar* (Sup.) 173 S. W. 869, reversing judgment (Civ. App.) *Bush & Tillar v. O'Neal*, 140 S. W. 242. Judgment reversed on rehearing *O'Neal v. Bush & Tillar* (Sup.) 177 S. W. 953.

30. **Contracts.**—Where a pledgor elects to assert that the relation still exists notwithstanding a sale of the property, the pledgee is estopped to say that it has ceased and that he is the owner of the property. *King v. Boerne State Bank* (Civ. App.) 159 S. W. 433.

In an action for damages for defendant's breach of its contract to sink an oil well, defendant could not be heard to say that plaintiff would have derived no benefit from a completion of its contract. *Henry Oil Co. v. Head* (Civ. App.) 163 S. W. 311.

That the payee of notes, secured by trust deed providing that all should become due if any remained unpaid for ten days after maturity, promised to notify a party in another county, who had assumed the notes, when any should become due, did not estop him from maintaining an action after default. *Ward v. San Antonio Life Ins. Co.* (Civ. App.) 164 S. W. 1043.

Where claimants, in order to transfer a note secured by a deed of trust, were required to guarantee payment, and thereafter were released to the extent of \$1,200, and were compelled to pay the balance of the debt, they were estopped to claim, as against the assignee, that their claim for the amount so paid was secured by a first lien on the security. *Slaughter v. Boyce* (Civ. App.) 170 S. W. 259.

Agreement whereby widow, children, and legatee of testator agreed to withhold the will from probate and to take certain shares therein held not to estop the parties from claiming under the will after its probate by purchasers from the estate. *Masterson v. Harris* (Civ. App.) 179 S. W. 284, conforming to answers to certified questions (Sup.) 174 S. W. 570.

Agreement by holder of note for extension of time for payment of installment of interest held to estop him and his assignee from declaring the entire note due, under its provisions, for failure to pay the installment when due. *Cofer v. Beverly* (Civ. App.) 184 S. W. 608.

31. — **Recognition of rights.**—A subscriber to a list for a fund in aid of railway construction will not be permitted to deny a contract authorizing trustees to contract with the railway company, where the subscription list recites that such contract was attached. *Quanah, A. & P. Ry. Co. v. Dickey* (Civ. App.) 179 S. W. 69.

32. — **Contracts relating to real estate.**—A mere contract of sale does not estop the purchaser to deny the vendor's title, but a purchaser obtaining possession on the faith of the contract may not deny the vendor's title. *Groves v. Whittenberg* (Civ. App.) 165 S. W. 889.

Where, in action involving title to land, one of the heirs of the deceased defendant, with authority from the others, entered into a written agreement settling the controversy, which was acquiesced in by all of the heirs, held, that they were estopped thereby, whether or not the agreed judgment settling the suit was valid. *Castleberry v. Bussey* (Civ. App.) 166 S. W. 14.

Where plaintiff and defendant, two claimants for a tract of land, entered into a compromise agreement, whereby they agreed to sell the disputed tract and divide the proceeds, plaintiff could recover under the agreement, though it was afterwards determined that the tract belonged to defendant. *Baker v. Heney* (Civ. App.) 166 S. W. 19.

Defendant, employing plaintiffs to sell land with provision for division of purchase money notes, held precluded from denying that time for settlement had arrived, though notes were to be held by third party as collateral security. *Plummer v. Simms* (Civ. App.) 177 S. W. 1037.

Plaintiff claiming title to school lands by purchase and settlement held not estopped to claim against defendant, to whom patent had issued, by his knowledge of and participation in fraudulent agreement in violation of law by which defendant was to acquire the land. *Perry v. Martin* (Civ. App.) 180 S. W. 1148.

33. — **Relying or acting on contract.**—Where a bank took two renewal notes for the debt evidenced by a single note, its attempt to enforce one of the renewal notes held not to estop it from asserting its right to collect the balance of the debt under the old note. *Rushing v. Citizens' Nat. Bank of Plainview* (Civ. App.) 162 S. W. 460.

A bank's use of a renewal note held not to estop it from relying on the original note, which was retained. *Id.*

36. **Representations.**—A bank held estopped to deny plaintiff's right to a note payable to one whose debt to the bank plaintiff had paid. *Citizens' State Bank v. McShan* (Civ. App.) 172 S. W. 565.

37. — **Ownership of property.**—The heirs of an administrator, who sold a donation certificate issued to the heirs of his intestate on representations that it belonged to the estate, were estopped from claiming any interest therein. *Moody v. Bonham* (Civ. App.) 178 S. W. 1020; *Moody v. Bonham* (Civ. App.) 179 S. W. 670.

42. **Admissions and receipts.**—Receipt, signed by some of purchasers of land to vendors for commissions for selling land, does not estop purchasers to deny that vendor's title was imperfect. *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

43. **Assent to or ratification of acts of others in general.**—Purchaser of conditional certificate in administration of grantee's estate held, by acquiescence in patent to assignee of certificate on land in A. county, precluded from asserting against the state or assignee's successors any prior valid right to land which he had relocated in P. county. *Baugh v. McLain* (Civ. App.) 173 S. W. 922.

A foreign insurance company cannot assail the constitutionality of art. 4876, since by the terms thereof it is deemed to have consented to its provisions. *Reliance Ins. Co. of Philadelphia v. Dalton* (Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 668.

Presence of mortgage creditors at a creditors' meeting at which a receivership to continue the business was decided on, held not to estop them to assert the priority of their liens over the receiver's operating expenses. *Craver v. Greer* (Sup.) 179 S. W. 862, answering certified questions (Civ. App.) 178 S. W. 699, and conformed to in (Civ. App.) 182 S. W. 368.

Bank which was instrumental in procuring the appointment of a receiver to continue the business of a lumber concern held not entitled to object to the postponement of its mortgage to the receiver's operating expenses. *Id.*

Where a broker employed to sell lands in Arizona carried on a selling campaign in person for over a year and then turned the matter over to subagents, the broker is not estopped to claim compensation; the owner after objections acquiescing. *Denton v. Holbert* (Civ. App.) 184 S. W. 251.

Where defendant, who was disposing of a large tract of land located in Texas, admitted that he made no objections to plaintiff broker's handling other Texas lands, the broker's right to compensation for sales made cannot be defeated on that ground. *Id.*

In an action by a broker for commissions for sales effected through subagents, evidence held to show that the sales were not made by defendant directly through the subagents, but that he recognized such agents as being agents for the broker. *Id.*

In a suit for compensation for sales of land, evidence held not to show that defendant discharged the broker or his subagent, but that defendant recognized the continuing agency of such persons. *Id.*

While as a general rule ratification partakes of the elements of estoppel, where that is not the case, something must have been done which, if ratified, would create liability. *St. Louis Southwestern Ry. Co. of Texas v. Ragsdale, Price & Co.* (Civ. App.) 185 S. W. 654.

A railroad is not estopped to maintain a fence along its right of way near a station cutting off access to plaintiff's business by the fact that it permitted him to give access to the railroad right of way, since permissive use across uninclosed land does not ripen into a right, however long existing. *Craig v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 185 S. W. 944.

44. — **Contracts.**—Where a building contract provided that the work should be done to the satisfaction of an architect and that no payment under the contract should be conclusive of full performance, and that weekly payments should be made on estimates, and they agreed that a third person should make estimates without authority to superintend, the owner making weekly payments on estimates was not estopped as against the surety of the contractor from recovering expenses in overhauling and rebuilding defective work. *Welsh v. Warren* (Civ. App.) 159 S. W. 106.

Where the amount payable under a contract to subscribe to the sinking of a test oil well was payable at the beginning of operations and defendant did not make any objection to the delay in beginning the well until it had been sunk a considerable distance, he waived any delay in beginning to drill. *Herron-Robbins v. Allen* (Civ. App.) 159 S. W. 1046.

Where defendant carrier had notice of plaintiff's claim for damages to cattle, and, through its agent, conferred with plaintiff with reference thereto, a provision in the shipping contract for a written notice within 91 days was waived. *St. Louis, S. F. & T. Ry. Co. v. Wall* (Civ. App.) 165 S. W. 527.

One who authorized another to make contracts as agent for the sale of corporate stock cannot deny the agent's authority to make the particular contract entered into, where it ratified the form of the contract, and sought to recover on it in a cross-action, when sued for payments made under it. *Amicable Life Ins. Co. v. Kenner* (Civ. App.) 166 S. W. 462.

Where a seller recognized a verbal contract by its agent for the sale of fuel oil, and shipped a part of the oil pursuant thereto, it was bound by the contract, whether the agent had authority to make the contract or not. *Texas Co. v. Alamo Cement Co.* (Civ. App.) 168 S. W. 62.

There was no ratification by E. of the unauthorized act of S. in signing for both of them a contract with T., where, as soon as he knew what the contract was, though not as soon as he knew one had been signed, he repudiated it, and informed T. thereof. *Texas Produce Exchange v. Sorrell* (Civ. App.) 168 S. W. 74.

Where an agent of a corporation secured plaintiff's subscription to the corporation's stock by fraudulent representations, and the corporation, with knowledge of the fraud, retained plaintiff's money and notes, it became an active participant in the fraud, and, on being cast in a suit to rescind, could not recover over against the agent. *Commonwealth Bonding & Casualty Ins. Co. v. Bomar* (Civ. App.) 169 S. W. 1060.

Though the engineer permitted some of the gravel delivered for government work, to be used by addition of cement, held that the buyers were not estopped from denying that the gravel tendered by the seller was not up to specifications. *Ball-Carden Co. v. Ridgell* (Civ. App.) 171 S. W. 509.

Under a contract for gravel according to the specifications of a government contract, held that the government engineer could not permit the furnishing of gravel not up to specifications and require the contractor to use additional cement so as to compel the buyers to accept gravel not up to specifications. *Id.*

The act of a subagent in furnishing automobiles to another dealer outside of his agent's territory, if a violation of his sales agency contract, entitling the principal to stipulated damages, was waived by the principal's failure to immediately terminate the contract and by its conduct in permitting the subagent to represent it. *Doering v. Denison* (Civ. App.) 178 S. W. 1018.

Where plaintiff relied on a contract whereby he was to exchange a certificate of stock for a set of tools, and it appeared that he offered to deliver the stock, but was told by defendant's agent to wait until demand was made, plaintiff was entitled to recover, though there had been no delivery. *West Texas Supply Co. v. Duniyan* (Civ. App.) 182 S. W. 425.

There can be no ratification of an unauthorized contract by a principal binding him, unless the ratified contract was made by one purporting to act as agent at the time. *Eardley Bros. v. Burt* (Civ. App.) 182 S. W. 721.

Where a party, who had contracted to exchange realty, believing time had expired in which other party could require him to accept an abstract, nevertheless accepted it, submitting it to attorney for examination, he waived time limit for furnishing it. *Gaut v. Dunlap* (Civ. App.) 188 S. W. 1020.

45. — **Accounts or settlements.**—That defendant executed the note sued on to plaintiff for money advanced to pay for drilling a well for plaintiff, without mentioning his claim for damages for delay caused by plaintiff's refusal to point out where the well was to be drilled, would not estop defendant from claiming such damages especially where they were not considered in the settlement made between the parties. *Ross v. Jackson* (Civ. App.) 165 S. W. 513.

48. **Acceptance of benefits.**—Surviving parents of a deceased who are entitled to a right of action for his wrongful death cannot complain that, under art. 4699, which is part of the act providing for actions for wrongful death, the widow has brought an action for the benefit of all, on the ground that it would deprive them of their rights without due process, for they take the right subject to the remedy. *Galveston, H. & S. A. Ry. Co. v. Pennington* (Civ. App.) 166 S. W. 464.

A city incorporated more than a year after art. 1080 et seq., became effective, could not complain because it was denied right to contest claims against the dissolved city. *Young v. City of Colorado* (Civ. App.) 174 S. W. 986.

A city availing itself of the statute allowing the dissolution of the former city, by reincorporating the same territory, may not invoke the Constitution as against the statutes. *Id.*

A city which has been organized under a statute, and which has proceeded to do business and has received benefits under it, cannot assert its invalidity. *Id.*

Principal held not entitled to retain advantage secured by agent's fraud and accept benefits without adopting the means employed by him, though unknown to the principal. *Lockney State Bank v. Damron* (Civ. App.) 179 S. W. 552.

Owner of land, suing broker to recover difference between price at which broker sold and for which he accounted, who had no notice of broker's fraud, held not estopped to sue broker by accepting from him money for an excess acreage, etc. *Barton v. McGuire* (Civ. App.) 189 S. W. 317.

49. — **Contracts.**—The purchaser of an automobile, by keeping and using it after he knew that its defects could or would not be cured by the seller, waived his right to rescind the contract because of such defects, leaving as his only remedy an action for damages. *Houston Motor Car Co. v. Brashear* (Civ. App.) 158 S. W. 233.

Where plaintiffs accepted a lease negotiated for them by B., who obtained defendants' signatures by falsely representing that the lease contained a prohibition defeasance clause, the court properly charged that B. was plaintiffs' agent, and that they could not ratify the lease so far as it was to their advantage, and repudiate B.'s authority to make the defeasance agreement. *Taber v. Eyer* (Civ. App.) 162 S. W. 490.

A buyer of cotton seed hulls for fattening cattle for market, who accepted those furnished with knowledge that they were damaged, inferior in quality, and unsuitable for his purpose, could not recover for damage to his cattle from feeding such hulls. *Major v. Hefley-Coleman Co.* (Civ. App.) 164 S. W. 445.

Where a buyer under a trial guaranty does not, within a reasonable time, manifest his dissatisfaction, that fact is strong evidence of satisfaction, and where, after the expiration of a reasonable time, he retains the machinery, he is estopped from setting up damages for breach of warranty. *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Civ. App.) 167 S. W. 256.

The buyer of a traction engine, who discovered in January, 1912, that it would not produce the warranted power, and who kept and used it until July, held to thereby waive his right to rescind for breach of the guaranty. *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Civ. App.) 169 S. W. 1143.

Where a purchaser has partly performed his contract, the vendor must give him reasonable notice of his intent to rescind for nonperformance. *Moore v. First State Bank of Teague* (Civ. App.) 173 S. W. 231.

Retention of liquidated damages by vendors of real property on breach of the contract by purchasers held to preclude them from rescinding the contract for such breach. *O'Neal v. Bush & Tillar* (Sup.) 173 S. W. 869, reversing judgment *Bush & Tillar v. O'Neal* (Civ. App.) 140 S. W. 242. Judgment reversed on rehearing *O'Neal v. Bush & Tillar*, 177 S. W. 953.

One extending credit to an agent in ignorance that he is acting as such may, on discovery of undisclosed principal, hold such principal, especially where he has accepted benefits under contract. *Dallam County v. S. H. Supply Co.* (Civ. App.) 176 S. W. 798.

Failure of buyers of cement mixer to reject for breach of warranty of capacity within the ten-day period stipulated in the chattel mortgage securing the price held to waive their right to reject later for such reason. *Braden-Zander Const. Co. v. Seng* (Civ. App.) 179 S. W. 1103.

Persons, accepting the benefit of an agreement giving purchasers of preferred stock of a corporation right to demand redemption of same in land, held estopped to claim that the agreement was unauthorized, where they accepted the benefits with full knowledge of its terms. *Rowan v. Texas Orchard Development Co.* (Civ. App.) 181 S. W. 871.

The owner of cattle, whose brother rented grazing lands therefor, and who reaped all the benefits of the contract, ratifying it by repaying the brother the sum paid on the contract, was liable for the rent. *Warburton v. Wilkinson* (Civ. App.) 182 S. W. 711.

A principal whose agent secured credit for him when he was authorized only to draw upon the principal could not complain or avoid liability for the credit extended, although the agent actually exceeded the authority given. *Daggett v. Avis Hardware Co.* (Civ. App.) 183 S. W. 20.

Where a motor truck was sold under a warranty of materials and workmanship for one year, the buyers' failure to repudiate the contract as soon as it discovered that the truck was useless will not bar recovery, where the contract was repudiated within a year. *Avery Co. of Texas v. Staples Mercantile Co.* (Civ. App.) 183 S. W. 43.

Buyer of auto truck, even if seller fraudulently represented its capacity, after using for six or seven months and negligently and recklessly injuring it, had no right to rescind. *Alamo Auto Sales Co. v. Herms* (Civ. App.) 184 S. W. 740.

Where the payee of a note for the price of property transferred the note to plaintiffs as collateral, and after the payee's bankruptcy maker and payee deeded and gave possession of the property to plaintiffs in consideration of cancellation of note, although plaintiffs subsequently purchased property and note from payee's trustee in bankruptcy, they were estopped to deny agreement by which the maker was released from liability. *H. C. Denny & Co. v. Lee* (Civ. App.) 188 S. W. 294.

Buyer of gasoline engine, who, when sued for part of price, filed cross-bill seeking to recover amount he was induced to part with by fraud of plaintiff, held entitled to recover, though cross-bill alleged that after he discovered defects of engine he retained it. *Bruns Kimball & Co. v. Amundsen* (Civ. App.) 188 S. W. 729.

That principal received benefit of transaction is not alone sufficient to make him liable for agent's undertaking in own name. *Borschow v. Wilson* (Civ. App.) 190 S. W. 202.

Where two defendants in suit for rescission by buyer of realty participated with another defendant in acquisition of plaintiff's property, they could not retain fruits of other defendant's fraud, if any, on ground that individually they made no representations. *Barbian v. Grant* (Civ. App.) 190 S. W. 789.

A buyer's acceptance of part of the calves enumerated in a sales contract does not estop him from suing for nondelivery of the remainder. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

A buyer's acceptance of goods without protest constitutes an estoppel or waiver as to defects then known. *Id.*

Where buyer retained a tractor nearly three years after knowing it was unsatisfactory, and that seller would make no further repairs, he cannot rescind. *Bancroft v. Emerson-Brantingham Implement Co.* (Civ. App.) 194 S. W. 991.

50. — **Sale and conveyance or mortgage of property.**—A principal who ratifies the actions of his agent, making false representations inducing a purchase of property, by taking the proceeds of the sale, except the commissions payable to the agent, is estopped



from denying the agent's authority to make the representations. *Foix v. Moeller* (Civ. App.) 159 S. W. 1048.

In the absence of positive fraud, a married woman is not estopped from denying the validity of her conveyance of an easement in her separate property, on the ground that she did not acknowledge the conveyance, by having received money or other benefit under the transaction. *King v. Driver* (Civ. App.) 160 S. W. 415.

Plaintiff, who exchanged lands with defendants, held not entitled to rescind the contract where, after discovering the fraud on him, he mortgaged the land he received in the exchange. *Trauzettel v. Kjellman* (Civ. App.) 163 S. W. 689.

In a suit for the rescission of an exchange of land, evidence held to show that plaintiff mortgaged the property which he received by the exchange, before he knew that the land which he parted with had been conveyed to a bona fide purchaser. *Id.*

Heirs who received the full benefit of the proceeds of a sale of property by an administrator are estopped to deny the validity of the sale. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

Where the owner of a note directed its delivery to her brother-in-law, who transferred it without authority, the fact that she received a portion of the proceeds, not knowing the money was from such source, did not estop her to deny the brother's authority. *Sloan v. Gilmore* (Civ. App.) 167 S. W. 1089.

That purchaser of horse, after discovering the fraud in its sale, attempted to sell or trade it, and attempted to use it, held not to destroy his right of rescission. *Hubbs v. Marshall* (Civ. App.) 175 S. W. 716.

**51. Permitting Improvement or expenditures—Erection of buildings.**—Oral agreement by father's grantees of land with daughter to whom he had previously made an advance-ment to waive conflicting claims and divide the land equally, on faith of which the daughter paid her share of the cost of defending a suit did not give her title to her aliquot share by estoppel. *Lindley v. Lindley* (Civ. App.) 178 S. W. 782.

**52. — Construction of railroad.**—An abutting owner held estopped to claim damages for the construction of a railroad past his property by subscribing to a fund to induce such construction and for relinquishment of damages therefor. *Quanah, A. & P. Ry. Co. v. Dickey* (Civ. App.) 179 S. W. 69.

**53. — Improvements and expenditures by purchasers of land.**—In an action in the nature of an action of trespass to try title, held, that defendant, by allowing plaintiff's intestate to remain on the land and improve it under a claim of right after the time fixed by their agreement, waived such time limit. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

**54. — Knowledge of facts.**—In an action on a claimant's bond to recover title and possession of an automobile, held, that judgment for plaintiff for the automobile will be charged with the value of beneficial repairs made with plaintiff's knowledge and before he asserted his claim. *Van Velzer v. Stryker* (Civ. App.) 188 S. W. 723.

**55. Permitting sale or mortgage of property.**—Any right of one having a contract for purchase of land to recover the earnest money paid by him thereon, because of the vendor's selling the contract to others, was waived; he knowing of and acquiescing in it. *Joyce v. Hagelstein* (Civ. App.) 163 S. W. 356.

The fact that one who had received a sheriff's deed to 200 acres of land subsequently took an acknowledgment of a conveyance of another tract by the owner, and read the description in such subsequent conveyance and knew of the conflict between that and the land conveyed by the sheriff's deed, would not estop him from asserting title under his own deed as against the subsequent conveyance. *Masterson Irr. Co. v. Foote* (Civ. App.) 163 S. W. 642.

In an action to recover payments on a contract to buy land on account of flaw in the title thereto, that plaintiff has permitted a foreclosure and sale upon the lien which constituted the flaw constitutes no defense. *Fordtran v. Cunningham* (Civ. App.) 177 S. W. 212.

In trespass to try title by cotenants against grantee under sale by their cotenant, evidence held insufficient to show plaintiffs' acquiescence in sale and estoppel. *Broom v. Pearson* (Civ. App.) 180 S. W. 895.

**56. — Public or Judicial sale.**—A purchaser of a house at execution sale, whose deed was unrecorded, held estopped to claim the fixtures against a mortgagee thereof, who bought them at foreclosure sale, and removed them, having been attorney for the former owner in the foreclosure suit, and given no notice of his purchase. *Wright Bros. v. Leonard* (Civ. App.) 183 S. W. 780.

**57. Silence.**—Plaintiff waived right to recover, for defect in the title, the earnest money paid on a contract for purchase of land; he, with knowledge of the title, claiming his option, and endeavoring to sell it, and not objecting to the title when refusing to consummate the contract. *Joyce v. Hagelstein* (Civ. App.) 163 S. W. 356.

Where a purchaser, with knowledge that a well, guaranteed by the vendor to supply the necessary water for irrigation, flowed so poorly that irrigation on all but a small part of the land had to be abandoned, made improvements on the premises and partial payments of the price and interest without objections, he could not compel a rescission. *Luckenbach v. Thomas* (Civ. App.) 166 S. W. 99.

Purchaser of land remaining on it after discovery of false representations as to area and capacity of well thereon, making improvements, paying interest, and trying to sell it, held, as matter of law, to have waived right to rescind. *Winters v. Coward* (Civ. App.) 174 S. W. 940.

Assured's acquiescence in an insurance agent's mistaken statement that contemplated foreclosure proceedings voided the policy does not estop him from denying that the policy was canceled by mutual consent, where there is no proof that his silence misled the insurer. *Glens Falls Ins. Co. v. Walker* (Civ. App.) 187 S. W. 1036.

Unless a party is bound to speak, his silence cannot work an estoppel. *Texas Life Ins. Co. v. Huntsman* (Civ. App.) 193 S. W. 455.

Where defendant, who rented a farm from plaintiff, which she represented was free from Johnson grass, discovered that it was sodded with Johnson grass, either at entering into possession or before execution of the lease and mortgage to secure rent, he waived right to damages. *Klyce v. Gundlach* (Civ. App.) 193 S. W. 1092.

**58. Negligence.**—Insured, induced to sign an application by agent's false representations, that it provides for the policy agreed upon, when, in fact, it provides for a materially different policy, is not estopped from setting up such false representations, unless inexcusably negligent in not informing himself. *Federal Life Ins. Co. v. Hoskins* (Civ. App.) 185 S. W. 607.

Where negligence is relied upon as ground of estoppel, it must not only influence the action of some one to his injury, but must reasonably have been expected that it would have such effect, though he exercised ordinary care. *Commonwealth Bonding & Casualty Ins. Co. v. Meeks* (Civ. App.) 187 S. W. 681.

Where a sales contract was dictated principally by defendant after several days' negotiations, plaintiffs' negligence in failing to discover a mutual mistake would not estop them from later seeking relief. *Littlefield v. Clayton Bros.* (Civ. App.) 194 S. W. 194.

### III. Persons Affected

**60. Persons estopped.**—Plaintiff, not having joined or acquiesced in the request of other citizens that defendant build a dam to impound water which it had diverted, is not estopped, because thereof, to claim damages to his land from the escape of water therefrom. *Texas & P. Ry. Co. v. Frazer* (Civ. App.) 182 S. W. 1161.

**61. — Purchasers from person creating estoppel.**—Sale of note, given to secure advancement of price of land, by the assignee of the original payee, with the understanding that the suit instituted by the assignee should be dismissed, and its dismissal, did not annul the assignee's election to declare the note due for nonpayment of interest, or estop the buyer from such election. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

Statement of former secretary of investment company to county attorney prior to his institution of tax sale proceeding against certain lots as the property of unknown owners, held not to estop subsequent purchaser from the company from claiming that the title thereto was in the company. *Hume v. Carpenter* (Civ. App.) 188 S. W. 707.

**62. — Heirs of person creating estoppel.**—The heirs of an administrator held estopped from claiming any interest in a donation certificate sold by him to his attorney on representations that it belonged to the estate. *Moody v. Bonham* (Civ. App.) 178 S. W. 1020; *Moody v. Bonham* (Civ. App.) 179 S. W. 670.

### IV. Matters Precluded

**64. Rights and liabilities under contracts.**—Though in negotiations nothing was said of rules of an association, the parties receiving and retaining the broker's memorandum of sale, stating contract was made subject thereto, they are bound thereby, there being no fraud or misrepresentation. *People's Ice & Mfg. Co. v. Interstate Cotton Oil Refining Co.* (Civ. App.) 182 S. W. 1163.

Act of party, who had contracted to exchange realty, in accepting abstract believing that time had expired in which other party could require him to accept, though waiver of time limit for furnishing abstract, was not waiver of requirement that it show clear title. *Gaut v. Dunlap* (Civ. App.) 188 S. W. 1020.

**65. Remedies.**—While retention and use of a horse, after discovery of the fraud by which the sale was induced, precludes a rescission, it does not prevent a recovery of damages resulting therefrom. *Hubbs v. Marshall* (Civ. App.) 175 S. W. 716.

#### Art. 3688. [2300] [2246] Color or interest does not disqualify.

In general.—On the issue of abandonment of homestead by moving to another place, the owner may testify as to his intention to return. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

#### Art. 3689. [2301] [2247] Husband or wife not disqualified, except, etc.

**Confidential communications.**—In an action by the wife on a policy on her husband's life, her statement as to what the husband said when he delivered to her the policy, as to the time when the premium would be due, is not objectionable as a confidential communication. *Illinois Bankers' Life Ass'n v. Dodson* (Civ. App.) 189 S. W. 992.

#### Art. 3690. [2302] [2248] In actions by or against executors, etc., certain testimony not allowed.

Cited, *Nowlin v. Clary* (Civ. App.) 178 S. W. 571; *Bright v. Briscoe* (Civ. App.) 193 S. W. 156.

**3. Actions in which testimony is excluded—Representative capacity or title or interest of party.**—Where the daughters of deceased tenant in common did not claim the land as her heirs, other tenants in common may testify to conversations concerning the repudiation of their interest by deceased. *Williams v. Randall* (Civ. App.) 158 S. W. 253.

In an action on a benefit certificate issued to plaintiff's husband, in which she was named as beneficiary, so that upon his death in good standing she became at once entitled to the moneys due, she was a competent witness to testify as to conversations with

him referring to payment of his dues. *Grand Lodge, F. & A. M. of Texas v. Dillard* (Civ. App.) 162 S. W. 1173.

Where a defendant under whom plaintiff claimed, had not herself claimed the land in controversy as heir of her brother, she was not precluded to testify that after the death of her mother she and her brother agreed on the partition in which she acquired the land. *Smith v. Huff* (Civ. App.) 164 S. W. 429.

In an action against a widow, in her individual capacity for the purchase price of coal furnished after the death of defendant's husband, and used in running the machinery of the hotel to which defendant succeeded upon his death, testimony by one who claimed to be defendant's agent, instead of an independent contractor, engaged to operate the hotel machinery at a fixed sum, as to conversations with defendant's husband, held not inadmissible. *Kohlberg v. Awbrey & Semple* (Civ. App.) 167 S. W. 828.

Suit for partition against plaintiff's brother and sister, as heirs of their deceased father, held a suit by or against heirs of a deceased as such, within this article, so that defendants' testimony as to statements made by and transactions had with decedent, tending to establish their interest, was inadmissible. *Peil v. Warren* (Civ. App.) 187 S. W. 1052.

**4. — Possibility of judgment for or against party in particular capacity or right.**—In contested proceeding for appointment of administrator, alleged common-law wife of deceased could testify what deceased said in publishing their marriage; the proceeding not being one by or against an executor or administrator wherein he could personally be made liable. *Walton v. Walton* (Civ. App.) 191 S. W. 188.

**5. — Probate or contest of will.**—Under this article it was improper in a will contest to permit contestant to testify that he loaned testator money which he always agreed to repay. *Ross v. Kell* (Civ. App.) 159 S. W. 119. See *Kell v. Ross* (Civ. App.) 175 S. W. 752.

This article applies in a proceeding to probate a will as well as in a proceeding to set aside a probate. *Clark v. Briley* (Civ. App.) 193 S. W. 419.

**8. Parties whose testimony is excluded.**—In suit to partition land which married woman claimed by gift from decedent, her husband being a necessary party held an incompetent witness on account of interest, notwithstanding Acts 33d Leg. c. 32 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624), giving married women control over the rents from their separate real estate. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

**10. — Legatee, devisee, heir or distributee.**—Under this article beneficiary under the will of the guarantor of the indebtedness, in suit by the creditor against himself and the guarantor's executrix, was not a competent witness when introduced by the executrix. *Neblett v. Cooper Grocery Co.* (Civ. App.) 180 S. W. 1162.

In suit for partition against plaintiff's brother and sister as surviving heirs of their deceased father, defendants held opposite parties, incompetent to testify to transactions with and statements by the deceased unless called thereto by plaintiff. *Peil v. Warren* (Civ. App.) 187 S. W. 1052.

**11. — Surviving spouse.**—In suit against surviving widow and heirs of party to contract for purchase of land, it was not error to exclude testimony of widow under this article. *Tharp v. Striker* (Civ. App.) 194 S. W. 1014.

**13. — Disclaimer or other discharge of interest.**—One of the makers of a note held a party to a suit by the heirs of the payee, though he confessed judgment; and hence he was incompetent to testify in behalf of his codefendants. *Pipkin v. Tuer* (Civ. App.) 177 S. W. 983.

Testimony of deceased's daughter, in partition suit in which she was a defendant, originally inadmissible is rendered admissible where she disclaims interest in the property although still entitled to recover costs. *Richards v. Hartley* (Civ. App.) 194 S. W. 478.

**14. Interest in subject-matter as disqualifying witness.**—This article does not disqualify an interested person, not a party to a suit between heirs, from testifying to a transaction with the ancestor. *Dicksen v. Cruse* (Civ. App.) 176 S. W. 655.

Under this article in attorney's action against administrator to cancel notes held by decedent, interest that witness and her husband had in maintaining attorney's claim did not disqualify her from testifying, but went merely to her credibility; statute applying only to parties. *Bright v. Briscoe* (Civ. App.) 193 S. W. 156.

One who has an interest in the controversy and who will be bound by the judgment is a party to the suit within this article. *Clark v. Briley* (Civ. App.) 193 S. W. 419.

Where testator made two children his executors and one of them offered the will for probate and asked letters testamentary, but the other did not join and the probate was contested, the executor named who did not join was nevertheless a party. *Id.*

**20. — Termination or extinguishment of interest.**—Assignor of a claim, who, if suing would be incompetent to testify to a transaction with defendant's testate, is incompetent to testify thereto for his assignee. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

**21. Parties as against whom testimony is excluded.**—In a lessee's action for an injunction, declarations against the deceased lessor's interest held not objectionable as declarations of a decedent, where neither his heirs nor executors nor any of the witnesses were parties to the suit. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

An action by surviving widow and sole heir is within this article and defendants cannot testify as to payments to deceased, though the widow be entitled to one-half the property sued for as survivor. *Spencer v. Schell* (Sup.) 173 S. W. 867, affirming judgment (Civ. App.) 142 S. W. 111.

That a transaction with deceased was had in his representative capacity for a corporation does not affect the rule as to admission of testimony regarding it, since it is nevertheless a transaction with one deceased, which is always inadmissible. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

Plaintiff may, in action to obstruct a way, testify to conversation with his deceased grantor, though defendant derived his title through warranty deed from same grantor, since grantor's administratrix is not a party to such action. *Miles v. Bodenheim* (Civ. App.) 184 S. W. 633.

In suit against corporations to remove cloud on title by one claiming under parol gift from a decedent, testimony of plaintiff as to transactions with and statements by such decedent, showing the gift, held admissible. *First State Bank & Trust Co. of Abilene v. Walker* (Civ. App.) 187 S. W. 724.

As to community property, the title to which is cast on survivor by Rev. St. 1911, art. 2469, the surviving widow is not an "heir" and hence in an action against the widow to declare a trust in favor of plaintiffs as against an absolute deed to the deceased husband, both parties may testify. *Briggs v. McBride* (Civ. App.) 190 S. W. 1123.

Defendant in suit to enjoin obstruction of alley could not render inadmissible testimony otherwise admissible by joining as party administratrix of one who had conveyed land to him by warranty deed. *Miles v. Bodenheim* (Civ. App.) 193 S. W. 693.

**23. — Party as to whom person deceased acted in representative or fiduciary relation.**—The statutory rule touching testimony of conversations with persons since deceased does not apply where the person deceased was superintendent of a corporation. *Texas & Pac. Ry. Co. v. Elliott* (Civ. App.) 189 S. W. 737.

**25. Subject-matter of testimony.**—What constitutes transaction in general.—In a suit to partition land of a decedent, the testimony of a defendant that she claimed the land in controversy by gift from the decedent was properly excluded. *Tannehill v. Tannehill* (Civ. App.) 171 S. W. 1050.

A denial by an interested party that he had a certain transaction with deceased is evidence of a transaction, and inadmissible. *Lester v. Hutson* (Civ. App.) 184 S. W. 268.

**26. — Occupancy of land and delivery of property.**—In an action to recover an interest in land, where plaintiff relied on the possession of her intestate, testimony of defendant, that before he purchased the land in question intestate was in possession, and that since then he had been in possession, held not objectionable as a transaction between defendant and deceased. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

**27. — Contracts.**—In an action to recover an interest in land, testimony of defendant that there was no agreement for its sale and the application of the proceeds to the obligation of plaintiff's intestate, as asserted, held based on a transaction with decedent and inadmissible. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

Under this article plaintiff claiming as heir, defendant may not testify to a purchase from deceased. *Yates v. Craddock* (Civ. App.) 184 S. W. 276.

**28. — Services and value thereof.**—In an action against estate of decedent on an alleged implied contract for personal services, plaintiff may testify as to what he did in service of decedent when latter was not present or a party to transaction. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

**30. — Payment or transmission of money.**—Under this article, plaintiff seeking to charge the estate of a decedent with a constructive trust cannot testify that decedent received the proceeds of the sale of plaintiff's farm, and that none of them were paid over to plaintiff. *Swan v. Price* (Civ. App.) 162 S. W. 994.

In an action where it was sought to charge the estate of a deceased person with a constructive trust, plaintiff cannot, under this article, testify that decedent never paid over to her certain moneys which he collected as her agent. *Id.*

Under this article, in attorney's suit against administrator to cancel notes agreed to be canceled by decedent, attorney's testimony that he had never been paid for his services by decedent held inadmissible. *Bright v. Briscoe* (Civ. App.) 193 S. W. 156.

**31. — Physical condition and mental capacity.**—The statutory rule excluding evidence as to statements by, or transactions with, a deceased person did not prevent evidence of the statements of a deceased person for the purpose of showing his mental condition in an action in which his competency to contract was involved. *Smith v. Guerre* (Civ. App.) 159 S. W. 417.

**32. — Transactions between persons other than witnesses and persons subsequently deceased or incompetent.**—Defendant cannot testify to an agreement made between his deceased grandfather, his predecessor in title, and plaintiff's deceased predecessor in title fixing an agreed boundary line. *Cosgrove v. Smith* (Civ. App.) 183 S. W. 109.

**34. — Admissions or other statements by person subsequently deceased.**—In a railroad servant's action for injuries, plaintiff's testimony that he applied to defendant's superintendent for work and was refused was admissible under this article, though superintendent was dead at the time of the trial, since no attempt was made to bind the corporation in regard to the matter to which this conversation related. *Texas & P. Ry. Co. v. Elliott* (Civ. App.) 189 S. W. 737.

Testimony of deceased's daughter, in partition suit in which she was a defendant that deceased stated no one could take away from his wife certain land he had deeded to her, is inadmissible. *Richards v. Hartley* (Civ. App.) 194 S. W. 478.

**40. Effect of calling or examination as witness by adverse party.**—Under this article held that, when a deposition of the opposite party was taken by the representative of decedent, such party might cross-examine the witness and bring out matters favorable to his interest. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

Where a witness is called by an administrator, his disqualification to testify against decedent is waived, and his testimony elicited by deposition or otherwise is admissible. *Id.*

Under this article held that a party so called and whose deposition had been taken could not testify to matters not testified to or inquired about in the deposition. *Id.*

Heir of plaintiff's intestate incompetent as witness against defendant administratrix, unless called by her, held not so called where plaintiff prepared and filed interrogatories, though defendant propounded cross-interrogatories and procured issuance of commission. *Wyatt v. Chambers* (Civ. App.) 182 S. W. 16.

41. **Objections to admissibility, and exclusion.**—Administratrix of decedent, joined, in suit to enjoin closing of alley, as warrantor of title defendant claimed to land in which plaintiffs asserted easement, alone had right to object to admission of testimony that it concerned statement of her decedent and was against her. *Miles v. Bodenheim* (Civ. App.) 193 S. W. 693.

### Art. 3694. [2306] [2252] Copies of records of public officers and courts to be prima facie evidence.

**Documents of record in general.**—The assessor's abstract, being a public record within this article, was admissible in evidence. *Randolph v. Lewis* (Civ. App.) 163 S. W. 647.

Under this article, where contracts between railroad and express companies were competent evidence, certified copies thereof, as filed with the Railroad Commission pursuant to a rule requiring them to be filed, were admissible. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Civ. App.) 173 S. W. 222.

Where public documents are admissible, but cannot, without inconvenience to the public interest be removed from their place of custody, certified copies or copies verified by some person who has seen the original are admissible. *Texas & P. Ry. Co. v. Graham & Price* (Civ. App.) 174 S. W. 297.

**Probate record.**—Under this article, in trespass to try title, certified copies of orders of probate court in administration of decedent's estate, offered in rebuttal of defendant's claim of title, held admissible. *Woods v. Moore* (Civ. App.) 185 S. W. 623.

**Orders of commissioners' court.**—The putting in force of prohibition within the territory may be proved either by the minute book, where the orders are entered in the minutes of the commissioners' court, or by properly certified copies thereof. *Howard v. State*, 72 Cr. R. 624, 163 S. W. 429.

**Records of land office.**—*Sayles' Ann. Civ. St. 1897*, arts. 2306, 2308, making certified copies of records admissible where the records would be admissible, do not make ex parte affidavits on file in the Land Office admissible to prove the facts therein recited. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

Under this article, art. 5397, and the article providing that books, papers, etc., required to be kept in any executive department shall constitute a part of the archives thereof, report of state surveyor of survey made by him held admissible in trespass to try title between private parties, though portions of report consisting of argument and opinions are not admissible. *Denton v. English* (Civ. App.) 171 S. W. 248.

In trespass to try title, certified sketches and maps from the land office were competent to show, at least prima facie, the location of surveys outlined there. *McCormack v. Crawford* (Civ. App.) 181 S. W. 485.

**Statement of facts.**—On the second trial of an action, testimony of witness at former trial, since deceased, could not be proved by a certified copy of the statement of facts upon the former appeal, not shown to have been made up from stenographer's notes, and no other proof of its verity being made. *Texas & N. O. R. Co. v. Williams* (Civ. App.) 178 S. W. 701.

### Art. 3696. [2308] [2253] Copies and certificates from certain officers are evidence.

**Land office.**—Certified copies of ex parte affidavits on file in the Land Office, made to procure the issuance of a duplicate land certificate, which, under the law in existence at the time, could be issued direct to the person claiming the original instead of to the grantee alone, are admissible to identify the duplicate and original, though not admissible to prove the facts therein recited. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

Although a map was made subsequent to the bringing of an action to define boundaries, a copy of such map certified from the land office was admissible in the action. *Thatcher v. Matthews* (Civ. App.) 183 S. W. 810.

In action on note secured by trust deed to premises to which defendant claimed homestead right, where he previously left such premises, and he claimed intent to return, his certified copy from general land office of his application to purchase land, reciting by affidavit that he desired to purchase land to make a home, was admissible. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

### Art. 3697. [2309] [2254] Notarial acts and copies thereof are evidence.

Cited, *Pipkin v. Ware* (Civ. App.) 175 S. W. 808.

### Art. 3698. [2310] [2255] In suits against delinquent officers, transcript from comptroller's office is evidence.

Cited, *Tharp v. Striker* (Civ. App.) 194 S. W. 1014.

**Art. 3700. [2312] [2257] Recorded instruments admitted in evidence without proof, when.**

Cited, *Johnson v. Sullivan* (Civ. App.) 163 S. W. 1015.

Application of article in general.—Articles of incorporation, under Rev. St. 1911, art. 5002, may be proved, as authorized by article 3707, by a copy certified by the secretary of state, and article 3700 has no application. *McKenzie v. Imperial Irr. Co.* (Civ. App.) 166 S. W. 495.

An original recorded chattel mortgage, having been declared on in the petition, and its execution and delivery proven, need not be filed with the papers in court as a predicate for its admission; the statute having no application. *Denman v. James* (Civ. App.) 180 S. W. 1157.

Under this article, a recorded chattel mortgage is admissible in evidence without proof of execution by parol; the record taking the place of proof of execution, which was necessary at common law. *Id.*

Act April 23, 1907 (Acts 30th Leg. c. 165), held to relate only to the admissibility in evidence of deeds not properly acknowledged, and not to the sufficiency of a married woman's conveyance, where a proper acknowledgment was necessary to convey the title. *Delay v. Truitt* (Civ. App.) 132 S. W. 722.

**Acknowledgment in general.**—Though acknowledged before one not authorized to take acknowledgments, a copy of a deed which was on record for more than ten years without assertion of any claim adverse to the one evidenced by the deed was admissible. *Sullivan v. Fant* (Civ. App.) 160 S. W. 612.

**What are recorded instruments.**—In an action to recover realty, the record of a deed which was a link in the chain of defendant's record title was inadmissible, where the book containing the purported copy was one used for recording conveyances in a county which never had any constitutional existence, and where it did not purport to have been proven before the proper officers of such district, or other legal officer, within Act Jan. 6, 1844 (2 Gammel's Early Laws of Texas, p. 922), but was acknowledged before a notary public, who then had no authority to take acknowledgments of deeds. *Houston Oil Co. of Texas v. Goodrich*, 226 Fed. 434, 141 C. C. A. 264.

**Certified copy.**—Under this article and art. 3703, a certified copy of a deed of trust not questioned for over 30 years held admissible in evidence. *Wacaser v. Rockland Savings Bank* (Civ. App.) 172 S. W. 737.

In trespass to try title, held error to admit a certified copy of a deed where issue was raised as to the genuineness of the original and there was failure to account for its nonproduction, or at least the issue should have been submitted to the jury. *Niles v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 748.

Under this article, in action by vendors to enforce specific performance of contract to purchase land, record of deed was properly rejected, where there was no affidavit of loss, and no certified copy or notice given to opposite party. *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

**Filing before trial and notice.**—In a prosecution under Pen. Code 1911, art. 500, relative to keeping of disorderly houses, held error to admit in evidence record of a deed, where a certified copy had not been filed and notice given. *Speers v. State* (Cr. App.) 190 S. W. 164.

**Affidavit of loss, mutilation or inability to procure.**—Under this article, evidence of a witness on a stand to inability to produce the original deed held equivalent to the statutory affidavit, and to authorize the introduction of a certified copy. *Hill & Jahns v. Lofton* (Civ. App.) 165 S. W. 67.

In trespass to try title, a finding of title is sustained where the place of a missing deed dated in 1837 was supplied by proof that it was recorded in a county whose records were subsequently burned. *Vann v. George* (Civ. App.) 191 S. W. 535.

Under this article, necessity of affidavit of loss might possibly be dispensed with, if evidence of witnesses was offered who testify to diligent search and inquiry made of proper person and in proper place. *Alling v. Vander Stucken* (Civ. App.) 194 S. W. 443.

**Affidavit of forgery.**—This article, held not to permit introduction of deed recorded for more than 10 years as against affidavit of opposite party that he believed it a forgery. *Emory v. Bailey* (Civ. App.) 181 S. W. 831.

In trespass to try title, where defendant filed an affidavit of forgery, age of deeds, registration, certified copies of original recorded in two counties, and evidence of long and continuous assertion of claim thereunder, with presumption of innocence, held sufficient to meet burden of proof of genuineness cast on plaintiff by affidavit. *Village Mills Co. v. Houston Oil Co. of Texas* (Civ. App.) 186 S. W. 785.

In trespass to try title, filing by defendant of affidavit of forgery of deed through which plaintiff derived title put upon plaintiff burden of proving execution of deed. *Id.*

In an action of trespass to try title where plaintiff filed an affidavit charging that a note, deed of trust, and indorsements were forgeries, burden rested upon defendant, claiming title as owner of the note and a trustee's deed under power of sale, to establish genuineness of notes and indorsements as against the affidavit. *Rudolph v. Hively* (Civ. App.) 188 S. W. 721.

In trespass to try title, filing by plaintiffs of affidavit of forgery of deed through which defendants derived title put upon defendants the burden of proving the execution of the deed. *Niles v. Houston Oil Co. of Texas* (Civ. App.) 191 S. W. 748.

**Ancient documents.**—Ex parte affidavits on file in the Land Office are not admissible to prove the facts therein recited on the ground that they are ancient instruments, though they have been on file for more than 30 years. *Magee v. Paul* (Civ. App.) 159 S. W. 325.

A bill of sale of an unlocated duplicate land certificate, which has existed for more than 30 years and which has been recorded for more than 25 years, is properly admitted in evidence as an ancient instrument. *Id.*

A defectively acknowledged bond for title held inadmissible as an ancient document under this article as against one claiming under an attachment of the property as that of the grantor where the latter's rights were returned within a year after the recording of the bond for title. *Rule v. Richards (Civ. App.) 159 S. W. 386.*

The record of a deed purporting to have been executed 35 years before, but recorded only five years before, is not admissible as an ancient instrument as proof of recitals in it. *Ketchum v. Boggs (Civ. App.) 194 S. W. 201.*

**Art. 3703. [2319] [2263] Transcribed records, certified copies of, evidence, etc.**

*In general.*—Under this article, and art. 3700, a certified copy of a deed of trust not questioned for over 30 years held admissible in evidence. *Wacaser v. Rockland Savings Bank (Civ. App.) 172 S. W. 737.*

**Art. 3707. [2315] [2259] Certified copies from heads of departments, evidence.**

*In general.*—Articles of incorporation, under Rev. St. 1911, art. 5002, may be proved, as authorized by article 3707, by a copy certified by the secretary of state, and article 3700 has no application. *McKenzie v. Imperial Irr. Co. (Civ. App.) 166 S. W. 495.*

**Art. 3708. [2316] [2260] Assessment or payment of taxes may be proven, how.**

Cited, *Sullivan v. Fant (Civ. App.) 160 S. W. 612.*

*In general.*—Under this article, and arts. 7743, 7745, 7746, comptroller's certificate of assessment and payment of taxes held admissible in trespass to try title, though not contained in abstract of title offered after demand. *Hays v. Hinkle (Civ. App.) 193 S. W. 153.*

**Art. 3710. [2318] [2262] Execution of notes and other instruments presumed, unless, etc.**

See notes under art. 1906.

*Foundation of action or defense.*—Where defendants pleaded payment, and not the receipt evidencing it, plea of non est factum held not necessary to enable plaintiff to attack the genuineness of the receipt. *Richards v. Osborne (Civ. App.) 164 S. W. 392.*

*Necessity of plea of non est factum and verification thereof.*—In suit on a note, a plea of non est factum is inapplicable where defendants admitted signing the instrument, and there is no evidence of any alteration after execution. *Farmers' & Citizens' Sav. Bank v. Smith (Civ. App.) 188 S. W. 1026.*

In a suit on a note, an unsworn plea of non est factum did not have effect of demanding proof of execution of note until sworn to. *Braxton v. Voyles (Civ. App.) 189 S. W. 965.*

*What constitutes plea of non est factum.*—A plea that by the false representations of plaintiffs' agent that a lease, for breach of which the action was brought, contained a defeasance clause providing for termination on an event which happened, and that defendants' signatures were secured by the agent's misrepresentation that the clause had been inserted, held not a plea of non est factum requiring verification. *Taber v. Eyer (Civ. App.) 162 S. W. 490.*

*Effect of plea non est factum.*—In an action on a renewal vendor's lien note, where in one of the defendants filed a plea of non est factum, the burden of proving that he signed the renewal note was on the plaintiff. *Spearman v. Connor Bros. (Civ. App.) 175 S. W. 478.*

Where defendant proves the execution and delivery of deeds under which possession is had and the mental capacity of the grantor, the deeds are admissible as evidence as against the affidavit of plaintiff as to forgery. *Wentzell v. Chester (Civ. App.) 189 S. W. 304.*

In action against corporation as maker of notes, there being a plea of non est factum, direct proof of authority of defendant's officers to execute notes is not required, but such authority may be shown by circumstantial evidence. *Galveston-Houston Interurban Land Co. v. Dow (Civ. App.) 193 S. W. 353.*

Notes are inadmissible in evidence in face of plea non est factum without proof of their execution. *Id.*

*Instruments the execution of which must be denied.*—Petition against a carrier for nondelivery held to charge that bill of lading was in writing, under Rev. St. 1911, art. 710, and carrier not denying under oath its execution under article 1906, subd. 8, and article 3710, may not question it. *Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co. (Civ. App.) 178 S. W. 858.*

**Art. 3712. [2323] [2266] Suit on sworn account.**

Cited, *Ahrep v. James A. Dick Co. (Civ. App.) 181 S. W. 269.*

*What constitutes open account.*—An account for numerous articles of merchandise purchased at single date held an "open account," subject to proof by ex parte affidavit. *Rockdale Mercantile Co. v. Brown Shoe Co. (Civ. App.) 184 S. W. 281.*

Account for merchandise sold defendant, not itemized as contemplated by the statute, is not such an account as when sworn to would be admissible to prove itself, although there was no denial under oath to any item. *A. Harris & Co. v. Grinnell Willis & Co.* (Civ. App.) 187 S. W. 753.

An action on account for goods sold held founded on open account, and hence the sworn statement of account constituted prima facie evidence under the statute. *Padgitt Bros. Co. v. Dorsey* (Civ. App.) 194 S. W. 1124.

**Accounts not within article.**—Verified account held insufficient to support default judgment, under this article; many of the items consisting merely of dates and amounts. *Wall & Carr v. J. M. Radford Grocery Co.* (Civ. App.) 176 S. W. 785.

Action on implied agreement to pay for labor performed and contract to pay commission for procuring buyer for land is not on open account, and pleadings need not conform to statute as to open accounts. *Myers v. Grantham* (Civ. App.) 187 S. W. 532.

**Effect of affidavit to account.**—Under this article, one sued on a verified account may, under appropriate pleadings, show that his liability for the account was conditional, and that the condition fixing the liability had not arisen. *Alexander Bros. v. Wroe & Geppert* (Civ. App.) 164 S. W. 1055.

Verified account under this article, containing charges of interest, held no proof of written agreement to pay interest at the rate of 10 per cent. *Wall & Carr v. J. M. Radford Grocery Co.* (Civ. App.) 176 S. W. 785.

In a suit on sworn account for merchandise sold, the burden was on plaintiff to make out his case; and until he had done so the Court of Civil Appeals cannot consider defendant's attitude as to its defense, if it had any. *A. Harris & Co. v. Grinnell Willis & Co.* (Civ. App.) 187 S. W. 753.

Where an account is properly verified under this article, it is admissible as prima facie evidence, in absence of a sworn denial by defendant that it was not true, etc., as required by such statute. *Wilson v. J. W. Crowdus Drug Co.* (Civ. App.) 190 S. W. 194.

**Sufficiency of counter affidavit.**—Under this article, denial of verified account alleging that it was not correct and true, that it was not due, and that defendant did not owe it or any item thereof, held sufficient. *Continental Lumber & Tie Co. v. Miller* (Civ. App.) 161 S. W. 927.

**Failure to file counter affidavit and effect thereof.**—Where plaintiff sued on a verified open account in compliance with this article, defendant, not denying any items under oath, as required by article 1906, could not object to the items. *Green v. Hoppe* (Civ. App.) 175 S. W. 1117.

Under this article, defendant's failure to deny the justness of a verified account or any item thereof is equivalent to an admission of its correctness. *Bay Lumber Co. v. Artman & Buettmer* (Civ. App.) 188 S. W. 279.

### Art. 3713. [677] [601] Records of corporation are evidence.

**Foreign corporations.**—In an action against a foreign insurance company on its policy, the record of an assessment passed at a meeting, signed by the president and secretary, is admissible in evidence under this article, and in view of the presumption, that the statute of the corporation's domicile was the same as prevailed in Texas. *Illinois Bankers' Life Ass'n v. Dodson* (Civ. App.) 189 S. W. 992.

In a suit on the policy of a foreign insurance corporation, a certificate signed by the president and secretary as to passage of an assessment at a meeting is admissible without proof that the signers were the president and secretary or that the signatures were theirs. *Id.*



## TITLE 54

## EXECUTION

Art.	Art.
3714. Execution on judgment of district and county court issued, when.	3759. Sales of real estate under powers conferred by deed of trust or other contract lien; land situated in more than one county; notice; sales how made; land in unorganized county.
3717. When judgment shall become dormant.	3759a. Judicial confirmation of foreclosure sales of property owned by soldier or sailor.
3723. On death of defendant, no execution for money.	3759b. Same; not applicable, when.
3725. Terms "plaintiff" and "defendant" defined.	3760. Sale of personal property.
3729. Requisites of an execution.	3761. Notice of sale of personal property.
3730. Returnable, when.	3762. Personal property present at sale, except.
3735. Levy of execution.	3765. Conveyance to purchaser.
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3740. On personal property.	3770. Officer or deputy shall not purchase.
3743. Interest of partner.	3774. Money to be paid over.
3744. Goods pledged or mortgaged.	3775. Failure to pay over money.
3746. Duty of officer as to property in his hands.	3776. Failure to levy or sell, penalty for.
3748. Defendant may give delivery bond and keep property.	3777. Failure to return execution.
3750. Forfeited delivery bond.	3779. Return of execution.
3751. Real property sold, how.	
3757. Notice of sale of real estate.	

### Article 3714. [2324] [2267] Execution on judgment of district and county court, issued when.

**Final judgment.**—Where a judgment on a cross-bill determined all the issues except defendant's claim to exemplary damages, which was not referred to, such issue was impliedly determined against defendant, and the judgment was a final one, sufficient to sustain an execution. *Stockwell v. Melbern* (Civ. App.) 168 S. W. 405.

A judgment in an action against two persons against one of the parties only held not a final judgment so as to authorize an execution. *Busby v. Schrank* (Civ. App.) 174 S. W. 295.

**Taxation of costs.**—Under this article, if clerk, before execution, taxes costs without their amount having been fixed by the court, held, that the amount stands as a judgment, unless the court, on motion, adjudges that the items are not proper. *Beaumont Irrigating Co. v. De Laune* (Civ. App.) 173 S. W. 514.

### Art. 3717. [2326a] When judgment shall become dormant.

Cited, *Dupree v. Gale Mfg. Co.* (Sup.) 184 S. W. 184.

**Revival of judgment—Evidence.**—In action to revive judgment where evidence introduced by defendant attacking judgment would not require a different judgment from that originally rendered, refusal of trial court to consider such evidence after hearing it was not error. *Walker v. Chatterton* (Civ. App.) 192 S. W. 1085.

### Art. 3723. [2332] [2275] On death of defendant, no execution for money.

**Dissolved corporation.**—Under this article, and arts. 3725, 5504, subd. 2, a sale of land under execution against a corporation after its dissolution by the sale of its franchise, etc., was void. *Allison v. Richardson* (Civ. App.) 171 S. W. 1021.

**Foreclosure sale after death of judgment debtor.**—In view of this article, no title passes under a sale ordered in a foreclosure suit after the death of the judgment debtor. *Cole v. Lewis* (Civ. App.) 159 S. W. 180.

### Art. 3725. [2334] [2277] Terms "plaintiff" and "defendant" defined.

**In general.**—Under this article, and arts. 3723, 5504, subd. 2, a sale of land under execution against a corporation after its dissolution by the sale of its franchise, etc., was void. *Allison v. Richardson* (Civ. App.) 171 S. W. 1021.

### Art. 3729. [2338] [2281] Requisites of an execution.

Cited, *Culbertson County v. Groves Lumber Co.* (Civ. App.) 191 S. W. 165.

**Validity in general.**—That an execution on a justice's judgment to enforce a lien on attached land was called an order of sale did not affect its validity as an execution. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

**Names of parties.**—Where the names of parties defendant appear on the face of the execution, and the name of plaintiff in the judgment on the back as an indorsement, the execution sufficiently shows the names of the parties. *Simmons v. Arnim* (Civ. App.) 172 S. W. 184.

**Description of judgment.**—An execution held to sufficiently describe the judgments on which it was issued. *Simmons v. Arnim* (Civ. App.) 172 S. W. 184.

**Conformity to judgment.**—An execution held to conform to the judgment so as to be sufficient to pass title on a sale. *Simmons v. Arnim* (Civ. App.) 172 S. W. 184.

**Direction as to return of execution.**—Execution from the county court of Houston county directing the officer to make return "before said court at the courthouse thereof in Houston within 60 days," etc., was not void for the omission of "county" after "Houston." *Collin County Nat. Bank v. Satterwhite* (Civ. App.) 184 S. W. 338.

#### Art. 3730. [2339] [2282] Returnable, when.

**No return day specified.**—An execution placed in the hands of an officer is returnable under this article in 30, 60, or 90 days if so directed, and if no return day is specified, is returnable on first day of next term of court whence it issued. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

**Former statute.**—The law in force on February 6, 1844, when an execution was issued which required that it be returned before the next term of court, meant the next regular term of court, so that it was not returnable to a special term authorized by a statute passed after the issuance of the execution. *Masterson Irr. Co. v. Foote* (Civ. App.) 163 S. W. 642.

#### Art. 3735. [2344] [2287] Levy of execution.

**Several writs.**—Where plaintiffs and defendants in each execution were the same, sheriff might levy on land to satisfy three different executions. *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

#### Art. 3736. [2345] [2288] Failure of defendant to designate property.

**Property subject to execution.**—Where an owner of land incumbered conveyed by mistake the entire tract, while intending to convey only an undivided half interest, and the mistake was mutual, the undivided half interest intended to be retained was subject to execution, and the purchaser at execution sale acquired the interest subject to the incumbrance. *Fallen v. Weatherford* (Civ. App.) 158 S. W. 1174.

The interest of a child in residuary real estate given testator's wife for life with remainder to the children, and providing that wife should manage the property and might sell or incumber it with consent of a majority of the children, is subject to execution, since will creates no trust relation. *Ward v. Caples* (Civ. App.) 170 S. W. 816, judgment affirmed *Caples v. Ward* (Sup.) 179 S. W. 856.

A judgment against a city in an action against it for a nuisance should order execution against it, in the absence of any statute forbidding it. *City of Clarendon v. Betts* (Civ. App.) 174 S. W. 958.

A vested remainder is subject to execution against the remaindermen. *Caples v. Ward* (Sup.) 179 S. W. 856.

**Property not subject to execution.**—A judgment against a school district cannot be enforced by execution; mandamus being the proper remedy. *Crowell Independent School Dist. v. First Nat. Bank* (Civ. App.) 163 S. W. 333.

**Correction deed after levy of execution.**—A correction deed may be given by grantor when a levy has been made on the land before correction, if the creditor had notice of the rights of the original purchaser. *Hodges v. Moore* (Civ. App.) 186 S. W. 415.

#### Art. 3740. [2349] [2292] On personal property.

See *Needham v. Cooney* (Civ. App.) 173 S. W. 979; note under art. 254.

**Personal property—Possession.**—Under this article possession upon levy of execution should be such that but for the protection of his writ, the officer would be trespasser, though manual possession or removal is not necessary, if he has the property in his view or control. *Burch v. Mounts* (Civ. App.) 185 S. W. 889.

Under this article sheriff's acts in levying upon cattle held a sufficient taking of possession to constitute a valid levy. *Id.*

— **Third party entitled to possession.**—Under this article levying on and sale under execution of property in which the debtor has merely an interest, without right to exclusive possession, is made by giving notice to the person entitled to the possession, and a levy made by taking actual possession cannot stand as legal on the ground that the debtor had an interest in the property, though not exclusive. *Kimbrough v. Bevering* (Civ. App.) 182 S. W. 403.

#### Art. 3743. [2352] [2295] Interest of partner.

**Effect of levy.**—The levy of an execution upon the interest of a partner in partnership property works no change in the possession of the property. *J. M. Radford Grocery Co. v. Owens* (Civ. App.) 161 S. W. 911.

The levy of an attachment on the interest of a partnership property does not inter-

ferre with the possession of the partnership nor its members. *Jones & Nixon v. First State Bank of Hamlin*, 106 Tex. 572, 173 S. W. 202, affirming judgment (Civ. App.) 140 S. W. 116.

#### Art. 3744. [2353] [2296] Goods pledged or mortgaged.

**In general.**—Both at common law and under this article mortgaged chattels are subject to execution and sale thereunder on a judgment recovered against the mortgagor. *Wilkerson v. Stasny & Holub* (Civ. App.) 183 S. W. 1191.

**Right to possession.**—Under this article where a tenant pledged his cotton crop to his landlord to secure advances, a judgment creditor of the tenant was not entitled to possession of the cotton or to any interest therein by levy and sale to himself under execution, unless he complied with the conditions of the pledge. *Kimbrough v. Bevering* (Civ. App.) 182 S. W. 403.

**Notice of lien to purchaser.**—Under this article, it is unnecessary that an officer disposing of mortgaged animals, which mortgage was recorded, notify purchasers of the existence of the mortgage. *Wilkerson v. Stasny & Holub* (Civ. App.) 183 S. W. 1191.

**Priority of lien.**—Despite this article, mortgagee, who made advances after part of the mortgaged property was sold under execution, has priority over the purchaser at execution sale, though at time of purchase the other property was sufficient to have discharged debt. *Law Sprinkle Mercantile Co. v. Hause* (Civ. App.) 184 S. W. 737.

#### Art. 3746. [2355] [2298] Duty of officer as to property in his hands.

Cited, *Burch v. Mounts* (Civ. App.) 185 S. W. 889.

**Release of levy.**—Fact that sheriff left live stock in a lot over night after making levy of execution, until arrangements could be made to care for it, did not release or invalidate levy. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

#### Art. 3748. [2357] [2300] Defendant may give delivery bond and keep property.

**Discharge of sureties.**—Sureties on redelivery bond under this article, are not discharged by bankruptcy of principal debtor, under Bankruptcy Act. *Evans v. Rea* (Sup.) 191 S. W. 1133.

#### Art. 3750. [2359] [2302] Forfeited delivery bond.

Cited, *Ross v. Kell* (Civ. App.) 159 S. W. 119.

**Effect of forfeiture.**—When sheriff released levy of execution upon judgment debtor's goods and indorsed forthcoming bond "forfeited," the right of plaintiff in judgment as against sureties on bond became fixed. *Evans v. Rea* (Civ. App.) 193 S. W. 707.

#### Art. 3751. [2360] [2303] Real property sold, how.

**In general.**—A finding that a trustee in a trust deed complied with this article and arts. 3757, 3759, by posting the proper notices of sale held authorized. *Adams v. Zellner* (Civ. App.) 174 S. W. 933, writ of error denied (Sup.) 183 S. W. 1143.

#### Art. 3757. [2366] [2309] Notice of sale of real estate.

Cited, *Unknown Heirs of Buchanan v. Creighton-McShane Oil Co.* (Civ. App.) 176 S. W. 914; *Home Benefit Ass'n of Angeline County v. Jordan* (Civ. App.) 191 S. W. 725.

**In general.**—A trustee in a deed of trust held to advertise a sale in compliance with Rev. St. 1911, art. 3759, and Rev. St. 1879, art. 2309. *Roe v. Davis*, 172 S. W. 708, 106 Tex. 537, affirming judgment (Civ. App.) 142 S. W. 950.

A finding that a trustee in a trust deed complied with this article and arts. 3751, 3759, by posting the proper notices of sale held authorized. *Adams v. Zellner* (Civ. App.) 174 S. W. 933, writ of error denied (Sup.) 183 S. W. 1143.

Where no personal judgment was rendered against plaintiff, and a judgment foreclosing vendor's lien notes upon land was an adjudication that she had no interest therein, notice of the sale to satisfy the lien need not be given to her. *Sells v. White* (Civ. App.) 175 S. W. 1079.

**Failure to advertise.**—Under this article, which requires a sale of land under execution order of sale or other process to be advertised for 20 days in a newspaper published in the county where the land is situated, the failure to so advertise the land renders the sale void. *United States v. Sinclair*, 209 Fed. 612, 126 C. C. A. 606.

**Notice to defendant—Necessity and sufficiency.**—Under this article, the posting in the United States mail of a properly addressed and stamped notice of sale to defendants in execution held sufficient, whether the notice is received or not. *South Texas Lumber Co. v. Burleson* (Civ. App.) 178 S. W. 961.

Where proper notice was given of sale under only one of three executions levied on land, in which parties were the same, sale was valid, though notice was not given under other executions. *Kenley v. Robb* (Civ. App.) 193 S. W. 375.

**Vacation for inadequacy of price.**—Plaintiffs, who were adjudicated to have no interest in land, held not entitled to have vacated for inadequacy of price a sale of the property. *Sells v. White* (Civ. App.) 175 S. W. 1079.

**Art. 3759. [2369] [2310a] Sales of real estate under powers conferred by deed of trust or other contract lien; land situated in more than one county; notice; sales how made; land in unorganized county.**—All sales of real estate made in this State under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated, unless such real estate be situated in more than one county, in which event, notices as herein provided shall be given in both or all of such counties, providing and giving notice that such sale will be made of such real estate in that one of said counties in which the greater portion of the real estate may be situated; if equal quantities of said land to be sold lie in different counties, said notice shall designate in which of said counties the sale is to be made. Notice of such proposed sale shall be given by posting written notice thereof for three consecutive weeks prior to the day of sale in three public places in said county or counties, one of which shall be at the court house door of the county in which such sale is to be made, and if such real estate be in more than one county, one at the court house door of each county in which said real estate is situated, or such notice may be given as required by statute in case of judicial sale, or such notice may be given in either of said methods, or as may be provided for in said deed of trust or contract lien; and such sales shall be made at public vendue, between the hours of 10 o'clock a. m., and 4 o'clock p. m., of the first Tuesday in any month provided; that when such real estate is situated in an unorganized county, such sale shall be made in the county to which such an unorganized county is attached for judicial purposes. [Acts 1889, p. 143; Act March 12, 1915, ch. 43, § 1; Act June 3, 1915, 1st C. S., ch. 15, § 2.]

**Explanatory.**—Took effect 90 days after May 28, 1915, date of adjournment. The act amends art. 3759, title 54, Rev. Civ. St. 1911, as amended by regular session of 34th Legislature so as to read as above.

Act March 12, 1915, ch. 43, § 1, referred to provides as follows: "All sales of real estate made in this state under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated, unless such real estate be situated in more than one county, in which event notices as herein provided shall be given in both or all of such counties, providing and giving notice that such sale will be made of such real estate in that one of said counties in which the greater portion of the real estate may be situated; if equal quantities of said land to be sold lie in different counties, said notice shall designate in which of said counties the sale is to be made. Notice of such proposed sale shall be given by posting written notice thereof in three public places in said county or counties, one of which shall be at the court house door of the county in which such sale is to be made, and if such real estate be in more than one county, one at the court house door of each county in which said real estate is situated, or such notice may be given as required by statute in case of judicial sales or such notice may be given in either of said methods as provided for in said deed of trust or contract lien; and such sales shall be made at public vendue, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of the first Tuesday in any month; provided, that when such real estate is situated in an unorganized county, such sale shall be made in the county to which such unorganized county is attached for judicial purposes."

The emergency clause in the act of March 12, 1915, recites that the fact that by the decisions of this state, sales under deeds of trust have been construed to refer back and be governed by the law that existed in 1889, thus creating confusion and litigation as to the method to pursue in making sales under deeds of trust, creates an emergency, etc. This act took effect 90 days after adjournment of the legislature on March 20, 1915. Cited, *National Surety Co. v. Murphy-Walker Co.* (Civ. App.) 174 S. W. 997.

**4. Power as authority for sale in general.**—In making a sale under a deed of trust, the trustee must comply with the terms of the deed, but incidental matters outside of its terms are left to his discretion. *Zeiss v. First State Bank* (Civ. App.) 189 S. W. 524.

The maker of a trust deed containing power of sale may impose on its exercise any limitations he desires, and they must be strictly followed, and the power admits of no substitution and of no equivalent. *Michael v. Crawford* (Sup.) 193 S. W. 1070.

**5. Commencement, suspension or termination of power.**—Where a trust deed to secure a debt authorized the trustee to sell on maturity of the debt and default at the request of the creditor, the creditor having made such request, his death pending injunction proceedings to restrain the sale did not deprive the trustee of a power to sell on termination of the injunction proceedings. *Todd v. Bemis* (Civ. App.) 158 S. W. 182.

Failure of a trustee to sell mortgaged property on the first day available after the dissolution of an injunction restraining the sale did not affect the continued existence of the power, which, having been once conferred, remained until executed. *Id.*

A sale by a trustee under a power of sale in a deed of trust, made after the note was barred by limitations and after the power could be exercised, is void. *Rudolph v. Hively* (Civ. App.) 188 S. W. 721.

Where a trustee in a trust deed was authorized to sell only on the mortgagee's request, such power remained dormant until the proper request was made, and he could not give a valid refusal to act to any one but the mortgagee. *Rawlings v. Lewis* (Civ. App.) 191 S. W. 784.

7. **Rights of junior incumbrancers.**—A junior mortgagee is not injured by a private sale under a senior mortgage, which called for a public sale where the property could not be sold for the debt secured. *Fidelity & Deposit Co. of Maryland v. Albrecht* (Civ. App.) 171 S. W. 819.

8. **Authority to execute power and execution of power in general.**—Where a deed of trust made it the duty of the trustee to sell on the debtor's default at the request of the beneficiary, it did not limit such request to the particular beneficiary named in the deed, but authorized a sale at the request of the owner of the debt. *Todd v. Bemis* (Civ. App.) 158 S. W. 182.

9. — **Substitute trustee.**—Where attorney of assignee of notes secured by trust deed requested trustee to refuse to act so that the attorney might sell the property as substituted trustee, this was not a request by mortgagee to act and refusal by the trustee, as required by the trust deed before substituting another trustee; the holder of the notes having no such power under the deed. *Rawlings v. Lewis* (Civ. App.) 191 S. W. 784.

Where trust deeds securing notes, authorized the trustee to sell on default of payment at mortgagee's request, and gave mortgagee power to appoint a substitute trustee upon the trustee's refusal to act, the transferee of the notes had no authority to appoint a substitute trustee, and the deed of trustee substituted by him conveyed no title. *Id.*

The power to appoint a substitute trustee for the execution of a power of sale in a trust deed can be exerted only through express authority of the instrument. *Michael v. Crawford* (Sup.) 193 S. W. 1070.

Under a trust deed granting to holder of note secured power to sell, and to substitute a trustee in case of death or failure to act, the holder alone could appoint a substitute trustee, and he could not make such appointment through an agent. *Id.*

12. **Place of sale.**—Under statute of 1889, a new promise by a widow to pay notes secured by joint deed of trust by herself and husband will not authorize sale under the deed of trust, except in the county where the land lies. *W. C. Belcher Land Mortgage Co. v. Taylor* (Civ. App.) 173 S. W. 278.

14. **Notice of sale.**—A finding that a trustee in a trust deed complied with this article and arts. 3751, 3757, by posting the proper notices of sale held authorized. *Adams v. Zellner* (Civ. App.) 174 S. W. 933, writ of error denied (Sup.) 183 S. W. 1143.

Recital in deed executed by trustee that notice of sale was made by posting a public notice on the courthouse door does not render the deed void for want of notice, but the purchaser may prove that proper notice was given. *Id.*

Notice to the debtors of the sale of the land under a trust deed prior to such sale is not a prerequisite to a valid sale. *McCullough v. Hurt* (Civ. App.) 175 S. W. 781.

15. — **Publication or other constructive notice.**—A trustee in a deed of trust held to advertise a sale in compliance with this article and Rev. St. 1879, art. 2309. *Roe v. Davis*, 172 S. W. 708, 106 Tex. 537, affirming judgment (Civ. App.) 142 S. W. 950.

A trustee's sale cannot be set aside because the trustee did not select the public places where notice should be posted; it appearing that, though another selected them, notices were duly posted. *Titterington v. Deutsch* (Civ. App.) 179 S. W. 279.

Where by terms of a mortgage, notice of sale must be published in a newspaper, if notice cannot be given because no newspaper is published in the county, the trustee cannot sell under power without recourse to a court. *Rudolph v. Hively* (Civ. App.) 188 S. W. 721.

16. **Sale in parcels.**—Where a trustee under a trust deed had authority to sell the whole of the property for nonpayment of the debt, his failure to do so did not affect the validity of a sale of a part thereof. *Todd v. Bemis* (Civ. App.) 158 S. W. 182.

18. **Persons who may purchase.**—Purchasers of land, who assumed the mortgage and later sold it to others, taking second vendors' lien notes, can purchase the land at the sale on foreclosure of the first mortgage as against the holders of the second lien notes by indorsement without recourse. *Doolen v. Hulsey* (Civ. App.) 192 S. W. 364.

19. **Setting aside sale.**—In a suit by the grantee to recover land sold by a trustee under a trust deed to secure a loan, where the sale was regular, evidence of the value of the land was immaterial. *McCullough v. Hurt* (Civ. App.) 175 S. W. 781.

It is a constructive fraud on the grantor in a deed of trust, warranting setting aside of the trustee's sale, for the trustee, unknown to such grantor, to accept employment by the beneficiary to collect the secured note. *Thornton v. Goodman* (Civ. App.) 185 S. W. 926.

A sale by a trustee under a deed of trust for \$1,000 was for an inadequate price, whether the property was worth, as found, \$5,800, or \$1,000 less. *Id.*

Where trust deed did not give grantor right to notice or to be present at foreclosure sale, refusal of trustee to delay sale for a few minutes until the grantor could arrive coupled with inadequacy of price will not warrant vacation; there being no showing that grantor would or could have protected his interest. *Zeiss v. First State Bank* (Civ. App.) 189 S. W. 524.

A sale by a trustee of a deed of trust will be set aside if there is proof of undue advantage. *Id.*

**21. Title and rights of purchaser.**—The purchaser of land at auction sale by the trustee under deed of trust cannot claim the growing crop, having agreed to a severance, by the trustee, at his request, announcing, at the sale, that the crop had been sold, and would not pass under sale of the land. *Stamps v. Ezell* (Civ. App.) 174 S. W. 944.

Rights acquired by purchase of the land at the sale on foreclosure of the first mortgage by those who had sold the property subject to the mortgage and indorsed without recourse vendors' lien notes received by them do not inure to the benefit of the holder of those notes. *Doolen v. Hulsey* (Civ. App.) 192 S. W. 364.

**25. Operation and effect.**—A trustee's deed is void and conveys no title when the sale is under a deed of trust which the mortgagor had no authority to execute. *W. C. Belcher Land Mortgage Co. v. Taylor* (Civ. App.) 173 S. W. 278.

**Art. 3759a. Judicial confirmation of foreclosure sales of property owned by soldier or sailor.**—In all cases of sales of real property of soldiers or sailors serving in the armies or navies of the United States during the continuance of the war with Germany, under and by virtue of deeds of trust or of mortgages where such sales are made without foreclosure suits, before the execution of any conveyance by reason thereof or the delivery of the property, or before such property is taken possession of, there shall first be filed in a court of competent jurisdiction a suit for the confirmation of such sale and for the authority to make conveyance of and delivery of the property; in such suits service shall be had on any soldier or sailor as is provided by law in such cases, and such suit shall be subject to all laws of this State applicable; on the final trial of the case if the court finds that it is proper and lawful to confirm such sale he shall do so and order a conveyance and delivery of the property, and all sales, not made in compliance with this Act and other Acts on the subject shall be null and void. Provided that on the final trial and before judgment of confirmation is entered by the court, the defendant may file an answer setting up any defense he may have to the merits of the case. [Act Sept. 17, 1917, ch. 4, § 1.]

See art. 1868a, ante.

**Art. 3759b. Same; not applicable when.**—Nothing contained in this Act shall in anywise affect or apply to existing laws governing the foreclosure of any deed of trust, mortgage or other lien upon any real property, not owned by such soldier or sailor at the time of his enlistment and subsequently conveyed to him encumbered by such deed of trust, mortgage or other lien. [Id., § 2.]

**Art. 3760. [2370] [2311] Sale of personal property.**

Cited, *Burch v. Mounts* (Civ. App.) 185 S. W. 889.

**Excuse for failure to comply.**—Under Rev. St. 1911, arts. 3760, 3762, requiring personal property taken under execution to be present at sale when it is susceptible of being exhibited, presence of property is only excused when its nature prevents it being exhibited and not because of nature of premises or remoteness thereof. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

**Art. 3761. [2371] [2312] Notice of sale of personal property.**

Cited, *Burch v. Mounts* (Civ. App.) 185 S. W. 889.

**Art. 3762. [2372] [2313] Personal property present at sale, except.**

Cited, *Burch v. Mounts* (Civ. App.) 185 S. W. 889.

**Failure to comply—In general.**—In a suit by surety on a secured note, as assignee of note after payment, seeking payment from maker and to establish a lien on chattels mortgaged, evidence held to warrant a finding that neither mortgagor nor plaintiff waived statutory requirement that property taken under execution must be present and exhibited at sale. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

— **Excuse.**—Under this article and art. 3760, requiring personal property taken under execution to be present at sale when it is susceptible of being exhibited, presence of property is only excused when its nature prevents it being exhibited and not because of nature of premises or remoteness thereof. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

— **Liability.**—Where a sale of chattels taken on execution was void because of failure to comply with statutes requiring presence of property at sale, sheriff and pur-

chaser at sale, having wrongfully taken possession of property over protest of owner, held guilty of conversion and liable to parties sustaining damages. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

#### Art. 3765. [2375] [2316] Conveyance to purchaser.

**Description of property.**—A description in a sheriff's deed is sufficient if it may be made certain by extrinsic evidence identifying the property. *Welles v. Arno Co-operative Irr. Co.* (Civ. App.) 177 S. W. 985.

A deed to purchaser at judicial sale is not void for uncertainty, unless on its face the description cannot by extrinsic evidence be made to apply to any definite land. *Waterhouse v. Gallup* (Civ. App.) 178 S. W. 773.

**Recitals.**—Recitals in a sheriff's deed that the same was executed pursuant to a sale by virtue of an order of sale held insufficient to show a sale under a valid judgment and execution, which the holder was required by show by other evidence. *Rule v. Richards* (Civ. App.) 159 S. W. 386.

**Title acquired by purchaser.**—Where a judgment of foreclosure of vendor's lien note is void for want of jurisdiction, a sale thereunder passes no title to the purchaser. *Moon v. Sherwood* (Civ. App.) 180 S. W. 296.

#### Art. 3768. [2378] [2318] Purchaser deemed innocent.

**Bona fide purchaser in general.**—A purchaser at an execution sale has a superior title to the heirs of a grantee who claim under a prior unrecorded deed. *Gosch v. Vrana* (Civ. App.) 167 S. W. 757.

One who purchased one-half of a tract of land sold under execution without notice of defendant's equitable title to one-half of the tract takes his purchase free from defendant's equities. *Cetti v. Wilson* (Civ. App.) 168 S. W. 996.

— **Notice.**—Payment of taxes held not constructive notice of an equitable interest in land to execution purchasers. *Cetti v. Wilson* (Civ. App.) 168 S. W. 996.

Recitals in mortgage as to vendor's lien held not admissible against persons claiming under sale under execution against the mortgagor. *Zeigel v. Magee* (Civ. App.) 176 S. W. 631.

**Liens and incumbrances on property—Vendor's lien.**—A purchaser of property under execution sale took title subject to the incumbrance of vendor's lien notes secured by a valid vendor's lien on record against the property. *Lane v. Kempner* (Civ. App.) 184 S. W. 1090.

#### Art. 3770. [2380] [2320] Officer or deputy shall not purchase.

Cited, *Davis v. Howe* (Civ. App.) 176 S. W. 759.

#### Art. 3774. [2384] [2324] Money to be paid over.

**In general.**—Where execution was in regular form duly authenticated, held that it was sheriff's right and duty to collect amount of the writ and pay it over to execution creditor. *Sanders v. Waghalter* (Civ. App.) 192 S. W. 1083.

#### Art. 3775. [2385] [2325] Failure to pay over money.

Cited, *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

**Penalty will not be enforced, when.**—That a deputy sheriff, after the return of an execution unsatisfied, agreed with the debtor that a debt owed to him by the deputy should be applied by him in payment of the judgment would not make the sheriff liable for failure to pay over money collected on execution, where none was actually collected, though the deputy did not apply the debt as agreed. *Matthews v. Perminter* (Civ. App.) 162 S. W. 1180.

#### Art. 3776. [2386] [2326] Failure to levy or sell, penalty for.

**Failure to levy—When duty arises.**—Where a sheriff received an execution, and specific land is pointed out to him, it is his duty to levy, regardless of what he might believe as to the title. *Wilson v. Dearborn* (Civ. App.) 174 S. W. 296, rehearing denied 179 S. W. 1102.

**What will excuse officer.**—On motion for judgment against constable for failure to levy execution, held, that it was too late to urge objection to his indemnity bond that solvency of sureties was not certified by any officer of the county of their residence. *Sharp v. Morgan* (Civ. App.) 192 S. W. 599.

— **Remedy.**—Mandamus held not to lie to compel sheriff to levy execution issued upon money judgment, as adequate remedy is provided by this article by action against sureties. *Seagraves v. Scarborough* (Civ. App.) 190 S. W. 1154.

— **Limitations.**—An action by assignee of judgment under this article and art. 3777, to recover the amount thereof from sheriff and his sureties for failure to levy and return execution thereon, was barred by five-year statute of limitations. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

**Procedure.**—On judgment creditor's motion for judgment against constable and his sureties for failure to levy execution, paragraphs of charge, submitting issues whether either of executions were delivered to and received by the constable and whether the judgment debtor had any property in the county subject to execution, were not merely interrogatories and misleading and confusing. *Sharp v. Morgan* (Civ. App.) 192 S. W. 599.

**Art. 3777. [2387] [2327] Failure to return execution.**

**What will excuse officer.**—Where a deputy sheriff returned an execution to the attorneys of plaintiff in execution by their directions, the deputy or his principal would not be liable under this article and 1911, art. 3775, as for failure to return an execution, the attorneys having power to control the execution. *Matthews v. Permitter* (Civ. App.) 162 S. W. 1180.

**Limitations.**—An action by assignee of judgment under this article and art. 3776, to recover the amount thereof from sheriff and his sureties for failure to levy and return execution thereon, was barred by five-year statute of limitations. *Peck v. Murphy & Bolanz* (Civ. App.) 184 S. W. 542.

**Art. 3779. [2389] [2329] Return of execution.**

**Conclusiveness.**—In a suit by surety on a secured note, as assignee of note after payment, seeking payment from maker and to establish a lien on chattels mortgaged, plaintiff, not being a party to a judgment under which execution was levied on the mortgaged property, may attack return on execution and show that there was no levy or sale thereunder. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

## DECISIONS RELATING TO SUBJECT OF TITLE IN GENERAL

**1. Indemnity to officer.**—Where bond to indemnify constable levying execution was made out on blank used for purpose, failure to describe any property, where none had been pointed out by the judgment creditor, and the constable had never requested him to do so, did not affect his validity. *Sharp v. Morgan* (Civ. App.) 192 S. W. 599.

Failure to erase the word "sheriff," where the two words "constable" and "sheriff" appeared on a blank for a bond to indemnify a levying constable, was a clerical mistake not affecting the validity of the bond; execution being delivered, not to a sheriff, but to a constable. *Id.*

**4. Rights of highest rejected bidder.**—A judgment creditor whose higher bid was wrongfully rejected by the sheriff may recover the property from the lower bidder to whom it was sold. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

**5. Who may purchase at sale.**—That an attachment against the judgment creditor might be levied upon money received by the sheriff at the execution sale does not defeat the creditor's right to bid in the property and give credit on the judgment. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

**5½. Payment.**—The sheriff on execution sale should accept a bid from the judgment creditor accompanied by a tender of credit on the judgment and payment of costs in cash. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

A judgment creditor who purchases at execution sale is not entitled to pay his bid by credit on the judgment, where there are other liens on the property of equal dignity with his lien or a contest over the proper disposition of the proceeds. *Id.*

**6. Grounds for setting aside sale.**—Courts generally refuse to set aside an execution sale for mere irregularities as shown by the record, where such sale is not shown to be void by reason of fraud or because of irregularities. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 189 S. W. 928.

Judicial sale of property of irrigation company on foreclosure of a lien held void, for want of proper description in the judgment ordering the sale and for other irregularities. *Id.*

**7. — Inadequacy of price.**—Sale of a judgment debtor's life estate in certain real property for \$100 held not objectionable for inadequacy of price. *Johnson v. Goldstein* (Civ. App.) 173 S. W. 458.

Mere inadequacy of price is not sufficient ground for setting aside a sale otherwise valid. *South Texas Lumber Co. v. Bursleson* (Civ. App.) 178 S. W. 961.

Where the testimony showed the value of the land to be between \$500 and \$1,000, and it was sold on execution for \$160, the price was inadequate. *Graham v. Cansler* (Civ. App.) 191 S. W. 856.

**8. — Inadequacy of price combined with other objections.**—Courts generally will not set aside judicial sales for inadequacy of price, where other things are regular, or where the irregularities, if any, are not such as to vitiate the sale. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.* (Civ. App.) 180 S. W. 928.

Inadequacy of price at execution sale with facts showing irregularities or other circumstances calculated to prevent the property from bringing approximately its reasonable value will avoid the sale. *Graham v. Cansler* (Civ. App.) 191 S. W. 856.

Where execution describes judgment on which it is entered as of the day when it was rendered without referring to the fact that it was not entered until much later *nunc pro tunc*, where plaintiff pointed out property levied upon and sold, and defendant was not permitted to point out other property subject to execution, though he could have done so, and land was not properly described in return on execution notice of sale or deed, and because of these irregularities property was sold at an inadequate price, the sale is invalid and will be set aside. *Id.*

**13. Actions to set aside sale—Tender.**—A judgment creditor suing to set aside a sale made to a lower bidder need not offer to return the amount paid by the bidder, which was still retained by the sheriff. *Needham v. Cooney* (Civ. App.) 173 S. W. 979.

**18. Collateral attack on sale.**—A collateral attack on the validity of an execution sale by intervening in trespass to try title could not effect its avoidance for irregularities and



defects not apparent on the face of the proceedings, and such right of intervention does not prevent a suit to restrain seizure on writ of sequestration. *Lane v. Kempner* (Civ. App.) 184 S. W. 1090.

A void execution sale can be collaterally attacked. *Bonougli v. Brown* (Civ. App.) 185 S. W. 47.

**20. Title and rights of purchaser in general.**—In a suit to partition land and establish title, where plaintiffs traced their title through a purchase at execution sale, the order of sale and return of the sheriff showing levy upon the property is properly received in evidence. *Cetti v. Wilson* (Civ. App.) 168 S. W. 996.

Where judgment, execution, and sheriff's sale are shown, mere irregularity in issuance or return of execution does not affect the title of the purchaser. *South Texas Lumber Co. v. Burleson* (Civ. App.) 178 S. W. 961.

The purchaser of chattels under void execution sale and officer conducting sale, being wrongdoers, are not in a position to demand that the assignee of a mortgagee of property taken look to other property of mortgagor or to the mortgagor's personal responsibility. *Hopping v. Hicks* (Civ. App.) 190 S. W. 1119.

**24. Wrongful execution.**—For an unauthorized levy of execution against a tenant farmer on cotton which the latter had sold to the landlord, the landlord was entitled to recover the value of all cotton appropriated by virtue of the execution and levy, whenever and by whomsoever the appropriation was made. *Kimbrough v. Bevering* (Civ. App.) 182 S. W. 403.

**24½. Liability of officer.**—Where a justice court docket showed that no judgment was entered against accused, and the writ of execution showed that it was not directed against his property, the fact that the writ recited that there was a judgment against accused will not warrant a constable in levying upon accused's property, and, if he does so, he is a trespasser. *Lassiter v. State*, 73 Cr. R. 35, 163 S. W. 710.

Where an officer proceeded under a writ of execution, which was void as to accused, the fact that the officer thought that the writ entitled him to take accused's property will not increase his rights. *Id.*

That a sheriff, having a due and regular writ of execution, promised to hold money paid to him until execution debtor could get a judgment and execution corrected held not to authorize a recovery by successor to rights of execution debtor against the sheriff, where the money was not paid by debtor until return day of execution. *Sanders v. Waghalter* (Civ. App.) 192 S. W. 1083.

A sheriff may safely obey a writ of execution fair and regular on its face, and is not bound to judge of it by facts within his knowledge which may be supposed to invalidate it. *Id.*

**25. — Liability of plaintiff in execution.**—Since the levy of an attachment upon the interest of a partnership in partnership property does not interfere with the possession of the partnership nor its members, latter cannot, after quashal of the writ recover for conversion of property or for trespass. *Jones & Nixon v. First State Bank of Hamlin*, 106 Tex. 572, 173 S. W. 202, affirming judgment (Civ. App.) 140 S. W. 116.

**30. — Damages in general.**—Where exempt property of a debtor was wrongfully levied upon and sold by creditor, the debtor was entitled to interest on the value thereof from the date of the conversion. *Seedig v. First Nat. Bank of Clifton* (Civ. App.) 168 S. W. 445.

## TITLE 55

## EXEMPTIONS

Chap.

1. Property exempt from forced sale.

Chap.

2. Excess over homestead, etc., how set apart and subjected to execution.

## CHAPTER ONE

## PROPERTY EXEMPT FROM FORCED SALE

Art.	Art.
3785. Property exempt from, to every family.	3788. Property exempt to others than families.
3786. "Homestead" defined.	3791. Public libraries.
3787. Proceeds of sale of homestead exempt for six months.	3792. Homestead exemption does not apply, when.

**Article 3785. [2395] [2335] Property exempt from, to every family.**

Cited, *American Bonding Co. of Baltimore v. Logan*, 106 Tex. 306, 166 S. W. 1132; *McFarland v. Hammond* (in dissenting opinion) 106 Tex. 579, 173 S. W. 645.

**3. Construction of statutes.**—Exemption laws, though in derogation of the common law, should be liberally construed. *Smith v. McBryde* (Civ. App.) 173 S. W. 234; *Harris v. Todd* (Civ. App.) 158 S. W. 1189; *Campbell v. Honaker's Heirs* (Civ. App.) 166 S. W. 74.

**8. Family—Persons divorced or living apart.**—Plaintiff, who had been divorced from his wife, who was given the custody of the issue of the marriage, held not the head of the family within the purview of the exemption laws, where the wife and child never resided within the state, and, though plaintiff contributed to their support, it appeared that the judgment of divorce dissolved the bonds of matrimony absolutely, although neither party was at liberty to remarry. *Hammond v. Pickett* (Civ. App.) 158 S. W. 174.

That a husband and his wife were temporarily or permanently residing in different parts of the state did not destroy the family and deprive it of its exemptions. *Smith v. McBryde* (Civ. App.) 173 S. W. 234.

**12. Implements of husbandry.**—Under this article it is not necessary to the exemption of agricultural implements that they be used in the cultivation of a homestead, or that the owner own a homestead. *Smith v. McBryde* (Civ. App.) 173 S. W. 234.

Implements of husbandry and other articles were exempt, though the owner may have been engaged in other work besides farming. *Id.*

Agricultural implements, used by farmer directly or by his tenants and employes, held exempt. *Id.*

**13. Tools and apparatus belonging to trade or profession.**—Pool tables used in running a pool hall and the proceeds of insurance thereon are exempt from garnishment; the business being a "trade or profession," within the meaning of this article. *Harris v. Todd* (Civ. App.) 158 S. W. 1189.

Conducting a butcher shop held a trade, notwithstanding the sale of the meats cut up or butchered. *Hammond v. McFarland* (Civ. App.) 161 S. W. 47.

Cash register and refrigerator held not tools or apparatus belonging to a butcher's trade. *Id.*

That one who conducted a moving picture show in a leased building was removing his appliances therefrom at the expiration of the lease did not show an abandonment of the business so as to remove the appliance from the protection of the exemption statute. *Campbell v. Honaker's Heirs* (Civ. App.) 166 S. W. 74.

One conducting a moving picture show is engaged in a trade or profession within this article. *Id.*

Appliances producing moving pictures are exempt from execution as tools or apparatus, but chairs used by the audience are not exempt. *Id.*

That one was operating an opera house and a moving picture show at the same time in different parts of rented premises did not prevent him from claiming the appliances used to produce the moving pictures as exempt. *Id.*

One conducting moving picture show who did not show for two or three weeks, but who then opened up for two or three nights to some prospective purchaser, and then closed, abandoned the business, the appliances were subject to execution. *Anthony v. Hardin* (Civ. App.) 175 S. W. 857.

A thrashing outfit held not exempt property as "tools of trade," or "apparatus of trade." *Comer v. Powell* (Civ. App.) 189 S. W. 88.

Oil driller's well-drilling rig, consisting of boiler, engine, rotary, pumps, and other parts of complicated machinery, held not a "tool" or "apparatus" exempt from execution sale. *Thresher v. McEvoy* (Civ. App.) 193 S. W. 159.

14. — **Printer and publisher.**—This article held to exempt the presses, engine, and other articles of a newspaper publisher necessary for the conduct of his business. *Harris v. Townley* (Civ. App.) 161 S. W. 5.

20. **Horses and wagon.**—The cart owned by a farmer in which he rode to his farm and the harness used in connection therewith were exempt. *Smith v. McBryde* (Civ. App.) 173 S. W. 234.

21. **Carriage.**—Under this article reserving to every family exempt from attachment and execution one carriage and buggy, a family automobile is exempt, being a carriage within the purview of the statute. *Hammond v. Pickett* (Civ. App.) 158 S. W. 174.

23. **Wages.**—Proceeds of a claim under an accident insurance policy for loss of wages by the insured while he was incapacitated from illness held not "current wages," exempt from garnishment by Const. art. 16, § 28, this article and art. 3788, though the premiums on the policy were paid by exempt wages. *Mitchell v. Western Casualty & Guaranty Ins. Co.* (Civ. App.) 163 S. W. 630.

26. **Wrongful levy on exempt property.**—A party whose horses, mares, and mules, including those exempt, are attached and sold, may recover the value of any two horses, mares, or mules, but not more. *Smith v. McBryde* (Civ. App.) 173 S. W. 234.

Where a judgment creditor levies upon and sells exempt property, and the debtor recovers a judgment, the creditor cannot, as against such judgment, offset his own judgment. *James McCord Co. v. Rea* (Civ. App.) 178 S. W. 649.

### Art. 3786. [2396] [2336] "Homestead" defined.

Cited, *American Bonding Co. of Baltimore v. Logan*, 106 Tex. 306, 166 S. W. 1132; *Hoefling v. Hoefling* (Civ. App.) 167 S. W. 210.

1. **But one homestead allowed.**—While the owner of a business may have the right to elect, if he is engaged in two businesses, which he will hold as his business homestead, a finding of the jury that his principal place of business was one and not the other shows an election. *Bowman v. Stark* (Civ. App.) 185 S. W. 921.

One is not entitled under the law to a mixed homestead, part urban and part rural. *Taylor v. Ullmann, Stern & Krause* (Civ. App.) 188 S. W. 746.

A party cannot claim a homestead right in two separate and distinct premises. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

Where land was purchased with declared purpose and intention to use such property as a homestead, accompanied by improvements and preparations to so occupy it, such property was not exempt from an attachment and sale as a homestead, while husband and wife were still occupying and using an existing homestead, and fact that proposed homestead was occupied under a lease preventing them from taking immediate possession was immaterial. *Pierce v. Langston* (Civ. App.) 193 S. W. 745.

3. **Estate or interest sustaining homestead right.**—Where a donee of land accepted the gift with the understanding that the property should be his homestead, and he began to improve the property and erect a house thereon with intent to occupy it as a home, and the improvements were completed and occupied, the property was his homestead. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275.

In the absence of evidence that plaintiff had made valuable improvements or resided on land under a parol contract for its purchase, he was not vested with a legal or equitable title to sustain a claim to homestead. *Page v. Vaughan* (Civ. App.) 173 S. W. 541.

An equitable title founded upon a conveyance in which an express lien is retained to secure unpaid purchase money may be the subject of a homestead, and exempt from the payment of ordinary debts. *Stratton v. Westchester Fire Ins. Co. of New York* (Civ. App.) 182 S. W. 4.

When a guardian's sale of land to husband and wife was confirmed by the county court, the title vested substantially in the purchasers, who, before delivery of deeds by the guardian and a ward, acquired such an interest that they could impress a homestead upon it. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

Where property has been conveyed by deed subject to vendor's lien, purchaser has title to support homestead; and, though vendor's lien may be greater than value of property, and superior to homestead right, property does not lose its status as a homestead. *Pierce v. Langston* (Civ. App.) 193 S. W. 745.

8. — **Tenants in common.**—A tenant in common and his wife held to have acquired a homestead on the common property. *Ward v. Walker* (Civ. App.) 159 S. W. 320.

10. **Intent to acquire homestead.**—Where a divorced woman occupied as a home premises set apart to her as a homestead, and then married one who intended to make the homestead the common homestead, actual occupancy held not essential. *Blackwell v. Vaughn* (Civ. App.) 176 S. W. 912.

While actual residence is not necessary to fix the homestead character upon land, the mere intention to occupy land in the future as a homestead, unaccompanied by affirmative acts evidencing the intention, is insufficient to create a homestead. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Civ. App.) 181 S. W. 534.

11. **Use and occupation as homestead necessary.**—When a homestead dedication has not been effected by actual occupancy, such effect must be accorded to ownership and visible acts of preparation to use it for a home. *Miller v. Flattery* (Civ. App.) 171 S. W. 253.

Instruction that one lost his homestead if he ceased to use or ceased to occupy the property as a homestead is erroneous; either use or occupancy being sufficient to maintain it. *Edwards v. Clemmons* (Civ. App.) 181 S. W. 840.

12. — **Character and mode of use or occupancy.**—Use of lots, on which plaintiff and his family did not reside, for agricultural purposes and to provide a residence for

plaintiff's son, who paid no rent, held insufficient, as a matter of law, to establish that the property was homestead. *Franklin v. Smith* (Civ. App.) 171 S. W. 501.

Evidence that one cultivated part of the land each year and used a part of it for pasture is sufficient to authorize a finding that he was continuing to make a homestead use of it. *Edwards v. Clemmons* (Civ. App.) 181 S. W. 840.

**15. Purpose of occupancy and use—Business homestead.**—The essentials of a business homestead to exempt it from the lien of a trust deed of the owner's property are that the owner shall be the head of a family and have a calling or business to which the place is adapted and reasonably necessary. *Bowman v. Stark* (Civ. App.) 185 S. W. 921.

Where the findings of the jury import that the place of business claimed exempt as a business homestead from the lien of a trust deed is not used as the principal business, but only as an incident thereto, the holder of the trust deed is entitled to a judgment on the findings foreclosing the mortgage lien. *Id.*

**17. Character of homestead as urban or rural—Extent and value of homestead.**—The word "lot" or "lots," as used in Const. art. 16, § 51 (Rev. St. 1911, art. 3786), relating to urban homesteads, held to mean merely a piece of ground and not an artificial subdivision of a city, and hence a homestead may be claimed on the fractional part of a lot. *General Bonding & Casualty Ins. Co. v. Trabue* (Civ. App.) 174 S. W. 689.

**20. Separate tracts or lots.**—One hundred acre tract situated four and a half miles from the ten-acre tract on which a husband and wife lived, the products of which were used to support the family, held a part of the homestead where they were entitled to a rural as distinguished from an urban homestead. *Cotten v. Friedman* (Civ. App.) 158 S. W. 780.

Tracts owned by husband and wife at husband's death, held sufficiently impressed with homestead character to permit widow, in addition to 100-acre tract on which she resided, to designate an additional 100 acres out of any of tracts. *Compton v. Woodward* (Civ. App.) 188 S. W. 271.

Use of mortgaged tract about one-fourth to one-half mile away from land on which maker of notes secured by deed of trust resided, as stock pasture, etc., held such as would impress upon it a homestead character. *Taylor v. Ullmann, Stern & Krause* (Civ. App.) 188 S. W. 746.

**22. Time of acquisition of homestead.**—Where a judgment debtor bought land for a homestead, and took possession as soon as possible, property was not subject to execution levied upon the land before there was any use of it by debtor as a homestead. *Ainsworth v. Dorsey* (Civ. App.) 191 S. W. 594.

**23. Change of homestead.**—A husband, to acquire a new homestead, so as to enable him to mortgage the old one, may acquire a new home in land owned at the time of the abandonment. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

After the wife's insanity, the husband may abandon the homestead and in good faith acquire a new one. *Pierce v. Gibson* (Sup.) 184 S. W. 502.

**24. Evidence of homestead right.**—Evidence held to warrant a finding that premises were impressed with a homestead status at the time of their conveyance by plaintiffs. *Miller v. Flattery* (Civ. App.) 171 S. W. 253.

Evidence, in an action on notes, held sufficient to sustain a finding that property conveyed therefor by the payee was not his business homestead. *Flynn v. J. M. Radford Grocery Co.* (Civ. App.) 174 S. W. 902.

In an action to recover land which a husband had conveyed without the consent of his wife, evidence held not to show that it was the wife's homestead. *Ragley-McWilliams Lumber Co. v. Davidson* (Civ. App.) 178 S. W. 785.

Evidence, in action on notes secured by a deed of trust on 64-acre tract about one-fourth to one-half mile away from smaller tract on which mortgagor lived, held to sustain a finding that smaller tract was the urban homestead of mortgagor. *Taylor v. Ullmann, Stern & Krause* (Civ. App.) 188 S. W. 746.

**27. Abandonment of homestead.**—That the owner of a business homestead, who was appointed postmaster, did not carry on the postal business in his homestead, but used another building, will not warrant an inference of abandonment; public officers being entitled to retain their business homesteads, so that on going out of office they may resume business. *McDowell v. Northcross* (Civ. App.) 162 S. W. 13.

The abandonment of a homestead is a question of intention. *Randleman v. Cargile* (Civ. App.) 163 S. W. 350.

Where complainant on one portion of lot erected a house in which he and his family resided, the subsequent construction of another house on another portion of the lot and the building of a deviation fence did not constitute an abandonment of the homestead character of that portion of the property so as to render it subject to execution. *Turnpaugh v. Dickey* (Civ. App.) 166 S. W. 1194.

On abandonment of a homestead, it becomes a subject of sale for the owner's debts. *Johnson v. Goldstein* (Civ. App.) 173 S. W. 458.

Suit to partition homestead by a widower was such an election no longer to use or occupy it as homestead that he could not, by amendment of his petition to one of trespass to try title, resume, as against answering defendants, the right he had abandoned. *Berry v. Godwin* (Civ. App.) 188 S. W. 30.

Abandonment of a homestead cannot be accomplished by mere intention. *Pierce v. Langston* (Civ. App.) 193 S. W. 745.

**28. — Consent of wife.**—A husband cannot abandon the homestead in fraud of the rights of the wife. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

**29. — Absence from homestead and other acts.**—If a husband and wife remove from their homestead after the execution of a conveyance thereof by the husband alone,

with the fixed intention not to again return to it as a home, they thereby abandoned it as a homestead, irrespective of whether they have since acquired another homestead. *Randleman v. Cargile* (Civ. App.) 163 S. W. 350.

Removal coupled with intent never to return constitutes abandonment of homestead. *Derry v. Harty* (Civ. App.) 187 S. W. 343.

Husband's abandonment of wife without cause, continuing until her death, forfeits all his claim of homestead which she owned at her death, though the property is community property. *Hollie v. Taylor* (Civ. App.) 189 S. W. 1091.

30. — **Intent to return to homestead.**—The mere intention to again resume business in a business homestead at an indefinite time in the future, dependent upon a contingency which may not happen, does not perpetuate the previous homestead character of the property. *McDowell v. Northcross* (Civ. App.) 162 S. W. 13.

Where the owner of a homestead sold part of the tract and removed to another locality, his mere intention to return at some indefinite time and take up his homestead upon the unimproved quarter section which he retained will not sustain a claim of a homestead exemption. *Johnson v. Conger* (Civ. App.) 166 S. W. 405.

Temporary absence of husband and wife with intent to return was not abandonment of the homestead. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

A farm occupied as a homestead does not lose that character when abandoned by the owner partly on account of ill health, with the intention of returning at a later date. *Rogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

31. — **Acquiring other residence or homestead.**—Occupation by husband and wife of a new homestead, to constitute an abandonment of the old one must be with intention of permanently residing thereon. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

Where the owner of a life estate in a homestead moved from the state and became a citizen of California, there was an abandonment of the homestead rendering it subject to his debts. *Johnson v. Goldstein* (Civ. App.) 173 S. W. 458.

A homestead may be abandoned notwithstanding another has not been acquired. *Derry v. Harty* (Civ. App.) 187 S. W. 343.

While temporary absence from home or renting it without intention to abandon will not deprive owner of homestead rights, moving away with intention of making a new place a homestead and adoption as such, destroys homestead rights in the first premises. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

32. — **Conveyance or sale.**—A general assignment by the owner of the business homestead is not an abandonment where he retained his homestead, and carried on his business subsequent to the assignment. *McDowell v. Northcross* (Civ. App.) 162 S. W. 13.

Conveyance of homestead property to third person to enable grantor to borrow money from bank and which was not intended to vest beneficial right in third person, held not abandonment of homestead. *Ainsworth v. Dorsey* (Civ. App.) 191 S. W. 594.

33. — **Renting or leasing.**—Where defendant made a general assignment, and his assignee sold his business homestead, and the person in possession paid only one month's rent to the purchaser, holding the remaining rent until the right to the homestead should be determined, there was no question of abandonment by lease or other contract. *McDowell v. Northcross* (Civ. App.) 162 S. W. 13.

Lease of land, including part which had been used for homestead for five years, when no other homestead had been acquired, held a temporary renting, which, under the express provisions of Const. art. 16, § 51, did not change the character of the homestead. *Bogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

While temporary absence from home or renting it without intention to abandon will not deprive owner of homestead rights, moving away with intention of making a new place a homestead and adoption as such, destroys homestead rights in the first premises. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

35. — **Evidence.**—The court's finding that a wife did not abandon her homestead, but merely left her husband temporarily to earn a living for herself and her minor child, held supported by the evidence. *Gutheridge v. Gutheridge* (Civ. App.) 161 S. W. 892.

Evidence held to support finding that land sold under deed of trust had been abandoned as a homestead prior to the execution of the deed of trust. *Bradshaw v. Kearby & Kearby* (Civ. App.) 168 S. W. 436.

Certain and conclusive evidence of abandonment with no intention to return and claim the exemption is required before a homestead once occupied as such can be subjected to a forced sale. *Bogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

In the absence of any evidence from the husband as to their purpose in leaving and their intention to again occupy a homestead, the wife's statement as to such purpose and intent was competent. *Farmers' & Merchants' Nat. Bank of Abilene v. Ivey* (Civ. App.) 182 S. W. 706.

In action by widow to recover title and possession of a lot as a homestead, evidence of removal and declarations held to support finding of abandonment. *Derry v. Harty* (Civ. App.) 187 S. W. 343.

Evidence held sufficient to show abandonment of homestead by defendant in action on note secured by trust deed to the premises in question. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

36. **Estoppel to claim homestead.**—So long as the owner is in possession of his homestead, no conduct on his part can estop him to claim the exemption. *McDowell v. Northcross* (Civ. App.) 162 S. W. 13.

A husband and wife may be estopped from asserting homestead rights by representations made to induce conveyance of, or incumbrance on, the property, where such premises are not occupied at the time as a homestead. *Calvin v. Neel* (Civ. App.) 191 S. W. 791.

**37. Conveyance or Incumbrance of homestead.**—See art. 1115 and notes.

A business homestead, if exempt at the date of a general assignment, does not pass to the assignee by virtue of that instrument. *McDowell v. Northcross* (Civ. App.) 162 S. W. 13.

Neither a business nor a residence homestead, though afterwards abandoned as such, will pass under a general assignment, if not abandoned until after execution. *Id.*

A mortgage on the homestead to secure a debt not within the constitutional exceptions is void as against mortgagee knowing the facts. *Stockton v. Jones* (Civ. App.) 175 S. W. 859.

Under Const. art. 16, § 50, any attempt to create a lien upon a homestead to secure a debt is void. *Wadsworth v. Powell* (Civ. App.) 191 S. W. 169.

40. — **Sale.**—Contract for sale of homestead occupied as such, though not enforceable, held not unlawful, and enforceable upon abandonment of the home or the death of the wife. *Pitts v. Kennedy* (Civ. App.) 177 S. W. 1016.

42. — **Mortgage.**—In an action to cancel a deed claimed to have been intended as a mortgage, on the ground that it covered homestead property, evidence held to sustain a finding of notice to the mortgagee that the property was homestead property. *Mitchell v. Morgan* (Civ. App.) 165 S. W. 883.

Whether land claimed as a homestead is exempt from the operation of a trust deed must be determined by the conditions existing when the deed was given. *Bogart v. Cowboy State Bank & Trust Co.* (Civ. App.) 182 S. W. 678.

In action on notes and to foreclose vendor's lien upon defendants' homestead, evidence held to show that defendants' deed and notes to plaintiff and plaintiff's reconveyance reciting the consideration of notes were intended to create mortgage on homestead. *Wadsworth v. Powell* (Civ. App.) 191 S. W. 169.

In suit to cancel deeds as a mortgage upon homestead, it was for plaintiff to allege facts showing the mortgage was one not permitted by the constitutional provision on that subject (Const. art. 16, § 50). *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

44. — **Effect of abandonment or termination of homestead right.**—There was no completed sale of a homestead prior to the delivery of a deed to the purchaser, so that if the homestead was abandoned prior to the delivery it became subject to a judgment against the grantor. *Texas Moline Plow Co. v. Henderson* (Civ. App.) 168 S. W. 414.

47. — **Estoppel to deny validity.**—Vendor, whose homestead had been conveyed to a purchaser in fraud of her right to have the entire consideration paid in cash, held estopped to rescind as against a subsequent purchaser, after the first purchaser had been in peaceable possession, collecting the revenues for several months. *Miller v. Flattery* (Civ. App.) 171 S. W. 253.

Where, during a temporary absence by a husband and wife from the homestead, the husband executed a mortgage thereon reciting that it was not the homestead, the wife held not estopped, unless she induced the mortgagee to accept the mortgage. *Parker v. Schrimsher* (Civ. App.) 172 S. W. 165.

A husband and wife, representing that property mortgaged by the husband alone was not homestead, held estopped from asserting the contrary. *Id.*

Where husband and wife executed their warranty deed to secure a loan conveying part of homestead tract, and the grantee executed a deed thereof to defendant with the knowledge of the husband and wife, the surviving wife was not thereby estopped from suing to cancel both deeds and to remove the cloud from the title. *Bailey v. Bailey* (Civ. App.) 188 S. W. 264.

**Art. 3787. Proceeds of sale of homestead exempt for six months.**

**In general.**—The assignor of lien notes had no claim thereto as exempt property on the ground that his assignment of them was made with the purpose of applying the proceeds to pay a debt due upon his business homestead. *Baker v. Robertson* (Civ. App.) 163 S. W. 326.

Money paid upon an insurance policy upon a house not the insured's homestead is not exempt from garnishment for payment of his debts. *Stratton v. Westchester Fire Ins. Co. of New York* (Civ. App.) 182 S. W. 4.

**Proceeds of exempt property—Voluntary sale or exchange.**—Under Const. art. 16, §§ 50, 52, and Rev. St. 1911, arts. 3235, 3422, 3427, 3785, 3786, a homestead, on the death of the owner, vests in his heirs free from debts, and the proceeds of a voluntary sale are also free from debts, though the probate court failed to set aside the homestead under article 3413, notwithstanding article 3787, declaring that the proceeds of a voluntary sale shall not be subject to forced sale within six months after such sale. *American Bonding Co. of Baltimore v. Logan*, 166 S. W. 1132, 106 Tex. 306.

Where three of four tracts were impressed with homestead character, surviving wife occupying 100-acre tract might maintain her residence thereon and exchange interest in other two tracts for another tract equally susceptible of being used for homestead purposes. *Compton v. Woodward* (Civ. App.) 188 S. W. 271.

— **Involuntary conversion.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 4155, 4160, probate court, which ordered sale of particular land of wards by guardian, held to have power to direct application of proceeds to payment of wards' debt, despite article 3787. *Ridling v. Murphy* (Civ. App.) 191 S. W. 206.

— **Proceeds of Insurance.**—A husband could not be deprived of his constitutional exemption in the insurance money coming from the destruction of the homestead by a proceeding to which he was not a party; such proceeds being protected by the constitutional provision exempting the homestead itself, while the proceeds from its voluntary sale would be exempt from payment of debts only for a limited statutory period. *Johnson v. Hall* (Civ. App.) 163 S. W. 399.

Since insurance money received for the loss of a homestead is personalty, its transfer is not subject to the restrictions placed upon the alienation of a homestead. *Id.*

Insurance money on a homestead, occupied as such, when insured by the purchaser, under express reservation of a vendor's lien, without agreement to insure for the benefit of the vendor, was not subject to payment of the vendor's foreclosure judgment against the purchaser. *Stratton v. Westchester Fire Ins. Co. of New York* (Civ. App.) 182 S. W. 4.

— **Property exchanged for homestead.**—Land taken in exchange for a homestead is exempt from attachment for a period of six months, though owner does not reside on it, and the owner's conveyance within that period, although made with the intent to defraud his creditors, passes good title. *Witt v. Teat* (Civ. App.) 167 S. W. 302.

Where levy of execution upon land exchanged for homestead of the judgment debtor is made within six months after the exchange, sale thereunder will be restrained by injunction, although the six months has expired; the levy made within such time being wholly ineffectual. *American Nat. Bank of Ft. Worth v. Strong* (Civ. App.) 188 S. W. 1014.

#### Art. 3788. [2397] [2337] Property exempt to others than families.

Cited, *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 166 S. W. 1132; *McFarland v. Hammond* (in dissenting opinion) 106 Tex. 579, 173 S. W. 645.

**In general.**—Proceeds of a claim under an accident insurance policy for loss of wages by the insured while he was incapacitated from illness held not "current wages," exempt from garnishment by Const. art. 16, § 28, this article, and art. 3785, though the premiums on the policy were paid by exempt wages. *Mitchell v. Western Casualty & Guaranty Ins. Co.* (Civ. App.) 163 S. W. 630.

Where two mules were the property of an unmarried man at the time of levy thereon to satisfy judgment against him and his brother, one of such mules was exempt. *Hawks v. Longbotham* (Civ. App.) 188 S. W. 734.

#### Art. 3791. [2400] [2340] Public libraries.

Cited, *American Bonding Co. of Baltimore v. Logan* (Civ. App.) 166 S. W. 1132.

#### Art. 3792. [2401] [2341] Homestead exemption does not apply, when.

**Purchase money.**—If a lot intended as a residence and thereafter occupied as a homestead was purchased with 20 other lots for a lump sum, vendor's lien held enforceable against it for the full price of all the lots. *Trammell v. Rosen* (Civ. App.) 163 S. W. 145.

If a lot intended and used as a homestead was purchased prior to other lots, all conveyed at the same time, possession taken, and improvements made thereon, held that it was impressed with a homestead character, and the husband could not give a lien thereon to secure payment for the other lots. *Id.*

Where vendor's lien notes were given for part of the price of land, and renewal notes were subsequently given reserving a lien, that the land subsequently became the homestead of the purchaser and his wife did not prevent the foreclosure of the lien. *Duller v. McNeill* (Civ. App.) 163 S. W. 636.

Neither a vendee nor his grantee can acquire homestead rights as against a vendor's lien reserved in a note given by the purchaser. *Wood v. Smith* (Civ. App.) 165 S. W. 471.

A deed of trust as further security for the payment of a vendor's lien note is not avoided by the fact that the property was occupied by the purchaser as a homestead when the deed was executed and delivered. *Id.*

A purchaser of land holding under a deed expressly retaining a lien for part of the purchase money cannot hold the land as a homestead against the vendor holding vendor's lien purchase-money notes. *Stratton v. Westchester Fire Ins. Co. of New York* (Civ. App.) 182 S. W. 4.

The wife of the purchaser is not a necessary party to action to enforce the vendor's lien, though the purchaser has used the property as a homestead. *Waldon v. Davis* (Civ. App.) 185 S. W. 1000.

If vendees conveyed land to satisfy purchase-money debt, leaving deficit, and a parcel was reconveyed to them under agreement that the lien reserved was for the original price, the amount thereof would attach, though the parcel was occupied as a homestead. *Jenkins v. Guaranty State Bank of Palestine* (Civ. App.) 189 S. W. 314.

To the extent that the consideration expressed in notes secured by mortgage on a homestead represents the original purchase-money debt due on the homestead, they express a valid lien on the homestead. *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

— **Other security.**—Where debt against homestead was secured by vendor's lien thereon and assignment of judgment against third person, the lienholder, as against set-off in favor of judgment debtors accruing subsequent to assignment, was required by law to apply judgment to payment of debt at debtor's request before selling homestead under the lien. *Pease v. Randle* (Civ. App.) 191 S. W. 566.

**Loans and advances for purchase money.**—If the debt owed to one for his payment of the purchase money on a homestead is extended by giving him new notes, the old lien may be perpetuated without loss of validity. *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

**Improvements.**—A subcontractor cannot claim an equitable lien on a homestead for labor or material where the statutory lien has not been secured by written contract as

required by article 5631, Vernon's Sayles' Ann. Civ. St. 1914. *Collops v. George W. Smith Lumber Co.* (Civ. App.) 185 S. W. 1043.

Under Const. art. 16, § 50, as to mortgage on the homestead for improvements, that part of a mortgage which represented material furnished for improvements put on the premises after the homestead right had attached and prior to the mortgage was not a valid lien for such improvements. *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

**Loans and advances for improvements.**—Under Const. art. 16, § 50, as to mortgage on the homestead for improvements, that part of a mortgage which represented money furnished for improvements put on the premises after the homestead right had attached and prior to the mortgage was not a valid lien for such improvements. *M. Kangerga & Bro. v. Willard* (Civ. App.) 191 S. W. 195.

**Attorneys' fees.**—Where vendor's lien notes provided for attorney's fees, the lien was enforceable for such fees, as well as for the original debt, though the land subsequently became homestead. *Duller v. McNeill* (Civ. App.) 163 S. W. 636.

A purchase-money note, stipulating for the payment of attorney's fees, creates a lien upon the land for the fees, which cannot be defeated by the subsequent establishment of a homestead. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

Under the Constitution, protecting the homestead, except for the purchase money, etc., original purchase-money note, and the note renewing it, which stipulated for attorney's fees, the latter being executed subsequently to the fixing of the buyers' homestead on the land, did not create a charge for the fees thereon. *Id.*

## CHAPTER TWO

### EXCESS OVER HOMESTEAD, ETC., HOW SET APART AND SUBJECTED TO EXECUTION

Art.	Art.
3794. Voluntary designation of, and who may set aside homestead.	3817. Provisions cumulative.
3795. Mode of setting it apart.	3818. Personal property may be designated.

**Article 3794. [2403] [2343] Voluntary designation of, and who may set aside, homestead in the country.**

**Designation of rural homestead out of part of larger tract.**—Where a debtor, who was the head of a family, and resided upon a large tract of land, conveyed it in fraud of his creditors, he is entitled, upon the setting aside of the conveyance, to select and hold 200 acres as his homestead. *Cobern v. Stevens* (Civ. App.) 167 S. W. 207.

A husband may designate a homestead of 200 acres out of a larger tract, and in so doing is not limited to the method prescribed by this article and art. 3795; subject only to the limitation that the land selected includes his residence and the land actually used as homestead. *Hughes v. Hughes* (Civ. App.) 170 S. W. 847.

**Art. 3795. [2404] [2344] Mode of setting it apart.**

**Necessity and sufficiency of designation.**—A husband may designate a homestead of 200 acres out of a larger tract, and in so doing is not limited to the method prescribed by this article and art. 3794; subject only to the limitation that the land selected includes his residence and the land actually used as homestead. *Hughes v. Hughes* (Civ. App.) 170 S. W. 847.

**Art. 3817. [2426] [2366] Provisions of this chapter cumulative.**

**Selling under trust deed.**—Where an urban homestead claimed on two lots is excessive as to part of the second lot, the excess may be sold under a trust deed by selling an undivided interest. *General Bonding & Casualty Ins. Co. v. Trabue* (Civ. App.) 174 S. W. 689.

**Art. 3818. [2427] [2367] Personal property may be designated, etc.**

**In general.**—A debtor has the equitable right to have a chattel mortgage debt satisfied first from the proceeds of the sale of the unexempt mortgaged property before resorting to the sale of the debtor's exempt property. *Pugh v. Whitsitt & Guerry* (Civ. App.) 161 S. W. 953.



## TITLE 56

## EXPRESS COMPANIES

**Article 3821. [2430] Penalties against, and railroad commission to enforce.**

**Penalties not enforceable.**—An individual cannot recover from an express company for extortion and discrimination in rates the penalty prescribed by the railroad act. *Helm v. Wells Fargo & Co. Express* (Civ. App.) 177 S. W. 134.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Negligence in general.**—Evidence held to warrant a finding that the ice on which an express company's employé had slipped had formed from water which leaked from a gutter on the station. *Wells Fargo & Co. Express v. Wilson* (Civ. App.) 175 S. W. 495.

**Liability for delay in transportation.**—Parties extorting money by duress held not entitled to complain that express company's delay in transmitting money to them allowed the party from whom it was extorted to garnish it. *American Express Co. v. North Ft. Worth Undertaking Co.* (Civ. App.) 179 S. W. 908.

## TITLE 57

## FACTORS AND COMMISSION MERCHANTS

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Suing in own name.**—A cotton factor, who engaged in repeated transactions with the defendant in behalf of his principal, could maintain action in his own name for a conversion of the principal's cotton stored with defendant by such factor. *Nacogdoches Compress Co. v. Hayter* (Civ. App.) 188 S. W. 506.

**Construction of contract.**—A contract to furnish rubber tires "on consignment" to be sold, and all sales settled for, any tires remaining unsold at the end of the year to be bought by the consignee, is clearly a consignment on commission rather than a sale, and constitutes the consignee the factor or agent of the manufacturer, though the tires were billed as though sold to the consignee. *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.* (Civ. App.) 159 S. W. 1013.

Intention of parties held controlling factor in construing contract as to whether it amounted to a sale of automobiles or consignment to plaintiff as agent for defendants for sale. *Overstreet v. Hancock* (Civ. App.) 177 S. W. 217.

Contract by plaintiff to sell automobiles in certain territory held not a purchase of cars by him, but a consignment to him as agent for sale. *Id.*

**Duty and liability in general.**—Where an uninstructed factor endeavors to secure the fair market value, he is not liable in damages, though he sells for less than the market value. *Wm. D. Cleveland & Sons v. Jamison* (Civ. App.) 182 S. W. 1175.

Factor commission merchant or broker receiving property from his principal and selling same under latter's instruction, and paying him proceeds of sale, is guilty of conversion if his principal has no title to property, and no right to sell, and is liable in trover to real owner for its value; his good faith and want of knowledge or notice of owner's title being no defense. *Alamo Live Stock Commission Co. v. Heimer* (Civ. App.) 192 S. W. 591.

Plaintiff sold cattle to one representing himself to be defendant's cattle buyer, received check drawn on defendant, and cattle were delivered to defendant, a commission merchant, who sold them and applied proceeds to payment of indebtedness of cattle buyer. Held, that regardless of agency relationship of defendant and buyer, defendant was liable to seller as a factor or commission merchant for proceeds of cattle. *Id.*

**Advances.**—In the absence of an agreement or direction to the contrary before advancements made, a factor who has made advancements may, over his principal's objection, sell enough of the goods to reimburse himself. *Wm. D. Cleveland & Sons v. Jamison* (Civ. App.) 182 S. W. 1175.

Factors, who had advanced approximately the value of cotton consigned to them for sale, held authorized to sell the cotton at what seemed to them the market price, where the principal had authorized them to use their best judgment and failed to comply with their demand to remit the difference between the amount advanced and the market price when the demand was made. *Id.*

**TITLE 57½****FEDERAL FARM LOAN BONDS**

**Article 3832½. Investments and public deposits.**—That hereafter all bonds issued under and by virtue of the Federal Farm Loan Act, approved by the President of the United States July 17, 1916, which is “An Act to provide capital for agricultural development, to create standard forms of investments based upon farm mortgages; to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes,” shall hereafter be lawful investment for all fiduciary and trust funds in this State and may be accepted as security for all public deposits where deposits of bonds or mortgages are authorized by law to be accepted; such bonds shall be lawful investment for all funds which may be lawfully invested by guardians, administrators, trustees and receivers, for savings departments of banks incorporated under the laws of Texas, for banks, savings banks and trust companies chartered under the laws of Texas, and for all insurance companies of every kind and character chartered or transacting business under the laws of Texas, where investments are required or permitted by the laws of this State; provided, further, that where such bonds are issued against and secured by promissory notes or other obligations, the payment of which is secured by mortgage, deed of trust or other valid lien upon unencumbered real estate situated in this State, then such bond or bonds so issued and so secured shall be regarded for investment purposes by insurance companies as “Texas securities,” within the meaning of the laws of this State governing such investments. [Act March 8, 1917, ch. 63, § 1.]

Became a law March 8, 1917.

## TITLE 58

## FEES OF OFFICE

Chap.

1. Certain state officers.
3. County officers.

Chap.

4. General provisions.

## CHAPTER ONE

## CERTAIN STATE OFFICERS

## 2. SECRETARY OF STATE

**Article 3837.** [2439] **Fees of state department.**—The secretary of state, besides other fees that may be prescribed by law, is authorized and required to charge for the use of the state the following fees:

For each and every charter, amendment or supplement thereto, of a private corporation created for the purpose of operating or constructing a railroad, magnetic telegraph line or street railway or express company, authorized or required by law to be recorded in said department, a fee of two hundred dollars to be paid when said charter is filed; provided, that if the authorized capital stock of said corporation shall exceed one hundred thousand dollars, it shall be required to pay an additional fee of fifth cents for each one thousand dollars authorized capital stock, or fractional part thereof, after the first.

For each and every charter, amendment or supplement thereto, of a private corporation intended for the support of public worship, any benevolent, charitable, educational, missionary, literary, or scientific undertaking, the maintenance of a library, the promotion of painting, music or other fine arts, the encouragement of agriculture or horticulture, the maintenance or public parks, the maintenance of a public cemetery not for profit, a fee of ten dollars to be paid when the charter is filed.

For each and every charter, amendment or supplement thereto, of a private corporation created for any other purposes intended for mutual profit or benefit, a fee of fifty dollars shall be paid when said charter is filed provided, that, if the capital stock of said corporation issued and outstanding shall exceed ten thousand dollars, it shall be required to pay an additional fee of ten dollars for each additional ten thousand dollars of its authorized capital stock, or fractional part thereof, after the first, and provided further that such fee shall not exceed the sum of twenty-five hundred dollars.

For each commission to every officer elected or appointed in this state, a fee of one dollar; and each and every state, district, county and precinct officer elected or appointed in this state is required to apply for and receive his commission; provided, that the secretary of state shall not be required to forward copies of laws to nor attest the authority of any officer in this state who fails or refuses to take out his commission as required herein.

For each official certificate, a fee of one dollar.

For each warrant of requisition, a fee of two dollars.

For every remission of fine or forfeiture, one dollar.

For copies of any paper, document or record in his office for each one hundred words, fifteen cents.

For each and every charter, amendment or supplement thereto, taken out under chapter 16, title 25, Revised Statutes, (channel and dock corporations), a fee of two hundred dollars shall be paid to the secretary of state for the use and benefit of the state, which shall be paid when the charter, amendment or supplement thereto is filed for record.

For each foreign corporation obtaining permit to do business in this state, there shall be paid to the secretary of state as permit fees the following; fifty dollars for the first ten thousand dollars of its capital stock issued and outstanding and ten dollars for each additional ten thousand dollars or fractional part thereof; provided, that in no event shall such fee exceed the sum of twenty-five hundred dollars; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph line in this state, shall in no event exceed the sum of twenty-five hundred dollars; and provided further that mutual building and loan companies, so called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars or fractional part thereof of its capital stock issued and outstanding and ten dollars for each additional one hundred thousand dollars or fractional part thereof and where the company is a foreign one, then the fee shall be based upon the capital invested in the state of Texas. [Acts 1883, p. 72; Acts 1889, p. 87; Acts 1889, p. 93; Acts 1905, p. 135; Acts 1907, S. S., p. 500; Acts 1909, S. S., p. 267; Act March 17, 1917, ch. 85, § 1.]

**Explanatory.**—The act amends art. 3837, Revised Statutes of Texas. Sec. 2 repeals all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

Cited, *A. Leschen & Sons Rope Co. v. Moser* (Civ. App.) 159 S. W. 1018.

**Constitutionality.**—This article and article 7394, imposing a franchise tax on any foreign corporation, as a condition to its right to do business in Texas, of a given percentage of all the corporation's capital and surplus, representing all of its property, wherever situated, and all of its business, both intrastate and interstate, thereby placing a tax on the corporation's property rights beyond the jurisdiction of the state for taxation purposes, are unconstitutional. *Crane Co. v. Looney* (D. C.) 213 Fed. 260.

## CHAPTER THREE

### COUNTY OFFICERS

Art.		Art.	
	<b>1. COUNTY JUDGE</b>		<b>7. COUNTY COMMISSIONERS</b>
3850.	Commissions to county judge.	3870.	Per diem pay of county commissioners.
3852.	Compensation for ex officio services.		
	<b>3. CLERKS OF THE COUNTY COURT</b>		<b>10. COUNTY TREASURER</b>
3862.	Compensation for ex officio services.	3873.	County treasurers' commissions.
		3874.	Commissions on school fund.
		3875.	Commissions shall not exceed \$2,000 annually.
	<b>4. SHERIFFS</b>		<b>13. NOTARIES PUBLIC</b>
3866.	Compensation for ex officio services.	3878.	Fees of notaries public.

#### 1. COUNTY JUDGE

##### **Article 3850. [2448] [2384] Commission allowed county judge.**

**Annual accounts.**—The commissions allowed the county judge by this article are payable on all cash receipts shown by any annual account of the guardian when such account is approved by the judge to whom it is presented, rather than of approval of the guardian's final account. *Grice v. Cooley* (Civ. App.) 179 S. W. 1098.

The word "exhibits," as used in this article refers to annual accounts. *Id.*

##### **Art. 3852. [2450] [2386] Compensation for ex officio services.**

**Constitutionality.**—An allowance to a county judge for ex officio services already performed, no salary having been previously provided, under this article was not invalid un-

der Const. art. 3, § 44, prohibiting the granting of "any extra compensation," after service rendered. *Dallas County v. Lively*, 167 S. W. 219, 106 Tex. 364, opinion of Supreme Court conformed to (Civ. App.) 167 S. W. 1107.

### 3. CLERKS OF THE COUNTY COURT

#### Art. 3862. [2459] [2395] Compensation for ex officio services.

**What constitutes filing.**—Under arts. 3862, 6792, 6789, if the clerk fails to demand fees immediately and retains an instrument in his custody pending notification of necessity of paying fees, the instrument is filed for record, and operates to give notice to all persons of its existence. *American Exch. Nat. Bank of Dallas v. Colonial Trust Co.* (Civ. App.) 186 S. W. 361.

### 4. SHERIFFS

#### Art. 3866. [2462] [2398] Compensation for ex officio services.

**Authority of commissioners' court.**—Where items of account allowed to sheriff by commissioners' court could not, under any circumstances, have been proper charges against county, want of authority on part of commissioners' court to allow them was jurisdictional, so that its action in so doing had no conclusive effect. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

**Action of commissioners' court of county in allowing to sheriff claims for attending commissioners' court, serving notices of election, etc., when his compensation for such services was limited to the annual salary paid him under this article was void, and had no conclusive or final effect; court's want of authority being jurisdictional.** Id.

**Liability of sureties for unauthorized compensation.**—In view of this article, sureties on official bond of sheriff to whom a salary was allowed and paid as compensation for summoning jurors, serving election notices, etc., held not liable to county for moneys paid the sheriff on claims for attending sessions of commissioners' court and for serving notices of election. *Jeff Davis County v. Davis* (Civ. App.) 192 S. W. 291.

### 7. COUNTY COMMISSIONERS

#### Art. 3870. [2466] [2402] Per diem pay of county commissioners.

Cited, *Altgelt v. Gutzeit* (Civ. App.) 187 S. W. 220.

### 10. COUNTY TREASURER

#### Art. 3873. [2467] [2403] County treasurers' commissions.

**Power to fix compensation.**—An order of a commissioners' court attempting to reduce the compensation of a county treasurer for past services, held void. *Montgomery County v. Talley* (Civ. App.) 169 S. W. 1141.

An order fixing the salary of the county treasurer at a stated sum per annum cannot be maintained as one fixing a rate of commissions on moneys received and disbursed. *Smith v. Wise County* (Civ. App.) 187 S. W. 705.

The commissioners' court held not entitled, under arts. 3873-3875, to fix the salary of the county treasurer at a sum less than \$2,000 provided for by statute. Id.

**Right to maximum allowance.**—Where an order, fixing the compensation of a county treasurer was void, the treasurer was entitled to receive the compensation established by arts. 3873, 3875. *Montgomery County v. Talley* (Civ. App.) 169 S. W. 1141.

The county treasurer, though he knew, when a candidate and inducted into office, that the commissioners' court did not intend to allow him the statutory compensation is not estopped from claiming it, where the court did not give legal effect to their intention by proper order. *Smith v. Wise County* (Civ. App.) 187 S. W. 705.

As commissioners' court cannot, under arts. 3873-3875, fix regular salary for county treasurer, held that under orders of court, treasurer was entitled to receive commissions at rate fixed until they reached sum of \$2,000 per annum, regardless of subsequent orders limiting his total compensation to less sum. Id.

#### Art. 3874. [2468] Commissions on school fund.

Cited, *Smith v. Wise County* (Civ. App.) 187 S. W. 705.

#### Art. 3875. [2469] [2405] Commissions shall not exceed \$2,000 annually.

Cited, *Smith v. Wise County* (Civ. App.) 187 S. W. 705.

**Right to statutory compensation.**—Where an order, fixing the compensation of a county treasurer was void, the treasurer was entitled to receive the compensation established by arts. 3873, 3875. *Montgomery County v. Talley* (Civ. App.) 169 S. W. 1141.

Where a commissioners' court attempted by a void order to fix the county treasurer's salary at \$600 per annum, the fact that defendant when elected knew that it was not in-

tended that he should receive the compensation specified by this article, did not estop him from retaining such amount. *Id.*

**Power to fix annual salary.**—Under this article commissioners' court had no jurisdiction to fix a treasurer's compensation at a yearly salary. *Montgomery County v. Talley* (Civ. App.) 169 S. W. 1141.

13. NOTARIES PUBLIC

**Art. 3878. [2472] [2408] Fees of notaries public.**—Notaries public shall receive the following fees:

Protesting a bill or note for non-acceptance or non-payment, register and seal.....	\$1.00
Each notice of protest.....	.25
Protest in all other cases, for each 100 words.....	.25
Certificate and seal to such protest.....	.50
Taking the acknowledgment or proof of any deed or other instrument in writing, for registration, including certificate and seal..	.50
Taking an acknowledgment of a married woman to any deed or other instrument of writing authorized to be executed by her, including certificate and seal.....	.50
Administering an oath or affirmation with certificate and seal....	.50
All certificates under seal not otherwise provided for.....	.50
Copies of all records and papers in their office, including certificate and seal, if less than 200 words.....	.50
If more than 200 words, for each 100 words in excess of 200, in addition to the fee of fifty cents.....	.25
All notarial acts not provided for.....	.50
Taking the depositions of witnesses, for each 100 words.....	.15
Swearing a witness to depositions, making certificate therefor with seal, and all other business connected with taking such deposition	.50

[Act Aug. 23, 1876, p. 293, § 18; Act Feb. 20, 1915, ch. 21, § 1.]

CHAPTER FOUR

GENERAL PROVISIONS

<b>Art.</b>	<b>Art.</b>
3881. Maximum amount of fees allowed.	3892. Delinquent fees, collection of, commissions on, remainder paid to treasurer.
3882. Maximum fees in certain counties.	3893. Compensation for ex-officio services, etc., may be allowed by commissioners' court, proviso.
3883. Maximum fees in certain counties of 37,000 inhabitants or containing cities of 25,000.	3903. County judge may authorize appointment of deputies and assistants; assistants for district and county attorneys in certain counties; compensation; additional allowance; salaries; order of county judge; compensation, how fixed; payment.
3883a. Maximum fees of county attorney in counties having more than 100,000 population; accounts; proviso.	3903a. Applicable to counties having both district and county attorney.
3887. Last United States census to govern as to population of cities.	
3888. Amounts allowed to be retained out of fees collected; state not responsible.	
3889. Fees, how disposed of; excess fees, etc.	

**Article 3881. Maximum amount of fees allowed.**

Cited, *Anderson County v. Hopkins* (Civ. App.) 187 S. W. 1019.

**Constitutionality.**—Power of Legislature to fix fees or compensation of constables, or methods of ascertaining fees, is not limited by the Constitution. *Harris County v. Smith* (Civ. App.) 187 S. W. 701.

**Former statute—"Next preceding city election."**—In Acts 25th Leg. Sp. Sess. c. 15 (10 Gammel's Laws, pp. 1482-1484), amending 10 Gammel's Laws, pp. 1445-1453, § 10, limiting compensation of constables in cities of certain population determinable by "next preceding city election," the words do not mean the election next preceding the passage of the law, but the election next preceding the occasion which gives rise to its application. *Harris County v. Smith* (Civ. App.) 187 S. W. 701.

In Acts 25th Leg. Sp. Sess. c. 15 (10 Gammel's Laws, pp. 1482-1484), amending 10 Gammel's Laws, pp. 1445-1453, the words "next preceding city election" refer to regular or general elections for the election of city officers held at fixed intervals, and not to special elections. *Id.*

**Art. 3882. Maximum fees in certain counties.**

Cited, *Anderson County v. Hopkins* (Civ. App.) 187 S. W. 1019.

**Art. 3883. Maximum fees in counties of 37,000 inhabitants or containing cities of 25,000.**—In counties containing a city of over twenty-five thousand inhabitants, or in such counties as shown by the United States Census of 1910, shall contain as many as thirty-seven thousand inhabitants, the following amount of fees shall be allowed, viz: county judge, an amount not exceeding thirty-five hundred dollars per annum; sheriff, an amount not exceeding thirty-five hundred dollars per annum; clerk of the county court, an amount not exceeding twenty-seven hundred and fifty dollars per annum; county attorney, an amount not exceeding thirty-five hundred dollars per annum; district attorney, an amount not exceeding twenty-five hundred dollars, inclusive of the five hundred dollars allowed by the Constitution and paid by the State; clerk of the district court, an amount not exceeding twenty-seven hundred and fifty dollars per annum; collector of taxes, an amount not exceeding twenty-seven hundred and fifty dollars per annum; assessor of taxes, an amount not exceeding twenty-seven hundred and fifty dollars per annum; provided, the compensation fixed herein for sheriffs and their deputies shall be exclusive of any rewards received for the apprehension of criminals or fugitives from justice. [Acts 1913, p. 246, § 1; Act March 29, 1917, ch. 130, § 1.]

**Explanatory.**—The act amends "article 3883 of chapter 121 of the general laws of the State of Texas, passed by the Thirty-Third Legislature at its regular session." Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 3883a. Maximum fees of county attorney in counties having more than 100,000 population; accounts; proviso.**—That in any county having a population in excess of one hundred thousand inhabitants according to the census of the United States of 1910, where there is no district attorney, the county attorney of such county shall be allowed to retain out of the fees earned and collected by him the sum of \$4,000.00 per annum, and in addition thereto one-fourth of the excess of such fees collected by him, provided, however, that such additional amount retained by him out of the excess fees shall not exceed the sum of \$2,000 per year, the remainder to be paid into the treasury of the county; provided that in arriving at the amount collected by him he shall include the fees arising from all classes of criminal cases whether felony or misdemeanor arising in any of the courts in such county now existing, or which may hereafter be created including habeas corpus hearing and fines and forfeitures; provided that after the 30th day of November and before the first day of January following each year, he shall make a full and complete report and accounting to the county judge of the county of all of such fees so collected by him; provided the said county attorney shall not receive any moneys from any source whatsoever in excess of the six thousand dollars above provided for. Such fees, however, to be included in the reports herein provided for and to be taken into consideration in arriving at the total maximum compensation provided in this Act. And further provided, that except as herein specifically provided otherwise, all provisions of Chapter 4, Title 58 of the Revised Civil Statutes of Texas of 1911, as amended by Chapter 121 of the Acts of the Regular Session of the Thirty-third Legislature, shall apply and remain in full force and effect. [Act May 19, 1917, 1st C. S., ch. 34, § 1.]

Took effect 90 days after May 17, 1917, date of adjournment.



**Art. 3887. Last United States census to govern in all cases.**

**Former statute.**—Under Maximum Fee Bill, § 10, as amended, held, that method of computing population provided in section 17 must give way to provision of section 10 when applied to county having population of more than 25,000, but casting less than 3,000 votes at preceding presidential election. *Sparks v. Kaufman County* (Civ. App.) 194 S. W. 605.

**Art. 3888. Amounts allowed to be retained out of fees collected; state not responsible.**

See *Anderson County v. Hopkins* (Civ. App.) 187 S. W. 1019, note under art. 3889.

**Art. 3889. Fees, how disposed of; excess fees, etc.**

**In general.**—Under this article and art. 3892, providing that the assessor shall be entitled to one-fourth of the fees in excess of the amount of his salary and expenses and that in addition he shall be entitled to 10 per cent. of all delinquent fees collected by him after making his annual statement, a tax assessor is not entitled to a percentage of the delinquent fees due from the state where the delinquency was due to his failure to present the order of such fees given him by the state comptroller as required by Rev. Civ. St. 1911, art. 7584. *Dallas County v. Bolton* (Civ. App.) 158 S. W. 1152.

This article and arts. 3881, 3882, and 3893, authorize the commissioners' court to allow the clerk of the county court in counties having between 25,000 and 38,000 inhabitants compensation for ex officio services, where it with the fees under articles 3881, 3882, and 3889, does not amount to more than \$3,650, and such compensation for ex officio services cannot be regarded as "excess fees" of which officers can retain only one-fourth, article 3888 not applying. *Anderson County v. Hopkins* (Civ. App.) 187 S. W. 1019.

**Art. 3892. Delinquent fees, collection of, commissions on, remainder paid to treasurer.**

See *Dallas County v. Bolton* (Civ. App.) 158 S. W. 1152; note under art. 3889.

**Art. 3893. Compensation for ex-officio services, when may be allowed by commissioners' court; proviso.**

See *Anderson County v. Hopkins* (Civ. App.) 187 S. W. 1019; note under art. 3889.

**Art. 3903. County judge may authorize appointment of deputies and assistants; assistants for district and county attorneys in certain counties; compensation; additional allowance; salaries; order of county judge; compensation, how fixed; payment.**—Whenever any officer named in Article 3881 to 3886 shall require the services of deputies or assistants in the performance of his duties, he shall apply to the county judge of his county for authority to appoint same; and the county judge shall issue an order authorizing the appointment of such a number of deputies or assistants as in his opinion may be necessary for the efficient performance of the duties of said office. The officer applying for appointment of a deputy or assistant, or deputies or assistants, shall make affidavit that they are necessary for the efficiency of the public service, and the county judge may require, in addition, a statement showing the need of such deputies or assistants; and in no case shall the county judge attempt to influence the appointment of any person as deputy or assistant in any office. Provided, that in all counties having a population in excess of 100,000 inhabitants, the district attorney of any district, or the county attorney of any county where there is no district attorney, is authorized, with the consent of the county judge of the country for which such appointment is intended to appoint not to exceed two (2) assistants, in addition to his regular deputies or assistants, the number of deputies or assistants not to exceed two for the entire district, regardless of the number of counties it may contain, which two assistants shall not be required to possess the qualifications prescribed by law for district and county attorneys, and who shall perform such duties as may be assigned to them by the county attorney of such county, or the district attorney of such district, and who shall receive as their compensation one hundred twenty-five (\$125) dollars per month, to be paid in monthly installments out of the funds of the county for which such appointment is made, by warrants drawn on such county funds; and provided, further, that in counties having a population in excess of 100,000, the district attorney in the county of his residence or the county attorney where there

is not a district attorney, shall be allowed by order of the commissioners' court of the county where such official resides, as in the judgment of the commissioners' court may be necessary to the proper administration of the duties of such office, not to exceed, however, the sum of fifty (\$50) dollars per month. Such amount as may be thus necessarily incurred shall be paid by the commissioners' court upon the affidavit made by the district attorney or the county attorney, showing the necessity of such expense and for what same was incurred. The commissioners' court may also require any other evidence as in their opinion may be necessary to show the necessity of such expenditure, but they shall be the sole judge as to the necessity of such expenditure and their judgment allowing same shall be final. The maximum amount allowed for deputies or assistants for their services shall be as follows, to-wit:

First assistant or chief deputy, a sum not to exceed a rate of twelve hundred (\$1200.00) dollars per annum; others not to exceed a rate of nine hundred (\$900.00) dollars per annum.

Provided, however, that in counties having a population of 37,500 to 100,000 inhabitants, the maximum salaries allowed for deputies or assistants for their services shall be as follows:

First assistant or chief deputy, a sum not to exceed a rate of eighteen hundred (\$1800.00) dollars per annum; heads of each department not to exceed the sum of fifteen hundred (\$1500.00) dollars per annum; others not to exceed a rate of twelve hundred (\$1200.00) dollars per annum.

Provided, however, that in counties having a population in excess of 100,000 inhabitants, as shown by the last scholastic census, the maximum salaries allowed for deputies or assistants for their services shall be as follows:

First assistant or chief deputy, a sum not to exceed a rate of twenty-one hundred (\$2100.00) dollars per annum; heads of each department not to exceed the sum of eighteen hundred (\$1800.00) dollars per annum; others not to exceed a rate of fifteen hundred (\$1500.00) dollars per annum.

The county judge in issuing his order granting authority to appoint deputies or assistants shall state in such order the number of deputies or assistants authorized, but the amount of compensation to be allowed each deputy or assistant shall be fixed by the officer requesting same and shall be paid out of the fees of office to which said deputies or assistants may be appointed and shall not be included in estimating the maximum salaries of the officers named in Articles 3881 to 3886, such salaries to be paid out of the fees of the office in the following manner: First, out of any current fees collected, and if such fees are not sufficient, then out of any delinquent fees collected and which are due the county after all legal deductions are made and lastly, if there be any balance remaining after the payment of the maximum salary due the officer and the salaries due the deputies, then such balance to be paid to the county treasury. [Acts 1897, S. S., p. 10, § 12; Acts 1913, p. 286, § 1; Act March 2, 1917, ch. 55, § 1.]

**Explanatory.**—The act amends art. 3903, ch. 4, title 53, Rev. Civ. St. 1911, so as to read as above. Became a law March 2, 1917.

**Art. 3903a. Applicability to counties having both district and county attorney.**—The provisions of this Act relating to the appointment and payment of deputies or assistants by County Attorneys in counties having a population in excess of 100,000 inhabitants, shall also apply to counties having both a district attorney and county attorney. [Act May 19, 1917, 1st C. S., ch. 26, § 1.]

**Explanatory.**—The title of the act, but not the enacting part, purports to amend art. 3903, Rev. Civ. St. 1911, as amended by ch. 142, regular session 33rd Leg., and by ch. 55, regular session 35th Leg., by adding "section" 3903a, authorizing, etc. Took effect 90 days after May 17, 1917, date of adjournment.

## TITLE 59

## FENCES

**Articles 3932-3934.**

Cited, *Jameson v. Board* (Civ. App.) 171 S. W. 1037.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Liability for trespass.**—Where owners agreed to the division of a partition fence as suggested by three of their neighbors, they thereby contracted for a partition fence, and one owner failing to maintain the part allotted to him, thereby permitting his cattle to trespass on the land of the other owner, was liable for the damages sustained. *Adair v. Stallings* (Civ. App.) 165 S. W. 140.

Defendant, a lessee of school lands within plaintiff's inclosure, held liable for removing a portion of his fence to which plaintiff had joined to complete his inclosure, allowing his cattle access to plaintiff's pasture. *Jameson v. Board* (Civ. App.) 171 S. W. 1037.

## TITLE 59 A

## FIRE ESCAPES

<p>Art. 3934¾. Owners and lessees of certain buildings shall construct fire escapes.</p> <p>3934½a. What constitutes adequate fire escape.</p> <p>3934½b. Guide signs and exit lights; obstructions.</p>	<p>Art. 3934½c. Duties of State Fire Marshal and other officers.</p> <p>3934½d. Notice to owner or lessee; lessee entitled to reimbursement.</p> <p>3934½e. Injunction to restrain occupancy of building not equipped as required by act; sequestration; bond.</p>
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**Article 3934½.** Owners and lessees of certain buildings shall construct fire escapes.—That it shall be the duty of the owner entitled to the beneficial use, rental or control, or, if such owner be a non-resident, the occupant or lessee, of any building three or more stories in height, constructed or used, or intended to be used, in whole or in part, as a hospital, seminary, college, academy, school house, dormitory, hotel, lodging house, apartment house, rooming house, boarding house, theater, or any place of public amusement, lodge hall or any hall used for public gatherings, or any manufacturing establishment or industrial plant, wholesale or retail mercantile store, workshop, warehouse, office building, and any building erected by municipal, county or State authority, wherein public assemblies are permitted or sleeping apartments are provided on any floor above the second, to cause to be erected and fixed to every such building one or more adequate fire escapes, which, in no case, shall be less than one such escape to each five thousand square feet of lot area covered by such building. Provided that any building six or more stories in height shall have at least two such fire escapes to each five thousand square feet of lot area covered by such building; provided, that, where the area and height of any building is such that the construction of one fire escape will meet the requirements of this Act and it is elected to construct an interior stairway type escape, then, in such case, there shall be provided at least one other exit from each floor of said building which exit shall be placed as remote from the entrance to the fire escape as is consistent with the construction of the building, and provided, further, that all fire escapes shall be located as far as possible, consistent with accessibility, from stairways, elevator hatchways and other openings in the floors, and as far apart as is consistent with the construction and location of the building. Provided that it shall be the duty of the owner entitled to the beneficial use, rental or control, or, if such owner be a non-resident, the occupant or lessee, of any building two stories in height, already erected or which may hereafter be erected and used in whole or in part as a hotel, school dormitory, theatre or hospital, to cause to be erected an adequate number of stairways, which, in no case, shall be less than two, and one additional stairway for each five thousand square feet of lot area covered by such building in excess of ten thousand square feet, which stairways shall be located as remote from each other as is possible, and be easy of access from all parts of the building. A basement of any building that extends five feet or more above grade line shall be considered a story within the meaning of this Act. [Act March 30, 1917, ch. 140, § 1.]

**Explanatory.**—Sec. 8 repeals articles 861 to 867, inclusive, Revised Criminal Statutes of 1911, and chapter 12, general laws of the regular session of the 34th Legislature, and all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 3934½a.** What constitutes adequate fire escape.—An adequate fire escape, provided for in Section One (1) [Art. 3934½] of this Act, is

defined to be a concrete stairway, an iron or steel stairway, an iron or steel straight chute, or an iron or steel spiral chute, each type of which may be constructed of other fireproof material of equal strength, and may be erected on the exterior or interior of any building requiring fire escapes. It is hereby made the duty of the fire marshal of the State Fire Insurance Commission, who for convenience will be referred to herein as the State Fire Marshal, to prepare and promulgate minimum specifications for the construction and erection of each type of fire escape authorized by this Act, which specifications shall be based upon a working stress of not less than sixteen thousand pounds to the square inch for steel, twelve thousand pounds to the square inch for wrought iron, and seven hundred pounds to the square inch for concrete; provided, that specifications for interior fire escapes shall require that they be enclosed with noncombustible material, and that all door and window openings be properly protected with self-closing, fire-proof shutters, and that all stairway escapes, interior and exterior, be continuous and suitably connected with the roof of the building. No fire escapes shall be approved as complying with the provisions of this Act the material and erection of which are not at least the equivalent of the minimum specifications promulgated by the State Fire Marshal as herein provided. It shall also be the duty of the State Fire Marshal to prepare and promulgate minimum specifications for the construction of stairways required for buildings two stories in height, as set forth in Section one (1) of this Act, which stairways may be constructed of wood or other material, and located on the interior or exterior of the building, but shall not be required to be enclosed. [Id., § 2.]

**Art. 3934 $\frac{1}{2}$ b. Guide signs and exit lights; obstructions.**—That it shall be the duty of the owner entitled to the beneficial use, rental or control; or if the owner be a non-resident the occupant or lessee, of any building used or intended to be used as described in Section one (1) [Art. 3934 $\frac{1}{2}$ ] of this Act, where fire escapes are required, also to provide and maintain, in good condition at all times, therein proper guide signs and exit lights, which signs and lights shall be of a sufficient number on each floor to indicate the location of fire escapes and all entrances thereto. And it shall be unlawful to obstruct, in any manner whatsoever, any fire escape required by the provisions of this Act, or any hallway, corridor, or entrance way leading thereto. [Id., § 3.]

**Art. 3934 $\frac{1}{2}$ c. Duties of State Fire Marshal and other officers.**—The State Fire Marshal shall have general charge and supervision of the enforcement of the provisions of this Act, and, for this purpose, it is hereby made the duty of any inspector of the State Fire Insurance Commission, the chief of any fire department, or the fire marshal of any city or town to assist the State Fire Marshal in giving effect to the terms and provisions hereof, and shall be subject to his direction, and to the rules and regulations adopted for its enforcement. [Id., § 4.]

**Art. 3934 $\frac{1}{2}$ d. Notice to owner or lessee; lessee entitled to reimbursement.**—It shall be the duty of the State Fire Marshal or anyone authorized to act in his stead, when any building shall be found which required the erection of fire escapes, and upon which fire escapes have not been erected according to the provisions of this Act, to serve a written notice upon the party or parties whose duty it is to erect such fire escapes, which notice shall specify the time within which said fire escapes shall be erected, and which in no case, shall be more than ninety days, and said notice shall be deemed to have been served if delivered to the person to be notified, or if left with any adult person at the usual

residence or place of business of the person to be notified, or if deposited in the postoffice, directed to the last known address of the person to be notified. In case of buildings within the terms of this Act, that are managed and controlled by a Board of trustees, Board of Commissioners or other governing body, notice may be served on the president, secretary, or treasurer of such Board of trustees, Board of Commissioners, or other governing body, to cause the erection of fire escapes on said buildings as may be required. Provided that the occupant or lessee of any building who is required to erect fire escapes under the provisions of this Act shall be entitled to reimburse himself for the cost and expense of erecting said fire escapes out of the rent or lease money of said premises, and such reimbursement shall not be construed to be a breach of any existing lease contract or any covenant thereof, nor grounds for any action of damages or ouster. [Id., § 5.]

**Art. 3934 $\frac{1}{2}$ e. Injunction to restrain occupancy of building not equipped as required by act; sequestration; bond.**—In addition to the other remedies and penalties herein provided, upon the failure of any of the parties charged with the duty so to do to erect fire escapes in accordance with this law, the Attorney General of the State, or any county or District Attorney of the county where any such building is located, upon direction of the Attorney General, shall bring an action against the owner, lessee and occupants of any such building for an injunction enjoining the further occupancy of such building until compliance with this Act. Such action may be brought in the county where such building is located. In case the owner of the building is a non-resident, then, in addition to an injunction against the actual occupants, the same shall be taken in possession by the court under a writ of sequestration issued at the instance of the State without bond which possession shall be retained until the owner thereof files in the court a bond in such amount as the court may direct conditioned for the immediate installation of proper fire escapes in accordance with this law. [Id., § 7.]

## TITLE 61

## FORCIBLE ENTRY AND DETAINER

<p>Art. 3940. In what cases the action will lie. 3941. "Forcible entry" defined. 3944. Citation; delivery of possession to party aggrieved on his giving bond; applicable to county court.</p>	<p>Art. 3950. Right of possession only issue. 3956. May appeal, when and how. 3957. Form of appeal bond. 3962. Judgment of county court final, etc., except, etc.</p>
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**Article 3940. [2519] [2440] In what cases the action will lie.**

**Persons entitled to sue.**—That one was keeper of the premises of a hunting and fishing club, and that it was his duty to "look after and attend to" the club property, did not impliedly authorize him to institute forcible detainer suit against, and evict, one who for some time had been living on the club premises. *Little Sandy Hunting & Fishing Club v. Berry* (Civ. App.) 194 S. W. 1161.

**Concurrent remedies.**—A lessor suing for possession in a district court is not thereby precluded from an action of forcible entry and detainer in the justice court, since, while the district court is an appropriate tribunal for the trial of the mere right to possession, its jurisdiction is concurrent with that of the justice court, so that the two remedies may be followed concurrently. *Hartzog v. Seeger Coal Co.* (Civ. App.) 163 S. W. 1055.

**Forcible eviction.**—Where one has lived for several years on land, he cannot lawfully be forcibly evicted by the owner, although he is but a trespasser. *Little Sandy Hunting & Fishing Club v. Berry* (Civ. App.) 194 S. W. 1161.

**Art. 3941. [2520] [2441] "Forcible entry" defined.**

**Consent to trespass.**—Unauthorized permission by one other than the owner after a trespass was no defense. *Dincans v. Keeran* (Civ. App.) 192 S. W. 603.

**Art. 3944. [2523] [2444] Citation; delivery of possession to party aggrieved on his giving bond; applicable to county court.**—When the party aggrieved or his authorized agent, shall file his complaint in writing and under oath with such Justice of the Peace, it shall be his duty immediately to issue his citation to the sheriff or any constable of the county, commanding him to summon the person against whom complaint is made to appear before such justice of the peace at a time and place named in such citation; such time not being more than ten days nor less than six days from the date of service of such citation.

Provided, if the party aggrieved shall, at the time of filing his complaint under oath, execute a bond with two or more good and sufficient sureties in such sum as may be fixed by the justice of the peace in a sum double the amount of rent sworn to be due, conditioned that he will pay to the defendant all such damages as shall be adjudged against him, it shall be the duty of the officer serving such citation to place the aggrieved party in possession of the property sued for, unless the defendant shall within six days from service of citation execute and deliver to such officer a bond with two or more good and sufficient sureties in at least double the amount of the bond given by plaintiff; to be approved by the officer serving such citation; conditioned that the defendant will pay all rent that may be due or owing at the time of the execution of said bond, and all rent that may become due or owing when said case is finally tried or settled and all costs of suit in case judgment is rendered against said defendant; provided that where there is a duly qualified and acting constable in a justice precinct, the justice of the peace thereof shall upon issuing notice, writs, process or other instruments authorized by law to be served by a constable, place such service, process, writ, notice, or other instrument with the said constable or deputy for service. The provisions of this Act shall apply to the clerk of the county court

where the county court has concurrent jurisdiction with the justice courts. [Act Aug. 17, 1876, p. 155, § 4; Act March 30, 1917, ch. 154, § 1.]

**Explanatory.**—The act amends art. 3944, Rev. St. 1911. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 3950. [2529] [2450] Right of possession the only issue.**

Cited, *Bull v. Bearden* (Civ. App.) 159 S. W. 1177.

**Art. 3956. [2534] [2455] May appeal, when and how.**

Cited, *Bull v. Bearden* (Civ. App.) 159 S. W. 1177 (in dissenting opinion).

**Effect of dismissal of appeal.**—Where defendants' appeal to the county court from a justice judgment for plaintiff for possession of the premises and for writ of restitution in a suit under the forcible entry and detainer statute was dismissed, such dismissal did not void the justice judgment for plaintiff, and the writ of restitution was properly issued thereafter. *Redden v. Vance* (Civ. App.) 181 S. W. 782.

**Art. 3957. [2535] [2456] Form of appeal bond.**

Cited *Bull v. Bearden* (Civ. App.) 159 S. W. 1177 (in dissenting opinion).

**Art. 3962. [2540] [2461] Judgment of county court, final, etc., except, etc.**

**Conclusiveness of judgment.**—A county court judgment dismissing forcible entry and detainer action for less than \$100 against plaintiff and his sureties is final and is not reviewable on writ of error. *Delgado v. Chapa* (Civ. App.) 173 S. W. 1169.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**In general.**—The remedy of forcible entry and detainer is not exclusive but is cumulative of any remedy which landowners may have in the district court. *Bull v. Bearden* (Civ. App.) 159 S. W. 1177.

**Liability for invalid writ.**—One who, after instituting a forcible detainer suit, executes an indemnity bond demanded by the constable as a condition upon which he would execute the process by evicting defendant, becomes liable for damages for the eviction, if it is unlawful, as a party to the act of the constable. *Little Sandy Hunting & Fishing Club v. Berry* (Civ. App.) 194 S. W. 1161.

Where the keeper of a hunting and fishing club in good faith instituted a forcible detainer suit against a trespasser on the club property, and secured his eviction believing the process lawful, he was not liable in exemplary damages. *Id.*



## TITLE 62

## FRAUDS AND FRAUDULENT CONVEYANCES

Art.		Art.	
3965.	Written memorandum required to maintain certain actions.	3970.	Mortgage of chattels void, when.
3966.	Conveyance to defraud creditors, etc., void.	3971.	Sales of merchandise and fixtures in bulk; notice to creditors; liability as receiver.
3967.	Voluntary conveyances.	3972.	Purchaser conforming to provisions, not accountable.
3968.	Gift of goods, etc.	3973.	Not applicable in what cases.
3969.	Loan of chattels.		

**Article 3965. [2543] [2464] Written memorandum required to maintain certain actions.**

1. **Promises to answer for the debt, default or miscarriage of another in general.**—Where a defendant, who was interested in a produce company whose shipment had been seized under judicial process, stated to plaintiff bank, which had cashed a draft with a bill of lading annexed, that he would see that it lost nothing, the agreement fell within the statute of frauds, not being in writing. *Citizens' Nat. Bank of Waco v. Abeel* (Civ. App.) 160 S. W. 609.

A collateral oral contract to pay the debt of another being within the statute of frauds testimony by plaintiff that defendant made such an agreement is incompetent to show an indebtedness on defendant's part and should be stricken. *Johnson v. Tindall* (Civ. App.) 161 S. W. 401.

A parol promise by a purchaser of merchandise from a dealer indebted to the seller thereof for the price to pay the debt if the seller did not do so is a conditional promise to pay the debt of another, and is not enforceable within the statute of frauds. *Williams v. City Nat. Bank* (Civ. App.) 166 S. W. 130.

An oral promise to pay for groceries and merchandise furnished to another was void, though the original debtor was the promisor's son and tenant, and the goods enabled the tenant to live while making a crop. *Fletcher v. Puckett* (Civ. App.) 170 S. W. 831.

An oral promise by defendant railroad's representative that it would see that plaintiffs were protected with regard to credit which had been given to defendants' section hands, being an oral promise to pay the debts of other persons, was within the statute of frauds. *St. Louis Southwestern Ry. Co. of Texas v. Ragsdale, Price & Co.* (Civ. App.) 185 S. W. 654.

A parol promise by a wife to pay a debt due a physician by her husband for services rendered necessary to her child would not render her separate estate liable. *Davenport v. Rutledge* (Civ. App.) 187 S. W. 988.

3. **Promise to debtor to discharge debt.**—An oral promise by a vendee of land to assume a purchase-money note of the vendor is not within the statute of frauds as a promise to pay the debt of another. *Bone v. Smith* (Civ. App.) 164 S. W. 922.

Where defendant for valuable consideration assumed the debts of a corporation, the agreement is not, though a corporate note was indorsed by others, void as to them because not in writing; the statute of frauds being inapplicable. *Bank of Garvin v. Freeman* (Sup.) 181 S. W. 187.

A custom of defendant railway company to deduct claims against its employes from their wages, when authorized in writing by them in the time book, held not to constitute an assumption of primary liability for goods purchased by them. *St. Louis Southwestern Ry. Co. of Texas v. Ragsdale, Price & Co.* (Civ. App.) 185 S. W. 654.

4. **Promise to indemnify.**—A parol contemporaneous agreement of indemnity between persons jointly liable on a note is not within the statute of frauds. *Clevenger v. Commercial Guaranty State Bank* (Civ. App.) 183 S. W. 65.

A contract of the organizer of a corporation to indemnify a subscriber to its stock, who executed a note, against all loss, was merely collateral to that evidenced by the note, and so was not subject to the statute of frauds. *Anderson v. First Nat. Bank* (Civ. App.) 191 S. W. 836.

5. **Original or collateral promise in general.**—A contract by the officers of a corporation to pay to plaintiff bank money loaned to them for the benefit of the corporation held an original undertaking. *Uvalde Nat. Bank v. Brooks* (Civ. App.) 162 S. W. 957.

A broker having promised to obtain \$150 from his principal to pay plaintiff for possession of land sold, the principal's promise to pay the amount held not within the statute of frauds as a promise to pay the debt of another. *Harral v. Bridges* (Civ. App.) 162 S. W. 1001.

That coal was ordered by another does not make defendants' agreement to pay for it a promise to discharge the debt of another, where plaintiff refused to deliver the coal until defendants agreed themselves to pay for it. *Roach, Stansell & Crane v. Timpson* (Civ. App.) 170 S. W. 863.

Where the purchaser and mortgagor of cattle had agreed to pay a certain amount for pasturage, the seller's and mortgagee's promise to pay the amount, or to pay it out of the proceeds of sale, in consideration of their possession, though not extinguishing the original indebtedness, was an original promise not within statute of frauds. *Harp v. Hamilton* (Civ. App.) 177 S. W. 565.

Promise by person, desiring services of a prisoner, to pay plaintiff any sums for which he might become liable if he would sign such person's bail bond, held an original promise, not within the statute of frauds. *Gonzales v. Garcia* (Civ. App.) 179 S. W. 932.

An agreement by a son, who desired to uphold his father's credit and to obtain goods for the latter on credit, that he would be liable for a note executed by the father, is not within the statute of frauds and need not be in writing; the credit being extended to the son. *Thornburg v. Moon* (Civ. App.) 180 S. W. 959.

Where a seller of apples acted as one of the principals in the transaction, his promise, made before acceptance to the buyer, to save the latter harmless from any defects in the fruit, was not within the statute of frauds. *Dublin Fruit Co. v. Neely* (Civ. App.) 182 S. W. 406.

In action to recover for plaintiffs' wheat which defendant had received, his promise to pay therefor held not within the statute of frauds. *Mendiola v. Garza Bros.* (Civ. App.) 185 S. W. 391.

7. **Guaranty.**—An oral agreement by a father to guarantee advances made to his son, not to exceed \$1,000, held unenforceable. *Hein v. John Finnigan Co.* (Civ. App.) 163 S. W. 124.

An oral agreement to guarantee payment of money advanced to a third person held unenforceable under the statute of frauds. *Carla Land & Irrigation Co. v. Asherton State Bank* (Civ. App.) 164 S. W. 1066.

8. **New consideration beneficial to promisor.**—Where a landlord, in consideration of plaintiff's agreement to permit the tenant to retain a horse and in consideration of additional advances, promised to pay the balance of the tenant's indebtedness to plaintiff plus the additional advances after crediting the value of the horse, defendant's promise was an original one and not within the statute of frauds. *Steed v. Day* (Civ. App.) 164 S. W. 1057.

Oral promise by director of a corporation, the stock of which had been pledged as collateral for the note of a third party, that if the creditor would forbear threatened steps to prevent removal of the corporation's stock of goods, he would pay or see that the debt was paid, held an original promise supported by a new consideration, sufficient to take it out of the statute of frauds. *Enterprise Trading Co. v. Bank of Crowell* (Civ. App.) 167 S. W. 296.

Where a creditor relinquishes some right upon a third person's promise to pay the debt, springing out of some new transaction, or upon some substantial ground of a personal concern to the promisor, the consideration to the promisor takes the promise out of the statute of frauds. *Id.*

Where an irrigation company, having purchased the irrigation plant of another company and assumed its contracts to furnish water to its tenants, promised plaintiff, one of such tenants, to furnish him water for one-fifth his crop, the promise was not a mere voluntary verbal guaranty of a pre-existing contract of the other company, but a direct promise based upon a sufficient consideration. *Lakeside Irr. Co. v. Buffington* (Civ. App.) 168 S. W. 21.

An oral promise by the owner to pay for materials furnished the contractor in consideration of the materialman's forbearance to sue is not within the statute of frauds. *Grant v. Alfalfa Lumber Co.* (Civ. App.) 177 S. W. 536.

Benefit to mortgagee of cattle from delivery of their possession held sufficient to support his promise to pay the amount agreed to be paid by the mortgagor for their pasturage. *Harp v. Hamilton* (Civ. App.) 177 S. W. 565.

10. **Discharge of original debtor.**—Upon surrender of a debt against another in consideration of a third person's promise to pay it, the primary debt is discharged, and only the promisor's original obligation remains, so that there can be no collateral liability, within the statute of frauds. *Harp v. Hamilton* (Civ. App.) 177 S. W. 565.

12. **Agreements not to be performed within one year—Possibility of performance.**—A parol contract which does not provide that it is not to be performed within a year, and which may be performed on some contingency within a year, is not within the statute of frauds. *Adair v. Stallings* (Civ. App.) 165 S. W. 140.

A verbal contract for the sale of growing timber which allowed the buyers four years within which to remove the timber is not void, under the statute of frauds, as an agreement not to be performed within a year. *Groce v. West Lumber Co.* (Civ. App.) 165 S. W. 519.

A parol agreement by the seller of his business not to engage in similar business in the village, so long as the buyer engages therein in the village, is not within the statute of frauds. *Tomlin v. Clay* (Civ. App.) 167 S. W. 204.

A contract which may or may not be performed within one year does not fall within the statute of frauds. *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 177 S. W. 226.

An oral contract whereby a brewing company, in consideration of plaintiff's assumption of a debt, agreed to give him the exclusive right to sell its beer in a county, there being no agreement as to the length of time the agreement should run, though for plaintiff to reimburse himself it would have to run for two or three years, was not invalid under the statute of frauds. *Woods v. American Brewing Ass'n* (Civ. App.) 183 S. W. 127.

13. — **Commencement of period.**—A verbal lease for a term not longer than one year to commence in the future is valid. *Street-Whittington Co. v. Sayres* (Civ. App.) 172 S. W. 772.

15. **Creation of estates or interests in general.**—A parol contract that defendant should live on land of plaintiff, build a house, pay taxes, and that after the land had become valuable it should be sold, and the profits divided, was insufficient to give defendant an interest in the land itself. *Snover v. Jones* (Civ. App.) 172 S. W. 1122.

16. **Creation of leases.**—Where land was rented verbally, and, after entry by the tenant, the landlord stated that as long as the tenant paid her rent she could have the place, the contract was not obnoxious to the statute of frauds. *Hamlett v. Coates* (Civ. App.) 182 S. W. 1144.

**17. Assignment, grant or surrender of existing estates, interests or terms.**—Where the legal title to land was in trustees for parties who had recovered it under a contract by which their attorney was to have an interest therein, any parol contract by such attorney that associated attorneys should have an interest in the land for their services was in violation of the statute of frauds and nonenforceable. *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

A verbal gift of land by a husband to his wife is wholly void, being within the statute of frauds, where it appeared that the land was not purchased with the wife's separate means. *Childress v. Robinson* (Civ. App.) 161 S. W. 78.

Cancellation of vendor's lien notes could be based on holder's oral agreement to cancel them, though cancellation might have destroyed lien upon land, and destroyed superior title of holder; statute of frauds having no application. *Bright v. Briscoe* (Civ. App.) 193 S. W. 156.

**19. — Establishment of boundary.**—Where the true location of a boundary line is unknown to the contiguous owners, and they orally agree on a line which they know is not the true boundary, the agreement is void under the statute of frauds. *Voigt v. Hunt* (Civ. App.) 167 S. W. 745.

That a boundary may be established by parol agreement, it is essential that there be doubt and uncertainty as to its true location. *Ware v. Perkins* (Civ. App.) 178 S. W. 846.

**21. Contracts for sale of interests in land.**—An agreement between two or more persons for the joint acquisition of land is not within the statute of frauds, as a "contract for the sale of land." *Phoenix Land Co. v. Exall* (Civ. App.) 159 S. W. 474.

Where adverse claim to land has matured into title under the ten-year statute of limitations, a verbal sale of the land and subsequent verbal resale are void under the statute of frauds, in the absence of circumstances taking it out of the operation of the statute. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

An agreement to purchase realty, improve it, and thereafter sell it to another on installments, cannot be enforced, unless reduced to writing. *Wade v. Cohen* (Civ. App.) 173 S. W. 1163.

Under this article, verbal agreement of father's grantees that a daughter to whom an advancement had already been made should share the granted land held not enforceable by her as a contract to convey to her an interest in the land. *Lindley v. Lindley* (Civ. App.) 178 S. W. 782.

Statute of frauds requiring contracts for conveyance of real estate to be in writing includes contracts to devise land. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

**22. — Nature of property.**—Growing trees are a part of the realty, and a verbal sale thereof which does not contemplate their immediate separation from the soil is within the statute of frauds. *Groce v. West Lumber Co.* (Civ. App.) 165 S. W. 519.

A contract for the sale of growing timber held a contract to sell chattels, and not one to convey an interest in land within the statute of frauds. *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 177 S. W. 226.

Share of stock in corporation may be sold by parol, or pass by delivery of certificate. *Condit v. Galveston City Co.* (Civ. App.) 186 S. W. 395.

**27. Part performance—In general.**—Oral agreement to take and raise the son of another and leave him all of the party's real and personal property at his death held sufficiently performed to remove it from the statute of frauds, where the child had treated such party as his father and performed services around his home without wages or money consideration. *Bridgewater v. Hooks* (Civ. App.) 159 S. W. 1004.

A joint and mutual will executed by husband and wife and a deed executed by them as part of the same transaction, in consummation of a parol contract between them for the equitable disposition of their property between their children, constitute part performance of the parol agreement so as to take it out of the statute of frauds. *Larrabee v. Porter* (Civ. App.) 166 S. W. 395.

Moving out by the lessee cannot be considered part performance of an oral contract to rescind the lease, being subsequent to insistence of the lessor that the lease be complied with. *Gardner v. Sittig* (Civ. App.) 188 S. W. 731.

That a party to an oral contract to convey land has conveyed to the other party will not, standing alone, be accepted as a part performance, since such act is merely equivalent to a payment by him, not entitling him to specific performance. *Clegg v. Brannan* (Civ. App.) 190 S. W. 812.

That plaintiff performed personal services for deceased is not such an execution or part performance as would take a contract to pay for such services by devise out of statute of frauds. *Henderson v. Davis* (Civ. App.) 191 S. W. 358.

**28. — Possession.**—Delivery of possession of land held not essential to part performance of a contract to leave all of a party's property to another, as from its nature and purpose it could not be evidenced by delivery of possession. *Bridgewater v. Hooks* (Civ. App.) 159 S. W. 1004.

A vendee under a parol sale of land, by permitting his vendor to thereafter enter and remove the timber, as was provided by the contract, did not thereby yield possession so as to affect the vendee's title under the parol sale. *Houston Oil Co. of Texas v. Payne* (Civ. App.) 164 S. W. 886.

**29. — Payment.**—Specific performance of an oral contract to convey land will not be enforced, in the absence of possession or permanent improvements made thereon, though the purchase money has been paid. *Clegg v. Brannan* (Civ. App.) 190 S. W. 812.

**30. — Improvements.**—Improvements begun by the lessee under a verbal lease during a few months between the lease and the death of the lessor held sufficient to take

the lease out of the statute of frauds, even though no part of the improvement was completed in the lifetime of the lessor. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

Where a parol grant of a way has been acted upon by the expenditure of moneys which would be lost if the right of way be revoked, an easement arises by estoppel. *Bowington v. Williams* (Civ. App.) 166 S. W. 719.

Piping a house for gas and slight expenditure for wall paper held so insignificant as not to amount to improvements taking an oral contract for sale of the land out of the statute of frauds. *Ryan v. Lofton* (Civ. App.) 190 S. W. 752.

**31. — Possession and payment.**—Where one having first obtained title to land by adverse possession makes an oral sale thereof, payment of purchase money, and taking possession of the vendee, and his making of improvements which are not permanent and have no particular relation to the value of the land, are insufficient to take the contract out of the statute of frauds. *Houston Oil Co. of Texas v. Gore* (Civ. App.) 159 S. W. 924.

**32. — Possession and improvements.**—In considering improvements which would take a verbal lease with delivery of possession out of the statute of frauds, a dam for the construction of which the lessee had agreed to pay a part, and which, though not on the leased land, created a lake thereon, used for irrigation purposes, and a valuable and permanent improvement, was properly included. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

Equity will sustain a parol gift of land, notwithstanding the statute of frauds, where possession has been delivered and improvements of a substantial value have been made on the land by the donee with the donor's knowledge. *Wilkerson & Satterfield v. McMurry* (Civ. App.) 167 S. W. 275.

Where an owner gave land to a son, who was placed in possession, and who, before building a house, removed trees and fences and filled in low places on the premises, the improvements made vested in the son the title in equity, notwithstanding the statute. *Id.*

Where change of possession and improvements on land are set up by a purchaser to take a parol contract for its purchase out of the statute of frauds, the value of the improvements must be substantial and must exceed the value of the use of the property. *Page v. Vaughan* (Civ. App.) 173 S. W. 541.

Verbal contract to sell tract, only part of which was conveyed, held not taken out of the statute of frauds by purchaser's possession of the whole tract, and improvements on that conveyed, with knowledge of the facts. *Pitts v. Kennedy* (Civ. App.) 177 S. W. 1016.

Where, to enforce an oral contract to convey, reliance is had upon the claimant's possession and improvement of the premises, the value of the improvements must be shown to be such proportion of the value of the property and made in such reliance upon the contract as to give the claimant equitable rights. *Ryan v. Lofton* (Civ. App.) 190 S. W. 752.

**34. Contracts implied by law on part performance.**—While payment of purchase money under a verbal contract for sale of land gives no right to specific performance, the vendee may recover the money paid if the vendor refuses to perform. *Whaley v. McDonald* (Civ. App.) 194 S. W. 409.

Where plaintiff paid money as initial payment on purchase price of land, and on next day vendors agreed that plaintiff should take different tract and money paid should apply thereto, vendors could not retain money and refuse to perform oral contract, and vendee could recover money paid. *Id.*

**35. Contracts completely performed.**—Where grantor, in pursuance of parol agreement, conveyed land in consideration of care, nursing, etc., the deed was not void because grantor, under statute of frauds, could not have been compelled to execute the same. *City of Houston v. Ritchie* (Civ. App.) 191 S. W. 362.

**36. Discharge of contracts without performance.**—A lease being, as required by the statute of fraud, in writing, rescission thereof cannot be proved by parol. *Gardner v. Sittig* (Civ. App.) 188 S. W. 731.

**37. Modification of contract.**—Where a contract for the exchange of real property was executed in part by delivery of the properties, including a certain house and lot, the statute of frauds had no application to a supplemental oral agreement relating to substitution of the house in lieu of the note which the owner was to assign. *Baker v. Robertson* (Civ. App.) 163 S. W. 326.

Under the statute of frauds, a written agreement to secure subtenants for a 5-year term could not be modified by parol agreement to accept tenants for a term of 4 years and 11 months. *Burgher & Co. v. Canter* (Civ. App.) 190 S. W. 1147.

**38. Equitable relief.**—Where defendant, in pursuance of a parol contract, whereby he was to receive 160 acres of land if he would look after and keep trespassers off a company's land, performed his part of the contract and took possession of and erected permanent and valuable improvements upon the 160 acres, he acquired an equitable title which the court will protect. *Houston Oil Co. of Texas v. Payne* (Civ. App.) 164 S. W. 886.

Where defendant released its lien upon plaintiff's property, relying upon his oral promise to give substitute security, that plaintiff claimed other land acquired as home-stand as against a trust deed subsequently executed under the agreement held to take the case out of the statute of frauds, since to apply the statute would permit the perpetration of a fraud. *Pipkin v. Bank of Miami* (Civ. App.) 179 S. W. 914.

**39. Persons to whom statute is available.**—The statute of frauds is no defense to an action for delay in delivering a telegram, because F., by whom the sender of the

telegram caused it to be sent, and who contracted with the company's agent to send it, orally guaranteed the charges, which were afterwards paid. *Western Union Telegraph Co. v. Taylor* (Civ. App.) 167 S. W. 289.

The defense of statute of frauds is a personal one, and so cannot be invoked by a defendant, not a party to the contract, in favor of plaintiff against interveners. *General Bonding & Casualty Ins. Co. v. McCurdy* (Civ. App.) 183 S. W. 796.

The statute of frauds does not render a contract thereunder absolutely void, but voidable only, and is for the benefit of defendant. *Graham v. Kessler* (Civ. App.) 192 S. W. 299.

**41. Waiver of bar of statute.**—A widow of one entering into a verbal lease contract, who, after his death, allowed permanent and valuable improvements to be made thereon, and who accepted the agreed rent therefor, held to have thereby ratified such verbal lease. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

The lessor is not estopped to object to evidence of oral rescission of lease in writing, as required by the statute of fraud, because of the lessee moving out; this being after the lessor insisted on performance of the lease. *Gardner v. Sittig* (Civ. App.) 188 S. W. 731.

**42. Trusts.**—An oral agreement between two persons to purchase land jointly created a trust in the land when purchased by one of the parties under the agreement notwithstanding the statute of frauds. *Sachs v. Goldberg* (Civ. App.) 159 S. W. 92.

The statute of frauds does not require that trusts shall be evidenced by writing. *Larrabee v. Porter* (Civ. App.) 166 S. W. 395.

An agreement whereby one of the parties constitutes himself a trustee for the specific purpose of carrying out an agreement for the sale and conveyance of an interest in land is not within the statute of frauds. *Lester v. Hutson* (Civ. App.) 167 S. W. 321.

Where legal title is taken in the name of the purchaser with the understanding that the equitable title shall vest in persons promising to support the purchaser until his death, such parol agreement, when executed, constitutes a valid enforceable trust notwithstanding the statute of frauds. *Ryan v. Lofton* (Civ. App.) 190 S. W. 752.

**43. Requisites and sufficiency of writing.**—A written proposal to sell land held not a memorandum of the terms of the sale within the statute of frauds and, unless the proposal be accepted by the seller, the contract is unenforceable. *Daugherty v. Leewright* (Civ. App.) 174 S. W. 841.

**45. — Description of land.**—Parol evidence is inadmissible to aid the description of land contained in a memorandum, relied on to take a contract out of the statute of frauds. *Clegg v. Brannan* (Civ. App.) 190 S. W. 812.

A description in a contract of sale of 263 acres of a specified distance N. E. of M., coupled with recitals of an incumbrance of \$8,140, that it had been inspected and accepted by the party, and that the vendors should have possession to January 1st, was sufficient within the statute of frauds. *Porter v. Memphis Land & Commission Co.* (Civ. App.) 159 S. W. 497.

A contract agreeing to convey "a certain three thousand acres in B. county, Texas," without designating the owner or any particular locality or natural objects fixing its location, or referring to any writing doing so, and, also certain lots described by merely giving the lot, and block number and price, was too indefinite in describing the land to permit specific performance. *Rosen v. Phelps* (Civ. App.) 160 S. W. 104.

A contract to sell a place consisting of four lots in a certain town, it appearing that vendor owned only one place in that town which consisted of four lots, describes the property with sufficient certainty to comply with the statute of frauds. *Beaton v. Fussell* (Civ. App.) 166 S. W. 458.

A description of land in a contract of sale held sufficient to satisfy the statute of frauds. *Spaulding v. Smith* (Civ. App.) 169 S. W. 627.

Description of land in contract sought to be specifically enforced is sufficient where from it the land can be identified. *Wooten v. Dermott Town-Site Co.* (Civ. App.) 178 S. W. 598.

A memorandum of agreement for exchange of lands, which did not describe a tract of land or give field notes from which it could be identified was insufficient. *Clegg v. Brannan* (Civ. App.) 190 S. W. 812.

**47. — Signature.**—Contract for exchange of land not signed by one of the parties was in contravention to the statute of frauds, and not binding upon him without allegations showing his right to specific performance by reason of possession, part payment, etc. *Clegg v. Brannan* (Civ. App.) 190 S. W. 812.

**48. Contents of memorandum in general.**—The written agreement for the sale or exchange of land required by the statute of frauds must contain the essential terms of a contract, such as its subject-matter, expressed with such certainty that it may be understood without parol evidence to show the intention of the parties. *Rosen v. Phelps* (Civ. App.) 160 S. W. 104.

**52. Separate writings.**—The memorandum or writing evidencing a contract for the sale of land, required by the statute of frauds, may be shown by correspondence. *Spaulding v. Smith* (Civ. App.) 169 S. W. 627.

Under the statute of frauds, agreement for sale of realty need not be contained in one instrument, but may take the form of telegrams, if, read as one, they present a concluded contract. *Longinotti v. McShane* (Civ. App.) 184 S. W. 598.

**53. Parol acceptance of written offer.**—An instrument, leasing land for one year and also giving exclusive option to lessee during the year, although signed by both parties, was not an option accepted in writing, and hence not enforceable in equity. *Petty v. Wilkins* (Civ. App.) 190 S. W. 531.

54½. **Operation of statute.**—A contract is not unlawful because not in compliance with the statute of frauds, as the statute presupposes its legality, the enforcement of which is only suspended until the provisions of the statute are satisfied. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

Action for damages for breach of verbal contract in contravention of statute of frauds held not to lie. *Pitts v. Kennedy* (Civ. App.) 177 S. W. 1016.

60. **Evidence.**—Where an oral lease was made under which the lessee went into possession and made valuable improvements, the fact that it was agreed that the lease should be reduced to writing does not conclusively show that the improvements were made on the faith of the promised written lease, and not on the strength of the oral one. *Edwards v. Old Settlers' Ass'n* (Civ. App.) 166 S. W. 423.

In an action to recover the price of coal ordered by another, evidence held to warrant a finding that the coal was sold to defendants, and that they agreed to pay for it. *Roach, Stansell & Crane v. Timpon* (Civ. App.) 170 S. W. 863.

To take a parol agreement for the sale of land out of the statute of frauds by part performance, its terms must be clearly established. *Snover v. Jones* (Civ. App.) 172 S. W. 1122.

In a suit to recover real estate, evidence held sufficient to sustain a finding that the parties agreed to locate a certain line bounding plaintiff's purchase, and that such location was not made to settle a doubt or dispute. *Ware v. Perkins* (Civ. App.) 178 S. W. 846.

Consideration in contract for sale of real estate may be shown by parol, and statute of frauds does not apply thereto. *Whaley v. McDonald* (Civ. App.) 194 S. W. 409.

### Art. 3966. [2544] [2465] Conveyance to defraud creditors, etc., void.

1. **Validity of transfer in general.**—A judgment foreclosing a mortgage, after payment of the debt secured, is void as to a junior lienholder and creditor of the mortgagor, who is not a party to the suit, and he may collaterally attack the judgment. *Clarke v. A. B. Frank Co.* (Civ. App.) 163 S. W. 492.

Though some of the property conveyed by a debtor was his wife's separate property, held, that a creditor might attack the conveyance as to property belonging to the debtor. *Citizens' State Bank v. McShan* (Civ. App.) 172 S. W. 565.

Where debtor transferred land for stock for goods which he had conveyed to a creditor, whose debt was less than the value of the goods, transaction held void if the creditor was to have the balance of the proceeds from a sale of the goods, above his debt. *Coughran v. Edmondson*, 106 Tex. 540, 172 S. W. 1106, reversing judgment *Edmondson v. Coughran* (Civ. App.) 138 S. W. 435.

Where corporation was sued, and receiver for it sought, attempted transfer of its property to another corporation, apparently organized to meet exigencies of receivership, was fraudulent and void. *Bond-Reed Hardware Co. v. Walsh* (Civ. App.) 193 S. W. 1148.

Where defendants formed two corporations, one to make contracts for goods and rents, the other to take possession of goods and use rented premises, there was a conspiracy to defraud creditors. *Id.*

9. **Reservations and trusts.**—Where insolvent debtor exchanged land for stock of goods and had them transferred to a creditor, whose debt was less than their value, transactions held void if goods were to be resold and surplus paid the debtor. *Coughran v. Edmondson*, 106 Tex. 540, 172 S. W. 1106, reversing judgment *Edmondson v. Coughran* (Civ. App.) 138 S. W. 435.

10. **Right of debtor to prefer creditor.**—Secret understanding between one of largest creditors of partnership, the party who was to take over its stock of goods, and the partnership, that such creditor should be paid its debt in full, was a fraud upon other creditors, which would defeat a composition agreement, if any had in fact been made. *Abernathy Rigby Co. v. McDougle, Cameron & Webster Co.* (Civ. App.) 187 S. W. 503.

Until a corporation ceases to be a going concern, it may prefer its creditors, and diligent creditor of such corporation, although a director, can in good faith secure such preference by attachment or garnishment. *McCormick v. Cornell & Wardlaw* (Civ. App.) 193 S. W. 1083.

Where a foreign corporation was insolvent and its president knew of such condition and negotiated to prevent creditors from taking steps against it and then assigned his claim against the corporation to certain persons, they could not by attachment secure a preferential lien upon the corporation property as against other general creditors. *Id.*

15. **Consideration and payment of liabilities.**—A creditor may receive property for his debt if not more than reasonably sufficient to discharge it; but, where the value materially exceeds the debt, the transaction is fraudulent in law. *Coughran v. Edmondson*, 172 S. W. 1106, 106 Tex. 540, reversing judgment *Edmondson v. Coughran* (Civ. App.) 138 S. W. 435.

A creditor could lawfully purchase of his debtor sufficient property to pay the debt due him and to pay off the claims of a lien creditor and another creditor. *Martin v. Jourdanton Mercantile Co.* (Civ. App.) 185 S. W. 583.

A vendor cannot commit a fraud on creditors by making a deed to a grantee to whom the land already belongs by equitable title. *Fidelity Trust Co. v. Rector* (Civ. App.) 190 S. W. 842.

Where defendant had, with others, received share of estate, but the others permitted him, without evidence of liability, to retain money due them and use it for 30 years, there was no legal or equitable enforceable liability, so that his conveyance of land to them one day prior to abstract of judgment against him was fraudulent as to the judgment creditors. *Hirt v. Werneburg* (Civ. App.) 191 S. W. 711.

15½. — **New debt.**—On exchange of land by insolvent debtor for stock of goods, cash and note for a difference in price given by a creditor, and expenses in perfecting the

title, held a new debt which, as against the debtor's other creditors, could be discharged by having the goods conveyed to such creditor. *Coughran v. Edmondson* (Sup.) 172 S. W. 1106, 106 Tex. 540, reversing judgment *Edmondson v. Coughran* (Civ. App.) 133 S. W. 435.

17. — **Transactions between husband and wife.**—The creditor of a husband who conveyed land to his wife could question the deed to the wife. *Emery v. Barfield* (Civ. App.) 133 S. W. 386.

18. — **Partial invalidity or illegality.**—A bank held entitled to attack, as in fraud of creditors, a debtor's conveyance of a note to one who paid to the bank the debt for which the note was collateral. *Citizens' State Bank v. McShan* (Civ. App.) 172 S. W. 565.

20. **Fraudulent intent of debtor—Knowledge or notice of intent and participation therein.**—Under this article, where a wife was indebted to her divorced husband for an accounting and settlement of the community property, a deed of gift by her to her children by such husband of land belonging to the community estate, made immediately after both she and the children had knowledge that an accounting and settlement was being demanded by him, was in fraud of his rights. *Messimer v. Echols* (Civ. App.) 194 S. W. 1171.

22. **Validity as between original parties or their representatives.**—Where property is conveyed by a decedent during his lifetime, whether bona fide or in fraud of creditors, such property forms no part of estate, and administrator is without authority to sue for its recovery. *Powell v. Stephenson* (Civ. App.) 189 S. W. 570.

Where land has been conveyed in fraud of creditors, title of grantor passes to fraudulent grantee, subject only to right of defrauded creditors to have the conveyance set aside. *Hughes v. Hughes* (Civ. App.) 191 S. W. 742.

Since the statute as to fraudulent conveyances makes them subject to be avoided by a creditor only, a conveyance, even if made in fraud of creditors, is valid between the parties. *Texas Rice Land Co. v. Langham* (Civ. App.) 193 S. W. 473.

25. **Creditors.**—Indebtedness for services rendered in pursuance of express or implied contract, or quantum meruit indebtedness for services, was such indebtedness as would render gift deed by debtor void as to prior creditor. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

26. **Subsequent creditors.**—Subsequent creditors held not entitled to interfere with mortgagee's possession of mortgaged chattels, though possession was delivered to him for the purpose of putting the property beyond the reach of other creditors. *Clopton v. Jolly & Terry* (Civ. App.) 181 S. W. 562.

The vendor's lien of the principal stockholder of a corporation who took a conveyance of the corporate property and then conveyed it to another, to whom he delivered the corporate stock, and who reconveyed the property to the corporation, is not invalid as against subsequent creditors with notice. *Gulf Pipe Line Co. v. Lasater* (Civ. App.) 193 S. W. 773.

Subsequent creditors of a corporation have no right or authority to question the validity of a sale by the corporation of its property. *Id.*

35. **Remedies of creditor.**—Where value of property involved in action to set aside fraudulent conveyance is in issue, market value should be subject of inquiry, providing property has market value, and, if not, its intrinsic value may be established. *Citizens' Nat. Bank of Plainview v. Slaton* (Civ. App.) 189 S. W. 742.

Where a conveyance was in fraud of creditors, a judgment creditor had right to subject to his judgment the excess in market value of property conveyed by his debtor over and above market value of property received by him in exchange. *Id.*

Party who was active agent of two corporations owned and controlled by him and operated pursuant to conspiracy so as to defraud parties who dealt with them was properly cast in judgment, since where one has conspired with others to cheat and defraud, he will be held liable. *Bond-Reed Hardware Co. v. Walsh* (Civ. App.) 193 S. W. 1148.

37. **Weight and sufficiency of evidence.**—In suit by execution purchaser against debtor's fraudulent grantee, evidence held to support finding against defendant's claim of equitable ownership, though he testified to facts showing such ownership. *Landers v. McCutchan* (Civ. App.) 161 S. W. 960.

In suit by execution purchaser against debtor's grantee, judgment for purchaser held not erroneous for insufficiency of evidence to show grantee's knowledge of the debtor's fraudulent intention. *Id.*

Evidence held to support a special verdict that a deed was executed by defendant without consideration and with intent to defraud his creditors. *First State Bank of Blackwell v. Knox* (Civ. App.) 173 S. W. 894.

Evidence held sufficient to justify jury's finding that the conveyance of the premises to defendant was fraudulent as to the grantor's creditors. *McGough v. Finley* (Civ. App.) 179 S. W. 918.

Evidence held to justify finding that sales by defendant were not in good faith, but were made with a view to delay creditors. *Bond-Reed Hardware Co. v. Walsh* (Civ. App.) 181 S. W. 248.

In a suit for damages for the conversion of mules, etc., wherein defendant contended that any sale to plaintiff by its debtor was in fraud of creditors, evidence held insufficient to show the debtor's intent to shield his property from future debts. *Martin v. Jourdan-ton Mercantile Co.* (Civ. App.) 185 S. W. 583.

Evidence held not to sustain a finding that a sale by a debtor was made with intent to defraud his creditors. *Id.*

In action for conversion, defended on ground of the fraudulent conveyance of property to plaintiff by defendant's debtor, where there was no evidence of the value of the property at the time of the conveyance, its value was not shown to exceed the amounts of the three debts canceled on its sale to plaintiff. *Id.*

That two horses on which plaintiff had a lien for food and care, together with other personal property, were sold for \$50, and that immediately afterwards the horses were sold for \$225 or \$250, indicated that the sale was simulated to defeat creditors. *Liberal Loan & Realty Co. v. Meyers* (Civ. App.) 186 S. W. 433.

In trespass to try title, evidence held to support a finding that a prior conveyance of land was made for purpose of defrauding, hindering, and delaying creditors. *Hughes v. Hughes* (Civ. App.) 191 S. W. 742.

Evidence held to justify finding that grantor conveyed all his land in Texas and Nebraska to hinder, delay, and defraud creditors. *Colgrove v. Falfurrias State Bank* (Civ. App.) 192 S. W. 580.

Evidence held insufficient to show that a conveyance was taken in the name of a stockholder, and not the corporation, for the purpose and with the intent of delaying, hindering, and defrauding the corporation creditors. *Texas Rice Land Co. v. Langham* (Civ. App.) 193 S. W. 473.

### Art. 3967. [2545] [2466] Voluntary conveyances.

**In general.**—Under this article, gift by insolvent father to children of money received from sale of his live stock, held void as to an existing creditor. *Rector v. Continental Bank & Trust Co.* (Civ. App.) 180 S. W. 309.

Voluntary conveyance, leaving grantor sufficient other property to pay his debts, is not void as to prior creditors, and presumption of fraudulent purpose may be rebutted by evidence that grantor was possessed of property within the state subject to execution sufficient to pay existing debts. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

Under this article, to sustain a gift of land as against prior creditors it must appear that the grantor was, at the time, possessed of property within the state subject to execution, sufficient to pay his existing debts. *First State Bank & Trust Co. of Abilene v. Walker* (Civ. App.) 187 S. W. 724.

**Transactions between husband and wife.**—The husband may give or convey to the wife community property, and thereby make it her separate property, when it is not done in fraud of creditors, and such a gift is good against subsequent creditors of the husband. *Amend v. Jahns* (Civ. App.) 184 S. W. 729.

Subsequent creditors cannot attack a gift of live stock to the wife on the ground that it was only in pursuance of an antecedent agreement, which was invalid, where it was actually a gift of things in esse. *Id.*

Part of the homestead property, not previously abandoned as such, may, without consideration, be conveyed to the wife, becoming her separate property, free from claims of the husband's creditors. *Palmer Pressed Brick Works v. Stevenson* (Civ. App.) 185 S. W. 999.

Voluntary conveyance of community property by husband to wife, deed expressly providing that conveyance should not become absolute until satisfaction of vendor's lien, was not void as to holder of vendor's lien note. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

A husband can lawfully give any of his property or his interest in the community property to his wife, provided he is solvent. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

Under this article, in wife's suit to enjoin sale on execution by husband's creditor of land conveyed her by husband, if creditor proves he was such prior to execution of deed, wife's prima facie case, made by its production, fails, unless she proves husband had other property to satisfy debt either when conveyance was made or execution levied. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

Gift deed from husband to wife vested legal title in wife, and neither husband nor his subsequent creditors or purchasers could question wife's deed, which could only be done by husband's prior creditor. *Id.*

**Effect of gift by insolvent debtor.**—A pretended gift of a half interest in land by an insolvent was void as to his creditors, and, where the land was subsequently exchanged for a stock of goods, the donee acquired no interest in the goods. *Coughran v. Edmondson*, 172 S. W. 1106, 106 Tex. 540, reversing judgment *Edmondson v. Coughran* (Civ. App.) 138 S. W. 435.

**Creditors who may challenge gift.**—Where a creditor takes a renewal note for his debt, after the debtor makes a voluntary conveyance, the original debt still continues and has precedence over the fraudulent conveyance, if the debtor was insolvent at the time of the gift. *First State Bank & Trust Co. of Abilene v. Walker* (Civ. App.) 187 S. W. 724.

Indebtedness for services rendered in pursuance of express or implied contract, or quantum meruit indebtedness for services, was such indebtedness as would render gift deed by debtor void as to prior creditor. *Stolte v. Karren* (Civ. App.) 191 S. W. 600.

**Right of subsequent creditor to avoid gift.**—Where it did not appear that a debtor's sale was made with intention to pass absolute title, future creditors could not set it aside on the ground that more than was reasonably necessary to pay the debts provided for in the transaction was conveyed. *Martin v. Jourdanton Mercantile Co.* (Civ. App.) 185 S. W. 583.

Voluntary conveyance is void as to existing creditors, but not as to subsequent creditors, merely on the ground that it is voluntary. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

In a suit to restrain the sale of land under an execution against the husband, evidence held to show a gift from the husband of his interest in the money with which the land was bought to the wife, which was valid against a subsequent creditor. *City Nat. Bank of Eastland v. Kinnebrew* (Civ. App.) 190 S. W. 536.

**Debtor within statute.**—An indorser of promissory notes is a "debtor" within this article. *Ochoa v. Edwards* (Civ. App.) 189 S. W. 1022.



**Donee's rights.**—Donee in voluntary conveyance cannot sustain it by showing he had no notice of donor's debts. *Collett v. Houston & T. C. R. Co.* (Civ. App.) 186 S. W. 232.

Where voluntary grantee of land, expressly subjected by deed to vendor's lien, paid note secured by lien, or such note was paid by another, such grantee became vested with fee-simple title. *Id.*

#### Art. 3968. [2546] [2467] Gift of goods, etc.

**What are goods and chattels.**—Where a father offered to give mules to son if he paid off mortgage thereon, which the son never undertook to do, nor claimed the mules, held, that the son was not the owner by purchase. *Carroll v. First State Bank of Denison* (Civ. App.) 160 S. W. 632.

This article does not make delivery and possession of a note essential to the validity of a gift thereof. *Earhart v. Agnew* (Civ. App.) 190 S. W. 1140.

**Requisites of gifts.**—Where V. executed a note to A. and B., which, with a paper asking them to accept it, was placed in an envelope and sealed, and the same was found in V.'s house after his death, there was no gift *inter vivos*, because of the absence of a delivery to A. and B. by V. during his lifetime. *Maris v. Adams* (Civ. App.) 166 S. W. 475.

Under this article, grass seed raised by wife on her separate real estate held not a gift to her by her husband as against his creditors where actual possession was not given to the wife. *First Nat. Bank of Plainview v. McWhorter* (Civ. App.) 179 S. W. 1147.

Under this article, live stock purchased by children with money their father realized from the sale of stock he had given them without delivery and placed in bank to the credit of one and given directly to the other was irrevocably the children's property by purchase. *Rector v. Continental Bank & Trust Co.* (Civ. App.) 180 S. W. 309.

Where a father by parol gave his daughter a mare running at large upon the range, in the absence of delivery, no property passed to the daughter, and she did not own such mare's increase. *Id.*

Complete and unconditional delivery by the donor, and acceptance by the donee are essential to the validity of a gift *inter vivos*. *Grayson v. Boyd* (Civ. App.) 185 S. W. 651.

Under this article, an alleged oral gift of a mule not executed by actual possession is void as against creditors. *Spaulding Mfg. Co. v. Allen* (Civ. App.) 193 S. W. 715.

**Evidence.**—Evidence held to sustain finding that notes sued on had not been given to maker by the payee thereof since deceased. *Baker v. Bledsoe* (Civ. App.) 182 S. W. 1184.

While mere branding cattle in the wife's name is insufficient to prove gift thereof to her it is evidence which may be considered with other facts to show a gift of the increase, as well as its proceeds. *Amend v. Jahns* (Civ. App.) 184 S. W. 729.

Evidence, in an action to restrain an execution sale of property, held to sustain a finding that the property was acquired by the principal defendant as a gift, and not as part consideration for property sold to the donor. *Fidelity Trust Co. v. Rector* (Civ. App.) 190 S. W. 842.

#### Art. 3969. [2547] [2468] Loan of chattels.

See *Posey v. Adam Schaaf Co.* (Civ. App.) 189 S. W. 977.  
Cited, *Hudgins v. Hammers* (Civ. App.) 178 S. W. 986.

#### Art. 3970. [2548] Chattel mortgage void, when.

**Purchase of entire stock.**—Notwithstanding this article, a purchaser of the whole of a stock of goods, who assumed the seller's debt, cannot question the legality of the mortgage. *Denman v. James* (Civ. App.) 180 S. W. 1157 (following *Continental State Bank of Beckville v. Trabue* [Civ. App.] 150 S. W. 209).

**Validity of mortgage in general.**—Evidence held to show that a sale of automobiles to a dealer was in contemplation that they would be exposed for sale by him in the ordinary course of business, so that a mortgage given by him on the automobiles was void. *J. I. Case Threshing Mach. Co. v. Lipper* (Civ. App.) 181 S. W. 236.

A chattel mortgage in the ordinary form given by a retail dealer in automobiles to the manufacturer and seller was void. *Id.*

**Security for purchase price.**—A reservation of title to a stock of goods to secure the purchase price, though declared a mortgage by Rev. St. 1911, art. 5654, is not within article 3970, declaring void a mortgage on a stock of goods. *Mayfield Co. v. Harlan & Harlan* (Civ. App.) 184 S. W. 313.

**Application where mortgagee in possession.**—This article does not apply where the goods mortgaged are segregated from the stock and possession delivered to the mortgagees. *Krower v. Martin* (Civ. App.) 184 S. W. 611.

**Art. 3971. Sales of merchandise and fixtures in bulk; notice to creditors; liability as receiver.**—The sale or transfer in bulk of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business otherwise than in the ordinary course of trade, and in the regular prosecution of the business of the seller or transferor, shall be void as against the creditors of the seller or transferor unless the purchaser or transferee demand and receive from

the seller or transferor a written list of names and addresses of the creditors of the seller or transferor, with the amount of the indebtedness due or owing to each and certified by the seller or transferor under oath to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser or transferee shall at least ten days before taking possession of such merchandise or merchandise and fixtures, or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof. Any purchaser or transferee who shall not conform to the provisions of this Act shall, upon application of any of the creditors of the seller or transferor, become a receiver and be held accountable to such creditors for all goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale or transfer. [Acts 1909, p. 66; Act March 23, 1915, ch. 114, § 1.]

**Explanatory.**—The title of the act purports to amend articles 3971, 3972, 3973, "so as to include the fixtures pertaining to the conduct of such business and to make the purchaser or transferee who shall not conform to the provisions of this act, upon the application of any creditor or seller or transferor, or receiver of said goods, wares and merchandise and fixtures, that have thus come into his possession." The act took effect 90 days after March 20, 1915, the date of adjournment.

Cited, *A. G. Schwab & Son v. Norwood* (Civ. App.) 183 S. W. 807.

**Constitutionality.**—The Bulk Sales Law held a valid exercise of the police power, and not to unreasonably deprive the owners of merchandise of their control over it and right to contract as to it. *Owosso Carriage & Sleigh Co. v. McIntosh & Warren* (Sup.) 179 S. W. 257.

**Creditors' remedies.**—Under this article, a sale of a stock is void as to a creditor of the seller whose name was omitted from the list furnished to the purchaser, but which list was not verified by the seller. *Williams v. J. W. Crowds Drug Co.* (Civ. App.) 167 S. W. 187.

Under Bulk Sales Law, § 1, a purchaser who did not comply with the statute is a trustee for the seller's creditors, and they may reach the debt by garnishment, though the goods have been sold and the proceeds disposed of. *Owosso Carriage & Sleigh Co. v. McIntosh & Warren* (Sup.) 179 S. W. 257.

The purchasers from one who sells without compliance with the Bulk Sales Law are liable in garnishment to his creditors for the goods or their proceeds if resold. *Mayfield Co. v. Harlan & Harlan* (Civ. App.) 184 S. W. 313.

S. selling in violation of the Bulk Sales Law to M., and M. reselling to N., and taking his note, S.'s creditors cannot subject to their debts both the note and the goods. *Id.*

One who in making a purchase, void because in violation of Bulk Sales Law, as consideration releases the seller's debt to him, cannot revive it, so as to share with the seller's other creditors. *Id.*

Purchaser of stock of merchandise not complying with Bulk Sales Law held constructive trustee for creditors to extent of merchandise purchased. *Barcus v. Parlin-Orendorf Implement Co.* (Civ. App.) 184 S. W. 640.

If transferor of stock of goods had creditors, purported sale was void as to them if Bulk Sales Law was not complied with, and if transferee sold, disposed of goods, or converted them by mingling them with its own, it became indebted to trust for creditors for value. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

**Evidence and burden of proof.**—Under Bulk Sales Law, in garnishment proceedings on account of goods sold to garnishee, burden of proof to show that sale was within exception of act validating it when notice is given held on garnishee. *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Civ. App.) 189 S. W. 784.

In garnishment proceedings on account of goods sold by judgment debtor to garnishee in violation of Bulk Sales Law, attorney for plaintiffs, resident elsewhere than in city of clients' residence, was properly allowed to testify they received no notice with reference to sale. *Id.*

**To what sales applicable.**—A sale by one formerly in the jewelry business who at the time had withdrawn therefrom, and who had mortgaged the goods and segregated them from his stock in trade, was not a sale in the "usual course of trade" within the Bulk Sales Act. *Krower v. Martin* (Civ. App.) 184 S. W. 511.

The Bulk Sales Law does not apply to a sale of goods segregated from a stock in trade by the owner who was formerly a merchant, but who at the time of the sale was a farmer. *Id.*

Where goods, having been segregated from the main stock, are mortgaged and possession delivered to the mortgagees, the Bulk Sales Law does not apply. *Id.*

**Art. 3972. Purchaser conforming to provisions, not accountable.**—Any purchaser or transferee who shall conform to the provisions of Article 3971 shall not in any way be held accountable to any creditor of the seller or transferor for any of the goods, wares, merchandise or fixtures

that have come into the possession of said purchaser or transferee by virtue of such sale or transfer. [Acts 1909, p. 66, § 2; Act March 23, 1915, ch. 114, § 1.]

Cited, *Williams v. J. W. Crowds Drug Co.* (Civ. App.) 167 S. W. 187.

**Rights of mortgagee.**—Though the purchaser of a stock of goods in bulk does not assume a mortgage debt thereon, the mortgagee, not having waived his lien, may foreclose. *Eagle Drug Co. v. White* (Civ. App.) 182 S. W. 378.

**Purchaser not personally liable.**—This article places no personal liability for the debts of the seller on the purchaser of a stock of goods in bulk. *Eagle Drug Co. v. White* (Civ. App.) 182 S. W. 378.

**Art. 3973. Not applicable in what cases.**—Nothing in Articles 3971 and 3972 shall apply to sales by executors, administrators, receivers or any public officer conducting a sale in his official capacity, nor to a sale or transfer of stocks of merchandise and fixtures for the payment of bona fide debts, where all creditors share in proportion to their respective claims, and without preference in the sale or transfer or the proceeds thereof. [Acts 1909, p. 66, § 3; Act March 23, 1915, ch. 114, § 1.]

## TITLE 63

## GAME, FISH, OYSTERS, ETC.

Chap.  
2. Fish, oysters, etc.

Chap.  
3. Game.

## CHAPTER TWO

## FISH, OYSTERS, ETC.

Art.	Art.
3980. Public rivers, etc., property of state, etc.; under jurisdiction of commissioner, etc.	etc., and stocking of waters with fish; taking fish for state and United States fisheries.
3982. Riparian rights prescribed.	4000a. United States commissioner of fisheries may conduct fish hatching and culture.
3987. Licenses to wholesale dealers in fish and oysters; definition.	4021c. Certain fresh water lakes shall not be sold; open to public; proviso, etc.
3988. Application; requisites, agreement for inspection, record, forfeiture, etc.	4021i. Sand and other deposits may be taken from Corpus Christi bay and Nueces bay.
3989. Issuance of license; requirements; tax; cancellation of license.	
4000. Duties of commissioner as to collection of tax, making of inspections,	

**Article 3980. Public rivers, etc., property of state, etc.; under jurisdiction of commissioner, etc.**

**Nature of statutory provision.**—This article is merely a declaration of the sovereign right of the state to protect the fish and game within its borders, and its power to regulate and control, or absolutely prohibit, the taking of fish. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

**Fishing rights as between individuals.**—Agreement of owners of land on which there was a small lake held to give fishing rights as an easement appurtenant to the land, to which the title of a grantee was subject, which were terminated by defendant club's act in cutting its dam and lowering the water, rendering it liable to the owner of the slough for damages to his fishing rights and for decreasing the market value of his property. *Thomas v. Fin & Feather Club*, 171 S. W. 698, 106 Tex. 490, reversing judgment *Fin & Feather Club v. Thomas* (Civ. App.) 138 S. W. 150.

**Art. 3982. [25180] Riparian rights prescribed.**

**Exclusive right of grantee.**—Under this article, although the original grant from the Republic of Texas, confirmed by the Legislature of the state of Texas, did not give the exclusive right, grantee has the exclusive right to take oysters within the limits of his grant. *North American Dredging Co. v. Jennings* (Civ. App.) 184 S. W. 287.

**Art. 3987. Licenses to wholesale dealers in fish and oysters; wholesale dealer defined.**

**Refusal of license.**—Where an applicant for a license under this article, to engage in the fish and oyster business, had engaged in such business for three months prior to her application without paying the monthly tax fixed by article 3989, the license was properly refused. *Adams Fish Market v. Sterett*, 172 S. W. 1109, 106 Tex. 562.

**Art. 3988. Application for license; requisites; agreement for inspection, record, forfeiture, etc.**

**Refusal of license.**—See note under article 3987.

**Art. 3989. Issuance of license; requirements; tax; cancellation of license.**

**Refusal of license.**—See note under article 3987.

**Computation of tax.**—To construe this article so as to require that the tax be computed on the "quantity purchased without the state" would render the statute invalid as imposing a burden on interstate commerce, and the measure of the tax for fish and oysters "handled" is the quantity purchased within the state, plus the quantity sold within the state from any amount acquired from without the state. *Adams Fish Market v. Sterett*, 172 S. W. 1109, 106 Tex. 562.

**Art. 4000. Duties of commissioner as to collection of tax, making of inspections, etc., and stocking of waters with fish; taking fish for state and United States fisheries.**—It shall be the duty of the Game, Fish and Oyster Commissioner to collect the special tax imposed by this chapter and enforce its payment, to inspect all products so taxed and verify the weights and measures thereof, to collect all license fees, to collect all rents on locations for planting oysters, to examine or have examined all streams, lakes or ponds when requested so to do for the purpose of stocking such waters with fish best suited to such location and he shall procure and furnish such stock fish from the nearest fishery and fish hatchery free of charge to any party or parties applying therefor. It shall be the duty of the Game, Fish and Oyster Commissioner to supply from the fish hatcheries and fisheries of this State free of charge all parties applying therefor such number of fish for the purpose of stocking private lakes and ponds, or public waters, as may be available for distribution; provided, however, that the parties applying therefor shall pay all transportation charges on such fish and shall return to the hatchery or fishery all containers free of cost.

It shall be lawful for the Game, Fish and Oyster Commissioner of this State and his deputies to take at any time from the public fresh waters of this State all brood fish required by him in operation of such hatcheries for the purpose of propagation and culture. It shall also be lawful for the United States Commissioner of Fisheries and his duly authorized agents to take from public fresh waters of this State all brood fish necessary in the operation of Federal Fish Hatcheries, provided that no other fish except brood fish shall be so taken for any purpose. [Act 1913, p. 297, § 1; Act Oct. 10, 1917, ch. 12, § 1.]

**Explanatory.**—Section 1 of the act amends art. 4000, Rev. Civ. St., as amended by ch. 146, Acts, Regular Session, 33rd Legislature. See note under art. 3982, Vernon's Sayles' Civ. St. 1914.

**Art. 4000a. United States Commissioner of Fisheries may conduct fish hatching and culture.**—Be it further enacted that there is hereby accorded to the United States Commissioner of Fisheries and his duly authorized agents the right to conduct fish hatching and fish culture and all operations connected therewith at any time that may by them be considered necessary and proper, provided that they conduct the same within prescribed limits of the Federal Fish Hatcheries. [Act Oct. 10, 1917, ch. 12, § 2.]

Sections 3, 4, and 5 of the act create offenses and are set forth post as articles 872a, 872b, and 872c of the Penal Code. Sections 1 and 2 of this act are set forth ante as arts. 4000 and 4000a, Civil Statutes.

**Art. 4021c. Certain fresh water lakes shall not be sold; open to public; proviso, etc.**

**Sufficiency of fish commissioner's order.**—It is no objection to an order of the fish commissioner closing a certain water against fishing with seines and nets that it does not name the time for which it is to be closed. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

**Art. 4021l. Sand and other deposits may be taken from Corpus Christi Bay and Nueces Bay.**—And provided further however, that there may be taken and appropriated from beneath the waters of Corpus Christi Bay and Nueces Bay, sand and other deposits for filling and raising the grade of the salt flats in the northern portion of the City of Corpus Christi and the lowlands lying north of the north boundary line of the City of Corpus Christi, in Nueces county, Texas, without making payment therefor to the Game, Fish and Oyster Commissioner or to the State of Texas. [Act March 19, 1917, ch. 86, § 1.]

**Explanatory.**—The act amends ch. 68, Acts 32nd Legislature, and ch. 154, Acts 33rd Legislature, by adding sec. 13. Took effect 90 days after March 21, 1917, date of adjournment.

CHAPTER THREE

GAME

**Article 4040. Compensation of commissioner and deputies.**

Note.—By Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, the salary of the commissioner is fixed at \$2,500, and that of his chief deputy at \$2,000.



TITLE 63 A

GOVERNING BOARDS OF STATE INSTITUTIONS

**Article 4042a. How composed; qualifications.**

Note.—Act June 3, 1915, ch. 13, p. 36, Acts 34th Leg., 1st Called Session, creates a special board for the Texas School for the Blind. See arts. 187½-187½c, ante.  
See art. 107c, ante.

## TITLE 64

## GUARDIAN AND WARD

## Chap.

1. General provisions.
3. Commencement of proceedings.
4. Persons entitled to be appointed guardians, and persons who are disqualified.
5. Appointment of guardian.
7. Oath and bond of guardians.
8. Inventory, appraisement and list of claims.
9. Powers and duties of guardians.

## Chap.

10. Renting and leasing property, and investing and loaning money of ward.
11. Sales.
12. Reports of sales and action of the court thereon.
13. Annual accounts.
15. Claims against the estate.
19. Final settlement.
20. Compensation of guardians, expense and cost of guardianship.
21. Appeal, bill of review and certiorari.

## CHAPTER ONE

## GENERAL PROVISIONS

## Art.

4043. Jurisdiction of county court over.  
4044. Jurisdiction of district court over.

## Art.

4053. Cases of guardianship shall be called at each term.

**Article 4043. [2550] [2469] Jurisdiction of county court over.**

Cited, *Loving v. Hazelwood* (Civ. App.) 184 S. W. 355.

**Jurisdiction over sureties on guardian's bond.**—Order of probate court decreeing an indebtedness against sureties on guardian's bond held void as to sureties, since the probate court had no jurisdiction as to them. *White v. Bedell* (Civ. App.) 173 S. W. 624.

**Jurisdiction over minor devisee.**—The administration of a will by an independent executor does not deprive the probate court of jurisdiction of the estate of a minor devisee, and it may, when necessary, appoint a guardian to take charge of such estate. *McAdams v. Wilson* (Civ. App.) 164 S. W. 59.

**Art. 4044. [2551] [2470] Jurisdiction of district court over.**

**Jurisdiction where guardian appointed by probate court.**—District court, which, through receiver, had taken possession of property belonging to son and mother, held to have had jurisdiction of suit on joint indebtedness of son and mother, and to fix priorities of several liens asserted upon their joint property and to direct sale of property to enforce the judgment, though the mother was insane and under guardianship by appointment of the probate court. *Lauraine v. Masterson* (Civ. App.) 193 S. W. 708.

**Art. 4053. [2560] [2479] Case of guardianship shall be called at each term.**

Cited, *Kent v. McDaniel* (Civ. App.) 178 S. W. 1006.

## CHAPTER THREE

## COMMENCEMENT OF PROCEEDINGS

**Article 4061. [2568] [2487] Commenced by written application.**

Cited, *Simmons v. Arnim* (Civ. App.) 172 S. W. 184.

## CHAPTER FOUR

PERSONS ENTITLED TO BE APPOINTED GUARDIANS, AND  
PERSONS WHO ARE DISQUALIFIED

Art. 4068. Father entitled, where parents live together.	Art. 4069. Parents equally entitled, when.
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**Article 4068. [2575] [2494] Father entitled, where parents live together.**

**Necessity of appointment by court.**—A parent cannot appoint himself guardian of his minor child's estate and dispose of the property without the sanction of court; his guardianship by nature not giving him such power. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

**Right to custody of child.**—A surrender of the possession of a child by its parents, whether evidenced by a written instrument or vesting in parol, is not a contract, and cannot be enforced as such, because neither the child nor its custody is a matter of contract, although the transfer will be enforced if for the benefit of the child, and a young father will not be given the custody of his minor child as against the maternal grandparents, who rightfully came into custody, where it was for the benefit of the child to remain with his grandmother. *Ex parte Sams* (Civ. App.) 161 S. W. 388.

In an action by a father for the custody of his minor child, evidence held to establish that the child's maternal grandparents acquired custody lawfully. *Id.*

While the parent is usually entitled to the custody of his child, the courts will consult the child's best interest in awarding custody, especially where a parent has voluntarily parted with custody and the child's present surroundings are better than if in the parent's custody. *Clark v. Hendricks* (Civ. App.) 164 S. W. 57.

In proceedings by a father to recover custody of his infant child on the death of his wife as against the child's maternal grandparents, evidence of the father's misconduct held insufficient to justify the court in denying him the relief prayed. *State v. Dowdell* (Civ. App.) 168 S. W. 2.

Evidence, held insufficient to support finding that father was not fit party to have custody of illegitimate child or that parents abandoned it, and to show that fitness of the parents was equal to that of the defendants, making award of child to the father's sister, to whom its parents had delivered it, erroneous. *Smith v. Moore* (Civ. App.) 171 S. W. 822.

Twenty-three year old father, who had settled down on his mother's farm and acquired property, held entitled to the custody of his four year old daughter as against the child's maternal grandparents, previously given her custody, since changes in their circumstances were such as to render inconclusive the former judgment giving custody of the child to the grandparents. *Smith v. Long* (Civ. App.) 181 S. W. 478.

**Duty to support.**—In view of this article and arts. 4069, 4634, both parents after divorce are liable to maintain children of the marriage. *Gully v. Gully* (Civ. App.) 184 S. W. 555.

**Art. 4069. [2576] [2495] Parents equally entitled, when.**

**Duty to support.**—See note under article 4068.

## CHAPTER FIVE

## APPOINTMENT OF GUARDIAN

Art. 4082. Only one guardian of the person or estate shall be appointed, except.	Art. 4083. Order of appointment, requisites. 4086. Guardian of minor continues in office, until, etc.
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**Article 4082. [2589] [2508] Only one guardian of the person or estate shall be appointed, except, etc.**

**Number of guardians.**—Under the express provisions of this article, only one guardian can be appointed for the person or estate of a minor though a separate guardian may be appointed for each. *McAdams v. Wilson* (Civ. App.) 164 S. W. 59.

**Appointment of trustee.**—The district court in its discretion may appoint a banker trustee of a trust for the benefit of an infant, instead of the guardian of the infant's person, where the duties of the trustee would not conflict with those of the guardian. *Kent v. McDaniel* (Civ. App.) 178 S. W. 1006.

**Art. 4083. [2590] [2509] Order of appointment shall contain what.**

**Transfer of funds by appointment.**—The funds in the hands of an independent executor, which belonged to an infant devisee, were transferred by operation of law to him as



guardian of the infant upon his appointment as such, so that no act was necessary to transfer them. *McAdams v. Wilson* (Civ. App.) 164 S. W. 59.

**Appointment for part of estate.**—Under this article and arts. 4099, 4113, 4115, 4116, relating to the appointment and duties of a guardian of a minor's estate, held, that a guardian could not be appointed for only a part of the estate belonging to the ward, as for one-half of the community property belonging to his mother, who devised to him and another brother all of her property. *McAdams v. Wilson* (Civ. App.) 164 S. W. 59.

**Art. 4086. [2593] [2512] Guardian of minor continues in office, until, etc.**

**Termination of guardianship.**—A guardianship proceeding is terminated when the ward reaches majority. *American Surety Co. of New York v. Hardwick* (Civ. App.) 186 S. W. 804.

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## CHAPTER SEVEN

### OATH AND BOND OF GUARDIANS

**Article 4099. [2600] [2519] Bond of guardian of the estate.**

**Appointment of guardian for part of estate.**—See note under article 4083.

**Amount of bond.**—The bond given by the guardian of the estate of an infant must be double the estimated value of the infant's estate, as expressly required by this article. *McAdams v. Wilson* (Civ. App.) 164 S. W. 59.

**Time to sue on bond.**—To authorize the county court to entertain a suit on a guardian's bond for funds of the estate alleged to have been misappropriated, it is not necessary that such court shall have required a final report where the ward has reached majority. *American Surety Co. of New York v. Hardwick* (Civ. App.) 186 S. W. 804.

**Sufficiency of evidence.**—In an action on a guardian's bond for misappropriation of the ward's money, held, that the evidence sustained a finding that, when the ward gave certain money to the guardian, he was a minor. *Childs v. McGrew* (Civ. App.) 171 S. W. 506.

**Failure to invest funds.**—Under this article and article 4150, making guardians liable for principal and interest in funds they negligently fail to invest, the guardian and his surety are liable for funds lost through failure to invest them. *United States Fidelity & Guaranty Co. v. Taggart* (Civ. App.) 194 S. W. 482.

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## CHAPTER EIGHT

### INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

<p>Art. 4113. Inventory shall be returned, when. 4115. Affidavit of guardian to inventory.</p>	<p>Art. 4116. Property held in common shall be specified. 4120. Inventory may be corrected.</p>
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**Article 4113. [2612] [2531] Inventory shall be returned in thirty days, etc.**

**Appointment of guardian for part of estate.**—See note under article 4083.

**Art. 4115. [2614] [2533] Affidavit of guardian to inventory, etc.**

**Appointment of guardian for part of estate.**—See note under article 4083.

**Art. 4116. [2615] [2534] Property held in common shall be specified.**

**Appointment of guardian for part of estate.**—See note under article 4083.

**Art. 4120. [2619] [2538] Inventories, etc., may be corrected, etc.**

**Conclusiveness and effect of correction.**—An order of the county court in guardianship proceedings, if valid as a correction of an inventory under this article and art. 3334, held only prima facie evidence that land owned by a deceased parent was community property, and not a conclusive adjudication that the surviving parent was entitled to one-half of the property, the court having no jurisdiction. *United States Fidelity & Guaranty Co. v. Hall* (Civ. App.) 173 S. W. 892.

## CHAPTER NINE

## POWERS AND DUTIES OF GUARDIANS

Art. 4122. Of the person.	Art. 4127. Duty to collect estate.
4123. Same subject.	4131. Ward's education and maintenance.
4124. Guardian of the estate.	

**Article 4122. [2621] [2540] Of the person.**

Cited, Eitel v. State (Cr. App.) 182 S. W. 318.

**Art. 4123. [2622] [2541] Same subject.**

Cited, Eitel v. State (Cr. App.) 182 S. W. 318.

**Art. 4124. [2623] [2542] Guardian of the estate.**

Cited, Kidd v. Prince (Civ. App.) 182 S. W. 725.

**Power to lease.**—Under this article and arts. 4136, 4137, 4139, held, that a guardian, renting without an order of court, was not limited to a lease for a year, but had power to lease for a longer term. Rogers v. Harris (Civ. App.) 171 S. W. 809.

**Art. 4127. [2626] [2545] Duty to collect estate.**

**Collection of assets.**—A grantee who fraudulently secured a conveyance from an insane person and a judgment confirming the deed, and thereafter conveyed the property to an innocent purchaser, is liable to the guardian of the insane person for the difference between the amount paid by the grantee and the actual value of the land. Pyle v. Pyle (Civ. App.) 159 S. W. 488.

**Art. 4131. [2630] [2549] Education and maintenance of ward.**

**Pension money as income.**—Pension money in mother's hands as guardian for her minor son was not "income" of minor's estate, within this article, as to expenditure of income, and though paid into hands of his mother, as guardian, by federal government for his education and maintenance, it was paid to her as person appointed under laws of state to receive it, and it could be expended by her only in conformity to laws of state. Anderson v. Steddum (Civ. App.) 194 S. W. 1132.

**Necessity of authorization and allowance.**—Under this article, a guardian cannot recover expenses paid by him prior to his appointment and never filed and approved by the court, although allowed and approved on his final account, but where he paid a reasonable attorney's fee due for collection of personal injury compensation constituting the estate, which amount was never inventoried as part of the estate, he was not liable therefor, although such payment was never approved by the court. Yates v. Watson (Civ. App.) 187 S. W. 548.

**Expenses for which state is liable.**—The estate of a minor ward is not chargeable with burial expenses of the father of such ward, nor with traveling expenses of the guardian which were not verified, filed, and approved by the county court, but court fees and costs in other courts retained out of money belonging to ward's estate are properly chargeable by the guardian against the estate of the ward, though not filed nor approved. Yates v. Watson (Civ. App.) 187 S. W. 548.

## CHAPTER TEN

## RENTING AND LEASING PROPERTY, AND INVESTING AND LOANING MONEY, OF WARD

Art. 4134. Guardian may carry on or rent farm, etc., under order of court.	Art. 4140. Money shall be invested, how.
4136. May rent improved property, other than, etc., without order.	4141. Security for money loaned; examination by attorney.
4137. Court may order improved property rented.	4150. Guardian's liability for interest.
4139. Guardian may be cited to show cause why he should not rent land.	4152a. Guardian may make mineral leases.
	4152b. Application to judge; notice; hearing, approval and order.

**Article 4134. [2633] [2552] Guardian may carry on or rent farm, etc., under order of the court.**

**Power to lease.**—A guardian at common law can lease a ward's real estate for any term of years not extending beyond minority. Rogers v. Harris (Civ. App.) 171 S. W. 809.

**Art. 4136.** [2635] [2554] May rent improved property other than, etc., without order.

Power to lease.—See note under article 4134.

**Art. 4137.** [2636] [2555] Court may order improved property rented, etc.

Power to lease.—See note under article 4134.

**Art. 4139.** [2638] [2557] Guardian may be cited to show cause why he should not rent land out, etc.

Power to lease.—See note under article 4134.

**Art. 4140.** [2639] [2558] Money may be invested, how.

Failure to invest.—The rule that a guardian temporarily depositing a ward's funds in a bank is not liable for loss from the bank's failure is inapplicable, where he intended to leave them there until the ward's majority, instead of investing them in bonds and mortgages as required by this article and art. 4141. *United States Fidelity & Guaranty Co. v. Taggart* (Civ. App.) 194 S. W. 482.

**Art. 4141.** [2640] [2559] Security for money loaned; examination by attorney.

Cited, *United States Fidelity & Guaranty Co. v. Taggart* (Civ. App.) 194 S. W. 482.

**Art. 4150.** [2648] [2567] When guardian is liable for interest.

Liability of guardian.—A guardian loaning and wasting estate funds held liable for the principal and interest, under this article, though the loan was made under court order. *American Surety Co. of New York v. Hardwick* (Civ. App.) 186 S. W. 804.

Under the statute, where the guardian of a minor's estate by the exercise of due diligence could have loaned funds and failed to do so, he is chargeable with interest thereon at the highest legal rate. *Yates v. Watson* (Civ. App.) 187 S. W. 548.

Under art. 4099, requiring guardian's bond, and this article, the guardian and his surety are liable for funds lost through failure to invest them. *United States Fidelity & Guaranty Co. v. Taggart* (Civ. App.) 194 S. W. 482.

**Art. 4152a.** Guardian may make mineral leases.—That guardians of the estates of minors or of any other persons, appointed under the laws of the State of Texas, which have heretofore been appointed, or which may hereafter be appointed, shall have the authority to make mineral leases for the estates of their wards. [Acts 1913, p. 261, § 1; Act March 12, 1915, ch. 44, § 1.]

Took effect March 12, 1915.

**Art. 4152b.** Application to judge; notice; hearing, approval and order.—That whenever a guardian of the estate of any persons shall desire to make a mineral lease upon the real estate of his ward, he shall apply to the county judge of the county where such guardianship is pending for authority to make and execute such mineral lease, and such application shall be in writing and sworn to by such guardian, and the county judge, either in term time or in vacation, shall hear such application, and shall require proof as to the necessity and advisability of such mineral lease, and if he shall approve the same, he shall enter an order on the minutes of the Probate Court, either in term time or vacation, authorizing the guardian to make such mineral lease, and the terms upon which it shall be made; provided, that no lease shall extend beyond the time that the ward shall become twenty-one years of age.

Before such application shall be heard by the county judge, notice of such application shall be given by the guardian for one week prior to the time such application shall be heard, by publishing same in some newspaper of the county where said guardianship is pending for one issue of said paper, and such notice shall state when and where such application shall be heard.

It is further provided that after notice and hearing of said application and the granting of the same by the Probate Court, that said guardian

shall be fully authorized to make mineral lease upon the real estate of his ward in accordance with the judgment of the County Court acting upon the same. [Acts 1913, p. 261, § 2; Act March 12, 1915, ch. 44, § 2.]

Note.—Sec. 3 of the act repeals chapter 131, Laws of 33d Leg., approved April 3, 1913.

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## CHAPTER ELEVEN

### SALES

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| Art.<br>4155. When real estate may be sold.                     | Art.<br>4160. Considerations in ordering sale. |
| 4156. Guardian shall apply for order to sell real estate, when. |  |

#### Article 4155. [2653] [2572] When real estate may be sold.

Sale by person not validly appointed guardian.—One not validly appointed guardian of an infant was not a guardian, and orders of the county court for sale of land of the infant by such person were void. *Hamer v. Sanford* (Civ. App.) 189 S. W. 343.

Validation of void sale.—Where a father sold land which he had previously conveyed to his son, he cannot validate the sale by six years later applying for guardianship of the son's estate, and for confirmation of the sale as an act of guardianship; there being no order of sale made. *Vineyard v. Heard* (Civ. App.) 167 S. W. 22.

Disposition of proceeds.—Under this article and art. 4160, probate court, which ordered sale of particular land of wards by guardian, held to have power to direct application of proceeds to payment of wards' debt, despite article 3787. *Ridling v. Murphy* (Civ. App.) 191 S. W. 206.

#### Art. 4156. [2654] [2573] Guardian shall apply for order to sell real estate, when.

Absence of verified exhibit.—Under this article, an order of the probate court directing the sale of a ward's property on an application not accompanied by a verified exhibit should be treated as void, where the court heard no testimony and made no inquiry to ascertain whether the necessity actually existed. *Mullinax v. Barrett* (Civ. App.) 173 S. W. 1181.

#### Art. 4160. [2658] [2577] Advantage of estate to be considered in ordering sale.

Disposition of proceeds.—Under this article and art. 4155, probate court, which ordered sale of particular land of wards by guardian, held to have power to direct application of proceeds to payment of wards' debt, despite article 3787. *Ridling v. Murphy* (Civ. App.) 191 S. W. 206.

### DECISIONS RELATING TO SUBJECT IN GENERAL

Disposition of proceeds.—Where the interest of infants in land inherited from their mother was sold, they were entitled to the entire proceeds; nothing appearing to show that the purchase price included the life estate of their father. *United States Fidelity & Guaranty Co. v. Hall* (Civ. App.) 173 S. W. 892.

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## CHAPTER TWELVE

### REPORTS OF SALES AND ACTION OF THE COURT THEREON

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| Art.<br>4177. Action of court upon the report. | Art.<br>4180. Conveyance of real estate, etc. |
| 4178. Sale to be set aside, when.              | 4181. No conveyance until, when.              |

#### Article 4177. [2675] [2593] Action of the court on the report; proviso.

Effect and conclusiveness of confirmation.—Probate court, after confirming guardian's private sale of ward's land, the record being fair on its face, could not at a subsequent term, on application for guardian's removal, while he was absent from the state, render

judgment against the guardian and sureties for amount lost by sale for less than actual value. *White v. Bedell* (Civ. App.) 173 S. W. 624.

Where a county court ordered the sale by a guardian of her wards' lands, such sale, and its confirmation, passed title, subject only to the payment of the purchase money, leaving no title in a ward or her husband. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

**Art. 4178. [2676] [2594] Sale shall be set aside, when.**

**Cancellation of deed.**—A guardian's deed, though the sale be set aside, will not be canceled where no cancellation was prayed. *Mullinax v. Barrett* (Civ. App.) 173 S. W. 1181.

**Art. 4180. [2678] [2596] Conveyance of real estate.**

**Necessity of proving authority of grantor.**—A deed to defendant's grantor signed C. B. per S. Le B., "curator," in the absence of any authority shown for the execution of the deed by him, held not binding upon C. B. and insufficient to pass her title. *Le Blanc v. Jackson* (Civ. App.) 161 S. W. 60.

**Art. 4181. [2679] [2597] No conveyance until terms of sale have been complied with.**

**Payment.**—An arrangement between a guardian who, with his wards, owned a tract of land, and a purchaser, that a payment to the guardian should be also a payment for the wards' interest, held in view of this article, not to give the purchaser any rights. *Mullinax v. Barrett* (Civ. App.) 173 S. W. 1181.

Payment, by the buyers of lands of minors from their guardian, in cash instead of part in cash and part by note, held a consummation of the sale as reported to the court and confirmed by it, giving the purchasers title. *Finley v. Wakefield* (Civ. App.) 184 S. W. 755.

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## CHAPTER THIRTEEN

### ANNUAL ACCOUNTS

**Article 4186. [2684] [2602] Annual account of guardian of estate.**

Cited, *Grice v. Cooley* (Civ. App.) 179 S. W. 1098.

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## CHAPTER FIFTEEN

### CLAIMS AGAINST THE ESTATE

**Article 4233. [2730] [2648] Payment of claims.**

**Compromise settlement.**—Rule preventing guardian of insane person from compromising claim by or against estate of ward without consent of probate court had no application in suit against guardian where judgment rendered against him was not a compromise judgment nor a judgment by confession. *Lauraine v. Masterson* (Civ. App.) 193 S. W. 708.

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## CHAPTER NINETEEN

### FINAL SETTLEMENT

Art.  
4273. Action of court upon account.

Art.  
4278. Labor or service of ward to be accounted for, etc.

**Article 4273. [2770] [2688] Action of the court upon account.**

**Review.**—Court of Civil Appeals is without power to disturb judgment of district court disapproving mother's final account as guardian of her minor son, if judgment was in accordance to law, merely because it was unjust. *Anderson v. Steddum* (Civ. App.) 194 S. W. 1132.

**Art. 4278. [2775] [2693] Labor or services of ward to be accounted for, etc.**

**Credit for expenditures.**—Under this article, guardian is entitled to credits as specified when they represent expenditures made by him as authorized by law, and not when they represent those made on account of his ward without authority of, if not in defiance of, requirements of law. *Anderson v. Steddum* (Civ. App.) 194 S. W. 1132.

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## CHAPTER TWENTY

### COMPENSATION OF GUARDIANS, EXPENSES AND COSTS OF GUARDIANSHIP

**Article 4281. [2780] [2698] Commissions of guardians.**

**Right to commissions.**—The general rule is that, when a guardian knowingly and wrongfully fails to account to his ward, which is a question of fact, he is not entitled to a commission on the sums expended for the ward, in her suit to compel an accounting, and where the ward, due to the guardian's mismanagement of the estate principal, was driven to the necessity suing for accounting with attending expenses and loss to the estate, it is inequitable to reduce the estate by allowing commissions to the guardian on sums expended for the ward, but they should be offset against the expense of the suit. *American Surety Co. of New York v. Hardwick* (Civ. App.) 186 S. W. 804.

**Conclusiveness of order to pay commissions.**—An order directing payment by a guardian from funds in his hands to his predecessor of commissions earned by her is a proceeding in rem, binding on all persons, till reversed or set aside, so that it cannot be collaterally attacked. *Scott v. Scott* (Civ. App.) 170 S. W. 273.

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## CHAPTER TWENTY-ONE

### APPEAL, BILL OF REVIEW AND CERTIORARI

**Article 4300. [2799] [2717] Bill of review may be brought.**

**Orders reviewable.**—Under this article, a bill of review is proper to correct errors in orders of county court approving guardian's final report and account on his application for discharge and may be entertained at any time after final order of discharge until barred by statute. *Yates v. Watson* (Civ. App.) 187 S. W. 548.

## TITLE 65

## HEADS OF DEPARTMENTS

Chap.

1. Secretary of state.
2. Comptroller of public accounts.
3. State treasurer.
5. Attorney general.

Chap.

6. Commissioner of agriculture.
8. State superintendent of public instruction.

## CHAPTER ONE

## SECRETARY OF STATE

**Article 4306a. Carbon copies of enrolled bills.**—Whereas, it is necessary that copy of all engrossed bills in both the House and Senate be furnished to the State Printer by the Secretary of State, and by such copy being made by the enrolling clerks of both the House and Senate an expense of \$200.00 will be saved the state; therefore, be it

Resolved, by the House of Representatives, the Senate concurring, that the Enrolling Clerk of the House and the Enrolling Clerk of the Senate be directed to make carbon copies of all enrolled bills that are sent to the Governor for his approval and furnish the same to the Secretary of State to be certified to and furnished to the State Printer. [H. C. R. No. 5, Feb. 16, 1915, p. 275.]

## CHAPTER TWO

## COMPTROLLER OF PUBLIC ACCOUNTS

Art.

4342. To be notified of deficiencies, when.  
4347. Claims to be classified.

Art.

4349. Pay warrants.

**Article 4342. To be notified of deficiencies, when.**

Cited *Terrell v. Middleton* (Sup.) 191 S. W. 1138.

**Constitutionality of deficiency appropriation for Governor.**—Despite Const. art. 3, § 49, and this article, a bill making a deficiency appropriation for water, fuel, lights, etc., for the Governor's mansion and covering items for food, liquors, engraved cards, and invitations for the Governor's private use, violated Const. art. 4, § 5, and art. 16, § 6. *Terrell v. Middleton* (Civ. App.) 187 S. W. 367.

**Art. 4347. Claims to be classified.**

**Pension warrants.**—Under subd. 3 of this article, the comptroller has power to make pension warrants negotiable or quasi negotiable by making them payable to order. *Dreeben v. State*, 71 Cr. R. 341, 162 S. W. 501.

Under subd. 3 of this article and art. 6273, it is not necessary to the validity of pension warrants that they be countersigned by the state treasurer before being sent out by the comptroller. *Id.*

**Art. 4349. Pay warrants.**

**Designation of fund from which payable.**—Act March 26, 1909 (Acts 31st Leg. c. 118), appropriating money for confederate pensions for the years 1909 and 1910, held superseded by the General Appropriation Act of May 12, 1909, so that the comptroller, in issuing warrants for confederate pensions for those years, properly stated that the money was to be paid out of the general appropriation. *Dreeben v. State*, 71 Cr. R. 341, 162 S. W. 501.

### CHAPTER THREE

#### STATE TREASURER

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| Art.<br>4372. Public moneys and that only to be kept in the treasury. | Art.<br>4378. Certain money returned to counties. |
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**Article 4372. [2860] Public moneys and that only to be kept in the treasury.**

Cited, *Moody v. Hemphill County* (Civ. App.) 192 S. W. 265.

**Art. 4378. Certain money returned to counties.**

Cited, *Matagorda County v. Horn* (Civ. App.) 182 S. W. 76.

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### CHAPTER FIVE

#### ATTORNEY GENERAL

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| Art.<br>4418a. Shall advise heads of departments, state boards; legislative committees, county auditors, district and county attorneys, etc.; advice as to | Art.<br>issuance of bonds; escheat proceedings.<br>4419. Shall inspect accounts, where. |
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**Article 4418a. Shall advise heads of departments, state boards, legislative committees, county auditors, district and county attorneys, etc.; advice as to issuance of bonds; escheat proceedings.**—In addition to the duties now or that may hereafter be imposed upon the Attorney General by law, he shall, at the request of the Governor or the heads of the departments of the State Government, including the heads and boards of penal and eleemosynary institutions, and all other State Boards, regents, trustees of the State educational institutions, and committees of either branch of the Legislature, and County Auditors now authorized by statute and to be authorized, give them advice in writing upon any question touching the public interest, or concerning their official duties. He shall counsel and advise the several district and county attorneys of the State, in the prosecution and defense of all actions in the district or inferior courts, wherein the State is interested, whenever requested by them, after said attorney shall have investigated the question, and shall with the question presented to the Attorney General, submit his brief also. He shall counsel and advise the proper legal authorities in regard to the issuance of all bonds that the law requires shall be approved by him, and it shall also be his duty to institute and prosecute or cause to be instituted and prosecuted all suits and proceedings necessary to recover for and on behalf of the State all properties, real, personal or mixed, that have heretofore escheated or that may escheat to this State under the provisions of Title 51, of the Acts of 1911, or under any other law now in existence, or that may hereafter be enacted, and the Attorney General is hereby prohibited from giving legal advice or written opinions to any other than the public officials named above. [Acts 1913, p. 48, § 1; Act March 30, 1917, ch. 165, § 1.]

**Explanatory.**—The act amends sec. 1, of ch. 26, general laws 33rd Leg., so as to read as above. Took effect 90 days after March 21, 1917, date of adjournment.

**Art. 4419. [2892] Shall inspect accounts in offices of treasurer and comptroller.**

**Repeal.**—Although art. 366, giving county attorney power to prosecute cases for collection of state funds misappropriated by county officers was passed before this article, the former is not repealed by the latter; the statutes being in *pari materia*. *State v. Bratton* (Civ. App.) 192 S. W. 314.



## CHAPTER SIX

## COMMISSIONER OF AGRICULTURE

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| <p>Art.<br/>4441. Chief clerk shall act, when.<br/>4443. Duties.</p> <p style="text-align: center;">BUREAU OF COTTON STATISTICS</p> <p>4450. Shall maintain bureau of cotton statistics.</p> <p style="text-align: center;">PROTECTION OF FRUIT TREES,<br/>SHRUBS AND PLANTS</p> <p>4465. Provisions, how enforced.</p> <p style="text-align: center;">PINK BOLL QUARANTINE</p> <p>4475a. Quarantine zone created.<br/>4475b. Proclamation by governor; duties of commissioner of agriculture; inspection and report.</p> | <p>Art.<br/>4475c. Prohibiting growing or transportation of cotton within quarantine zone.<br/>4475d. Inspection of cotton fields; proclamation of quarantine; fumigation or disinfection.<br/>4475e. Special quarantine zones.<br/>4475f. Destruction of infected cotton; valuation and payment to owners.<br/>4475g. Proclamation against growing of cotton in infected districts.<br/>4475h. Commissioner may enter fields and prescribe duties and compensation of inspectors.<br/>4475i. Co-operation with federal officers.<br/>4475j. Employment of entomologist to make inspection and report.<br/>4475k. Cumulative construction, partial invalidity.</p> |
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**Article 4441. Chief clerk shall act, when.**

Note.—Act June 5, 1917, 1st C. S., ch. 48, § 2, post, art. 7085b, fixes the salary of the chief clerk at \$2,000.

**Art. 4443. Duties.**

Note.—Duties of State Forester with respect to fires, see arts. 2676d-2676i.

## BUREAU OF COTTON STATISTICS

**Art. 4450. Shall maintain bureau of cotton statistics.**

See art. 7827mm, post.

## PROTECTION OF FRUIT TREES, SHRUBS AND PLANTS

**Art. 4465. Provisions, how enforced.**

Note.—See art. 7085b, post, fixing salary of chief of department of plant pathology at \$2,100, and the chief inspector of nurseries at \$2,000.

## PINK BOLL QUARANTINE

**Art. 4475a. Quarantine zone created.**—There is hereby created a zone along the boundary between the State of Texas and the Republic of Mexico, comprising the counties of El Paso, Hudspeth, Culberson, Jeff Davis, Presidio, Brewster, Terrell, Val Verde, Kinney, Maverick, Webb, Zapata, Starr, Hidalgo and Cameron, and that part of Dimmit county south of a line drawn diagonally across the county from the northwest corner of the county where it joins Zavalla and Maverick counties to the southeast corner of the said Dimmit county on the line of La Salle County, for the purpose of aiding in the prevention of the introduction into this State of the cotton pest, *Pectinophera Gossypiella* Saund, hereinafter referred to as the pink boll worm. [Act Oct. 3, 1917, ch. 11, § 1.]

**Art. 4475b. Proclamation by governor; duties of commissioner of agriculture; inspection and report.**—Whenever the Secretary of Agriculture of the United States shall certify to the Governor of this state that the pink boll worm in any of its stages of development, including

the egg, larval, pupal and adult stages, has been discovered in Mexico within fifty miles of the Texas border, it shall be the duty of Governor to proclaim that part of the zone established by Section 1 adjacent to the location of the pest and for a distance of not less than fifty miles in such zone along the border of the State a closed zone from which it shall be unlawful to transport any cotton or cotton products to any part of the State from such closed zone embraced in the proclamation of the Governor; provided, however, that it shall be the duty of the Commissioner of Agriculture of Texas to make a thorough inspection of the cotton fields and cotton and cotton products in such closed zone and if such investigation determines the fact that there is no pink boll worm in such closed zone, and no pink boll worm in any of its stages of development in any territory within the State of Texas or without the United States, and adjacent to said zone and not less than fifty miles from such closed zone, then in such event after such finding of fact by him he shall certify such finding to the Governor, who may be proclamation declare it lawful for cotton grown in such closed zone and its products to be transported from such closed zone under such conditions as may be deemed essential to the protection of the cotton industry of the State. [Id., § 2.]

**Art. 4475c. Prohibiting growing or transportation of cotton within quarantine zone.**—At any time the Secretary of Agriculture of the United States shall report the presence of pink boll worm within twenty-five miles of the Texas border, the governor shall cause a special examination to be made by the Commissioner of Agriculture of this State of the danger of infestation of Texas fields by the pest, and if such report, in the judgement of the Governor, shall justify such action, he shall declare the growing of cotton in the said zone for such distance adjacent to the known location of the pink boll worm as may be deemed necessary to assure the prevention of the introduction of the pest, a public menace, and thereafter it shall be unlawful for any person or persons to grow cotton in such territory so set apart, or to transport any cotton, or its products from such zone to any other point in Texas, so long as such condition of menace to the cotton industry shall be deemed to exist. [Id., § 3.]

**Art. 4475d. Inspection of cotton fields; proclamation of quarantine; fumigation or disinfection.**—It shall be the duty of the Commissioner of Agriculture of this State to maintain a rigid inspection of the cotton fields, and of the cotton and cotton products in the zone provided for in Section 1 [Art. 4475a] of this Act, in such manner as to determine the presence of pink boll worm in all stages of development, and whenever the pest is discovered in such zone the Commissioner shall certify that fact to the Governor of the State, who shall immediately proclaim a quarantine of such territory in the zone, and such territory adjacent thereto, as may be deemed necessary to prevent further advance of the pest into Texas; and thereafter it shall be unlawful for any person or persons to transport cotton, or cotton products of any kind from any territory within the counties in such zone, or the territory adjacent thereto embraced in such quarantine proclamation, through or to any other part of the State of Texas, or transport any car or vehicle or freight or other article contaminated with cotton seed, or other products of cotton capable of carrying the pink boll worm in any of its stages from the counties embraced in such zone through or to any other point in Texas, unless and until it shall have been freed from cotton seed or other cotton products and shall have been properly fumigated or disinfected in such manner as the Commissioner of Agriculture of this State shall direct. Any and

all such fumigation or disinfection and the cost of such protective measures against the spread of the pink boll worm shall be paid by the owners of the cotton or cotton products or of the car, vehicle, freight, or other article used for such transportation of cotton or its products. [Id., § 4.]

**Art. 4475e. Special quarantine zones.**—If the cotton pest known as the pink boll worm in any of its different stages shall be found in the State, and outside the zone provided for in this Act, the Commissioner of Agriculture of this State shall immediately certify that fact to the Governor, who shall proclaim a special zone or quarantine district surrounding the known location of the pest to such extent as may be determined sufficient to prevent the spread of the pink boll worm and it shall be unlawful for any person or persons to ship any cotton products of any kind from such quarantined district or transport any car or vehicle, or freight, or any other article contaminated with cotton seed, or other cotton product capable of carrying the pink boll worm in any of its stages from the quarantined area through or to any other point in this State unless and until it shall have been freed from cotton seed or other cotton product, and shall have been fumigated or disinfected in such manner as the Commissioner of Agriculture of this State shall direct. Any and all such fumigation or disinfection and cost of such protective measures against the spread of the pink boll worm shall be paid by the owners of the cotton or its products or by the owners of the car, vehicle or freight or other article employed in its transportation. [Id., § 5.]

**Art. 4475f. Destruction of infected cotton; valuation and payment to owners.**—If it shall become necessary in the judgment of the Commissioner of Agriculture of this State to the protection of the cotton industry of Texas, that the Commissioner shall destroy cotton and cotton plants in any field or fields in which the pink boll worm may have been discovered, or in any fields in the vicinity of such infested fields, he shall report such condition and certify a recommendation to that effect to the Governor, who shall thereupon declare such cotton or fields of cotton a public menace, and upon the promulgation of such proclamation the Commissioner of Agriculture shall be empowered to exercise all authority requisite to the complete destruction of such cotton or cotton plants in such field or fields, and it shall be his duty to effect such destruction in such manner as may be deemed essential to the eradication of the pest and to the adequate protection of the cotton industry of this State. In the event it shall be found necessary in the accomplishment of the purposes of this act to destroy any field or fields of cotton, the county judge of the county in which such field or fields may be located shall immediately appoint three disinterested citizens whose duty it shall be carefully to examine such field or fields of cotton, and report their conclusions of the value of the cotton in such field or fields to be destroyed to the county judge. Before entering upon the duties required of them, such citizens shall take an oath before some officer legally qualified legally to administer oaths that they will discharge impartially the duties herein provided for. When the report of the three said citizens shall be filed with the county judge it shall be his duty to transmit the same with his endorsement to the Commissioner of Agriculture of the State, who shall certify to the fact of such field or fields of cotton having been destroyed, in pursuance of the provisions of this act and he shall then file such report and certificate with the State Comptroller, who shall issue his warrant upon the State Treasurer for such sum as may be declared just and due in such report, which sum shall be paid from any funds in the State Treasury not

otherwise appropriated. Provided if any person whose cotton or field of cotton has been destroyed according to the provisions of this Act is dissatisfied with the estimate of damage assessed by the said three citizens he shall have the right of appeal to any court of competent jurisdiction. [Id., § 6.]

**Art. 4475g. Proclamation against growing of cotton in infested districts.**—If it shall be deemed necessary by the Commissioner of Agriculture to the protection of the cotton industry of Texas that the growing of cotton in any quarantined district known to be infested with the pink boll worm, or in any part of such quarantined district, constitutes a certain danger to the cotton industry of the State he shall certify such conclusion to the Governor who shall thereupon proclaim the growing of cotton in such district a public menace, and thereafter it shall be unlawful to grow cotton in such district for such term of years as the proclamation may designate, or so long as such conditions of menace to the cotton industry shall be deemed to exist. [Id., § 7.]

**Art. 4475h. Commissioner may enter fields and prescribe duties and compensation of inspectors.**—For the purposes of complying with the requirements of this Act in preventing the introduction of the pink boll worm into Texas, or to eradicate the pest if its presence shall be discovered in the State, the Commissioner of Agriculture and his authorized agents shall have power to enter into any field or fields of cotton or upon any premises in which cotton or its products may be stored or held and may examine any products or container of cotton or its products, or thing or substance liable to be infested with the pink boll worm in any of the stages of its development. For the purpose of effecting the provisions of this Act, the Commissioner of Agriculture may employ and prescribe the duties of such inspectors as may be necessary and fix their compensation. [Id., § 8.]

**Art. 4475i. Co-operation with federal officers.**—It shall be the duty of the Commissioner of Agriculture of this State to cooperate with the Secretary of Agriculture of the United States in any measures authorized and to be undertaken by the Federal Government in preventing the introduction of the pink boll worm. [Id., § 9.]

Sections 10 and 11 create offenses, and are set forth post as Arts. 729½ and 729½a, Penal Code.

**Art. 4475j. Employment of entomologist to make inspection and report.**—Before any quarantine shall be declared or established embracing any section or territory within this State pursuant to any of the provisions of this Act, the Commissioner of Agriculture of this State shall cause to be made a thorough examination of the territory and premises believed to be infected by a competent and experienced entomologist, who shall, after going upon the said premises, and after making the said examination in person, report the result thereof to the Commissioner of Agriculture; should said report disclose the fact that the pink boll worm in any of its stages exists within the territory under investigation, said person who made the examination shall make a statement in writing setting forth, among other things the following facts:

1. The date when such examination was made.
2. The name or names of the person or persons who were present when such examination was made.
3. The locality where said pink boll worm was found.
4. The name or names of the owners of the premises.

5. The extent of the infection, and the number and description of the different localities infected.

6. The necessary steps to be taken in dealing with the said infection and the proper safe-guards to be employed.

7. Any other information deemed necessary to be given preparatory to dealing with said infection.

Said statement shall be duly verified by the oath of the person making the said examination, the same shall be filed and preserved in the office of the Commissioner of Agriculture, and shall be open to the inspection of the public. [Id., § 11a.]

Sec. 12 of the act makes an appropriation of \$10,000 for inspections and investigations for the fiscal years ending Aug. 31, 1918, and Aug. 31, 1919.

**Art. 4475k. Cumulative construction; partial invalidity.**—The provisions of the several sections of this Act shall be construed as cumulative in effect and shall not be held to modify the provisions, restrictions or requirements of other sections; and if any provisions of this Act shall be declared by proper judicial action to be unconstitutional that fact shall not operate to invalidate other provisions. [Id., § 13.]

## CHAPTER EIGHT

### STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

Art.  
4509. Election of.  
4510. General duties.

Art.  
4517. School officers to make reports to state superintendent.

#### Article 4509. Election of.

**Note.**—By Act June 5, 1917, 1st C. S., ch. 48, § 2, post, Art. 7085b, the salary of the superintendent is fixed at \$4,000.

**Appeals.**—See *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216; *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

The remedies provided in this article, by appeals to the county superintendent, and the state superintendent, and state board of education are conditions precedent to the jurisdiction of the courts, and, where those remedies have not been exhausted, the case will be dismissed. *Adkins v. Heard* (Civ. App.) 163 S. W. 127. See, also, Arts. 2749d, 2749h, ante, and notes thereunder.

#### Art. 4510. General duties.

**Note.**—By Act March 5, 1915, amending Acts 1911, p. 34 (Art. 2749h, ante), all appeals from the decisions of the county superintendent shall lie to the county school trustees and from such trustees to the state superintendent, and thence to the State Board of Education.

See Penal Code, Art. 1513h, post.

Cited, *Adkins v. Heard* (Civ. App.) 163 S. W. 127; *Houston Nat. Exchange Bank v. School Dist. No. 25, Harris County* (Civ. App.) 185 S. W. 589.

**Appeals.**—See Articles 2749d, 2749h, notes thereunder, and *Collin County School Trustees v. Stiff* (Civ. App.) 190 S. W. 216; *Price v. County School Trustees of Navarro County* (Civ. App.) 192 S. W. 1140.

#### Art. 4517. School officers to make reports to state superintendent.

See Art. 1513h, Penal Code, post.

**Punishment.**—Pen. Code 1911, art. 1580, does not embrace the treasurer of an independent school district authorized by art. 2851, and his failure to report as required by this article is not punishable thereunder, and under Pen. Code 1911, art. 3, a violation of this article is not punishable because the penalty provisions are omitted from the civil and criminal statutes. *Hall v. State* (Cr. App.) 188 S. W. 1002.

## TITLE 66

## HEALTH—PUBLIC

## Chap.

1. Texas state board of health.
2. Sanitary Code.
3. Pollution of waters.

## Chap.

5. Special quarantine regulations.
6. Pure food regulations.
7. Embalming board.

## CHAPTER ONE

## TEXAS STATE BOARD OF HEALTH

## Art.

4522. Salaries and expenses of president and members.
4524. Officers and assistants appointed; salaries and duties.
- 4524a. Bureau of vital statistics.
- 4524b. Qualifications of state registrar; duties.
- 4524c. Salary of state registrar.
- 4524d. Deputy state registrar.
- 4524e. Salary of deputy state registrar.

## Art.

- 4524f. Salaries and expenses of bureau to be paid by state; appropriation.
- 4524g. Local systems of registration of births and deaths.
4528. General powers and duties of the state board of health.
- 4528e. Appropriation; expenditures subject to approval of governor.
4537. Investigations by board; powers of and duties of court.
4543. Duties of county health officer.

**Article 4522. Salaries and expenses of president and members.**

Note.—See art. 7085b, post, fixing president's salary at \$3,000.

**Art. 4524. Officers and assistants appointed; salaries and duties.**

Note.—Superseded in part by Act June 5, 1917, 1st C. S. ch. 48, § 2, post, art. 7085b, fixing salaries of assistant health officer, registrar of vital statistics, and chemist and bacteriologist.

**Art. 4524a. Bureau of Vital Statistics.**—That for the purpose of the efficient enforcement of the Sanitary Code of Texas, and the State Board of Health, shall establish a Bureau of Vital Statistics, and shall provide therefor suitable apartments, fire-proof vaults and filing cases necessary for the permanent preservation of all official records relating to births and deaths in the State of Texas, including those of the years prior to 1910 now in the basement of the State Capitol. [Act March 29, 1917, ch. 129, § 1.]

**Explanatory.**—Took effect 90 days after March 21, 1917, date of adjournment. Sections 2 to 15, inclusive, of the act, are set forth post as arts. 4524b-4524g, 4553a (rules 36a, 36b, 36c, 37a, 38a, 38b, and 50a) of the Civil Statutes, and arts. 801a and 801b of the Penal Code.

**Art. 4524b. Qualifications of State Registrar; duties.**—In addition to the qualification now required of the State Registrar of Vital Statistics, he shall be a licensed physician under the laws of this State, and shall have had not less than five years' experience as a general practitioner and two years' experience as a Vital Statistician; and it shall be his duty to superintend the collection, filing and compilation of all birth and death certificates. [Id., § 2.]

**Art. 4524c. Salary of State Registrar.**—The State Registrar of Vital Statistics shall receive an annual salary of (\$2,400.00), and shall not engage in private practice during the time he serves as such registrar. [Id., § 3.]

See art. 7085b, post, fixing salary of registrar.

**Art. 4524d. Deputy State Registrar.**—The State Health Officer is hereby authorized, and it shall be his duty, immediately after this Act takes effect, to appoint a Deputy State Registrar of Vital Statistics, who shall act as assistant to the State Registrar and shall perform such duties as may be assigned him by the State Registrar. [Id., § 4.]

**Art. 4524e. Salary of Deputy State Registrar.**—The Deputy State Registrar shall receive an annual salary of (\$1,500.00); provided, that said Deputy State Registrar shall have had at least two years' practical experience as a Vital Statistician. [Id., § 5.]

**Art. 4524f. Salaries and expenses of bureau to be paid by state; appropriation.**—The salaries and contingent expenses of the Bureau of Vital Statistics shall be paid by the State, and for the purpose of putting this Act into immediate effect, and for the purpose of the efficient enforcement of the same, there is hereby appropriated out of any money in the State Treasury, not otherwise, appropriated, the sum of eight thousand (\$8,000.00) dollars for the purpose of paying the salaries of the State Registrar, Deputy State Registrar, all necessary clerical services, and other necessary expenses, for the remainder of the fiscal year ending August 31, 1917. [Id., § 14.]

**Art. 4524g. Local systems of registration of births and deaths.**—No system for the registration of births and deaths shall be continued or maintained in any of the several cities or counties of this State other than the system provided for and prescribed by the provisions of this Act.

Provided, this Act shall not be construed to repeal any of the laws of this State now in force effecting public health and the registration of birth and death certificates, which are not clearly in conflict herewith, but shall be construed to be cumulative to said laws. [Id., § 15.]

**Art. 4528. General powers and duties of the state board of health.**

**Repeal.**—This article and arts. 4537, 4543, under which railroads may be criminally prosecuted for not maintaining sanitary closets at stations, do not repeal arts. 6592-6594, providing a civil penalty for same offense. *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 194 S. W. 959.

**Art. 4528e. Appropriation; expenditures subject to approval of governor.**

**Note.**—Act Feb. 22, 1917, c. 36, Reg. Sess., makes an appropriation for expenditure by the state health officer in rural health work and rural sanitation for the years ending Aug. 31, 1917, and Aug. 31, 1918. The act is omitted from this compilation as temporary in its operation.

**Art. 4537. Investigations by board; powers and duties of court.**

**Repeal.**—See note under article 4528.

**Art. 4543. Duties of county health officer.**

**Repeal.**—See note under article 4528.

## CHAPTER TWO

### SANITARY CODE

**Art. 4553a. Sanitary Code.****QUARANTINE AND DISINFECTION**

Rule 3. "Contagious diseases" shall include Asiatic cholera, etc., and be reported to the president of the state board of health.

28. School may be reopened after disinfection and vaccination.

**VITAL STATISTICS**

36a. Fees of local registrars; accounts; audit and approval.

36b. Appointment of precinct registrars on failure of city and county registrars to perform their duties; fees.

Rule 36c. Appointment of registrars for inaccessible precincts; fees.

37a. Burial or removal permit; certificate of death.

38a. Data to be shown by death certificate.

38b. Data to be shown by birth certificate.

50a. Certified copies of birth and death certificates furnished by state registrar; fee; fund, how used.

**DEPOTS, RAILWAY COACHES AND SLEEPING CARS**

52. Depots, etc., to be ventilated and heated.

**Article 4553a. Sanitary Code.**

Cited, *Beaumont, S. L. & W. Ry. Co. v. State* (Civ. App.) 194 S. W. 959.

**Police power.**—The state, through its Legislature, may, in the exercise of its police power, enact all reasonable legislation for the promotion of public welfare, including the preservation of health. *Waldschmidt v. City of New Braunfels* (Civ. App.) 193 S. W. 1077.

**QUARANTINE AND DISINFECTION**

Rule 3. "Contagious diseases" shall include Asiatic cholera, etc., and be reported to the president of the state board of health.

**Note.**—Act March 23, 1915, c. 118, p. 180, makes an appropriation for use in preventing bubonic plague.

Rule 28. School may be reopened after disinfection and vaccination.

**Validity of vaccination requirement.**—A rule of the school board requiring vaccination, but providing for exceptions where the health of the pupils was such that it could not be done is not unreasonable, was not a deprivation of due process of law in violation of Const. art. 1, § 19, and Const. U. S. Amend. 14, in that it vests the school physician and the city board of health with arbitrary powers, does not violate Const. art. 7, §§ 1-3, 5, authorizing the Legislature to provide for the support and maintenance of public schools, and was not invalid because it did not provide when it should expire. *Zucht v. San Antonio School Board* (Civ. App.) 170 S. W. 840.

**VITAL STATISTICS**

Rule 36a. Fees of local registrars; accounts; audit and approval. —The city or county registrar shall receive a fee of twenty-five cents for each birth and for each death certificate completely filled in and properly registered and filed by him with the State Registrar as required by the rules and regulations of the Sanitary Code for Texas and the provisions of this Act, and, all accounts payable to a county registrar shall be paid by the county treasurer out of the general fund of the county; provided, however, that each account shall in addition to the approval of the commissioners' court of the county, or the county auditor, as the case might be, bear approval of the State Registrar; and provided, further, that the State Registrar shall, not later than December 1, 1917, and each year thereafter, certify to the commissioners' court of the several counties the number of births and death certificates properly returned to the Bureau of Vital Statistics during the preceding year, together with the name and the amount due each county registrar at the rate fixed herein; provided, further, that all accounts payable to a city registrar shall be approved by



the city council, or city commission, as the case might be, and also bear the approval of the State Registrar, and the same shall be paid out of the general fund of the city; provided, however, that in all incorporated cities or towns where the official who performs the duties of city registrar receives any salary, compensation or reward for his services that the 25 cents provided for each certificate herein shall not be allowed. [Act March 29, 1917, ch. 129, § 6.]

**Rule 36b. Appointment of precinct registrars on failure of city and county registrars to perform their duties; fees.**—That for the purpose of the efficient enforcement of this Act, when any county registrar shall fail or refuse to secure and return to the Bureau of Vital Statistics the birth and death certificates required to be secured and returned by him as such county registrar, then the State Health Officer, upon the written recommendation of the State Registrar, shall petition the commissioners' court of such county to appoint some qualified person to perform the duties of local or precinct registrar for each commissioners' precinct within such county, provided that such person so appointed shall be a bona fide resident of the county and of such commissioners' precinct, and shall receive the 25 cents provided herein for each birth or death certificate; provided, further, that such local or precinct registrar shall forward the original birth or death certificate to the Bureau of Vital Statistics in the same manner as provided by law for city and county registrars, and shall also send on same date a copy or duplicate of such birth or death certificate to the county clerk to be recorded by him in the record kept by him in his office for that purpose; provided, further, that when any city registrar shall fail or refuse to secure and return to the Bureau of Vital Statistics the birth and death certificates required to be secured and returned by him as such city registrar, then the State Health Officer, upon the written recommendation of the State Registrar, shall petition the city council, or commission, of such city or town to appoint some qualified person to perform the duties of city registrar, provided that such person so appointed shall be a bona fide resident of such city or town, and shall receive 25 cents provided herein for each birth or death certificate. [Id., § 7.]

**Rule 36c. Appointment of registrars for inaccessible precincts; fees.**—Whenever a commissioners' precinct of a county is located so as not to be conveniently accessible to the county registrar, and that fact is brought to the knowledge of the State Registrar, or the County Health Officer shall recommend in writing that the State Health Officer petition the commissioners' court of such county to appoint some qualified person to perform the duties of precinct registrar for such precinct, and it shall be the duty of the commissioners' court, upon receipt of such petition from the State Health Officer, to appoint such precinct registrar; provided, that such registrar shall possess the qualifications, perform the duties, and receive the rate of compensation prescribed for precinct registrars by the provisions of Section 7 [Rule 36b] of this Act. [Id., § 7a.]

**Rule 37a. Burial or removal permit; certificate of death.**—The body of any person whose death occurs within the State of Texas, or which may be found dead within the State of Texas, shall not be interred or deposited in a vault, or tomb, or cremated, or otherwise disposed of, or removed from or into any registration district, or be held temporarily pending further disposition, for a period of more than seventy-two (72) hours after death, unless a permit for burial, removal or other disposition thereof shall have been properly issued by the registrar of the city, county

or precinct in which the death occurred or the body was found; provided, however, that this section shall not apply to counties of less than two thousand (2,000) inhabitants; provided, further, that no such burial or removal permit shall be issued by any registrar until a complete certificate of death has been filed with him as herein provided; and provided, further, that when a body is transported from one registration district to another district, or from another State into another registration district within this State, for burial or other disposition, the transmit or removal permit issued in accordance with the law shall be accepted by the registrar of the district into which the body is transported for burial or other disposition as a basis upon which he may issue a local burial permit; and provided, further, that the registrar shall note upon the face of such permit the fact that the body was shipped in for burial or other disposition, and shall state thereon the actual place of death; and provided, further that no registrar shall receive any fee or pay for the issuance of such permits. [Id., § 11.]

For penal provision see post, arts. 801a, 801b, Penal Code.

**Rule 38a. Data to be shown by death certificate.**—Each death certificate shall contain the following items, and which are hereby declared to be personal and statistical particulars and medical particulars necessary to complete such certificate:

- (1) Place of death, including city or village;
- (2) Full name of decedent;
- (3) Sex;
- (4) Color and race;
- (5) Conjugal relations (single, married, widowed, or divorced);
- (6) Date of birth (year, month and day);
- (7) Age (years, month and days);
- (8) Occupation described in full;
- (9) Place of birth;
- (10) Name of father;
- (11) Birthplace of father;
- (12) Maiden name of mother;
- (13) Birthplace of mother;
- (14) Signature and address of informant;
- (15) Date of death (give year, month and day);
- (16) Certification as to the medical attendance on the decedent, fact and time of death, time last seen alive and cause of death, with contributory cause, if any, and duration of each, and whether due to dangerous or unsanitary conditions of employment, together with signature and address of physician or official making the medical certificate and date of certification.
- (17) Length of residence at place of death.
- (18) Place of burial or removal and date of same.
- (19) Signature of undertaker or person acting as such, and all death certificates shall be made on a form and of a size prescribed by the State Registrar of Vital Statistics, and provided subdivision five (5) to thirteen (13), inclusive, may be omitted, if such information is not obtainable, and the death certificate shall be so endorsed. [Id., § 8.]

**Rule 38b. Data to be shown by birth certificate.**—Each birth certificate shall contain the following items, and which are declared to be necessary statistical data to complete such certificate:

- (1) Place of birth, county, city or village;
- (2) Full name of child.
- (3) Sex of child.

- (4) Whether twin, triplet, or plural birth.
- (5) Whether legitimate or illegitimate.
- (6) Date of birth, year, month and day.
- (7) Full name of father.
- (8) Residence of father.
- (9) Color or race of father.
- (10) Age of father at last birthday.
- (11) Occupation of father.
- (12) Birthplace of father.
- (13) Maiden name of mother.
- (14) Residence of mother.
- (15) Color or race of mother.
- (16) Age of mother at last birthday.
- (17) Birthplace of mother.
- (18) Occupation of mother.
- (19) Number of children born to this mother prior to this birth.
- (20) Number of children of this mother living.
- (21) The certification of attending physician, surgeon or midwife, as to attendance at birth, including the statement of the year, month, day and hour of birth, and whether the child was born alive or was still-born; provided that such certificate shall be signed by the physician or surgeon, or mid-wife, with the date of signature and address of such physician, or surgeon, or mid-wife; provided, further, that if there was no physician, surgeon, or mid-wife in attendance, then the father or mother of the child, or the owner of the premises, shall notify the local registrar within five days following the birth, and such registrar shall fill in this item and the party so notifying the registrar shall sign such certificate, and such certificate shall fully and completely contain all the facts in connection with such birth; and provided, further, that all birth certificates shall be upon a form and of a size prescribed by the State Registrar of Vital Statistics. [Id., § 9.]

**Rule 50a. Certified copies of birth and death certificates furnished by State Registrar; fee; fund, how used.**—The State Registrar of Vital Statistics shall, upon the request of any applicant, furnish a certified copy of any birth or death record registered under the provisions of this Act, and for such certified copy he shall be entitled to a fee of 50 cents to be paid by the applicant; and provided, further, that such copy of the record of birth or death, when properly certified by the State Registrar of Vital Statistics as a true copy of the original, shall be prima facie evidence in all courts and places of such facts therein stated; and provided, further, that it shall be the duty of the State Registrar, at the end of each month, to make an itemized account of all fees collected by him during that month and pay the same over to the State Treasurer to be kept by such treasurer in a special and separate fund to be known as the "Vital Statistics fund," and the amounts so deposited in such fund may be used for the expenses incurred in the enforcement of the law relating to the registration of births and deaths within this State, and any unexpended balance remaining in such fund at the end of each fiscal year shall be transferred to the public school fund of the State. [Id., § 10.]

#### DEPOTS, RAILWAY COACHES AND SLEEPING CARS

##### **Rule 52. Depots, etc., to be ventilated and heated.**

**In general.**—An award of \$1,700 for injuries to plaintiff's wife resulting from cold contracted in an unheated car held not excessive, where it affected her menstruation and general health, and fact that plaintiff did not inform the carrier or its servants of the

delicate condition of his wife will not preclude recovery. *St. Louis Southwestern Ry. Co. of Texas v. Rutherford* (Civ. App.) 184 S. W. 700.

This rule applies to case of passengers waiting for a delayed train, and failure to perform that duty would be negligence as a matter of law. *Chicago, R. I. & G. Ry. Co. v. Faulkner* (Civ. App.) 194 S. W. 651.

## CHAPTER THREE

### POLLUTION OF WATERS

Art.

4553b. Polluting certain waters unlawful; penalty for violation, etc.

4553c. Enjoining pollution; penalty for violation of injunction, etc.

Art.

4553d. Cities and persons affected to have specified time to make arrangements for compliance with act.

4553e. State board of health to enforce; inspector, how appointed; duties.

**Article 4553b. Polluting certain waters unlawful; penalty for violation, etc.**—That it shall be unlawful for any person, firm or corporation, private or municipal, to pollute any water course, or other public body of water, from which water is taken for the uses of farm, live stock, drinking and domestic purposes, in the State of Texas, by the discharge, directly or indirectly, of any sewage or unclean water or unclean or polluting matter or thing therein, or in such proximity thereto as that it will probably reach and pollute the waters of such water course or other public body of water from which water is taken, for the uses of farm live stock, drinking and domestic purposes; provided, however, that the provisions of this bill shall not affect any municipal corporation situated on tide water; that is to say, where the tide ebbs and flows in such water course. A violation of this provision shall be punished by a fine of not less than one hundred dollars and not more than one thousand dollars. When the offense shall have been committed by a firm, partnership or association, each member thereof who has knowledge of the commission of such offense, shall be held guilty. When committed by a private corporation, the officers and members of the board of directors, having knowledge of the commission of such offense, shall each be deemed guilty; and when by a municipal corporation, the mayor and each member of the board of aldermen or commission, having knowledge of the commission of such offense, as the case may be, shall be held guilty as representatives of the municipality; and each person so indicated as above shall be subject to the punishment provided hereinbefore; provided, however, that the payment of the fine by one of the persons so named shall be a satisfaction of the penalty as against his associates for the offenses for which he may have been convicted; provided, the provisions of this Act shall not apply to any place or premises located without the limits of an incorporated town or city, nor to manufacturing plants whose affluents contain no organic matter that will putrify, or any poisonous compounds, or any bacteria dangerous to public health or destructive of the fishlife of streams or other public bodies of water. [Acts 1913, p. 90, § 1; Act Feb. 25, 1915, ch. 23, § 1.]

**Art. 4553c. Enjoining pollution; penalty for violation of injunction, etc.**—Upon the conviction of any person under Section 1 of this Act [Art. 4553b], it shall be the duty of the court, or judge of the court, in which such conviction is had, to issue a writ of injunction, enjoining and restraining the person or persons or corporation responsible for such pollution, from a further continuance of such pollution; and for a violation of such injunction, the said court and the judge thereof shall

have the power of fine and imprisonment, as for contempt of court, within the limits prescribed by law in other cases; provided, that this remedy by injunction and punishment for violation thereof shall be cumulative of the penalty fixed by Section 1 of this Act; and the assessment of a fine for contempt shall be no bar to a prosecution under Section 1; neither shall a conviction and payment of fine under Section 1 be a bar to contempt proceedings under this section. [Acts 1913, p. 90, § 2; Act Feb. 25, 1915, ch. 23, § 2.]

**Power to enjoin.**—Acts 33d Leg. c. 47, punishing the pollution of any water course by the discharge of sewage therein, does not deprive the district court of jurisdiction to suppress such nuisances by injunction. *Cardwell v. Austin* (Civ. App.) 168 S. W. 385.

**Art. 4553d. Cities and persons affected to have specified time to make arrangements for compliance with act.**—Any city or town of this State, with a population of more than fifty thousand inhabitants, which has already an established sewerage system dependent upon any water course or other public body of water, from which water is taken for the uses of farm, live stock, drinking and domestic purposes, or which discharges into any water course or public body of water, from which water is taken for the uses of farm, live stock, drinking and domestic purposes, shall have until January 1, 1917, within which to make other provisions for such sewage. Cities and towns of less population than fifty thousand inhabitants shall have until January 1, 1917, within which to make other arrangements for the disposal of such sewage. Any person, firm or corporation, private or municipal, coming under or affected by the terms of this bill, or any independent contractor having the disposal of the sewage of any city or town, shall have until January 1, 1917, within which to make other arrangements for the disposal of such sewage, or other matter which may pollute the water, as defined in this bill. [Acts 1913, p. 90, § 3; Act Feb. 25, 1915, ch. 23, § 3.]

**Art. 4553e. State board of health to enforce; inspector, how appointed; duties.**—The Texas State Board of Health is authorized, and it is hereby made its duty, to enforce the provisions of this Act; and to this end the Governor shall appoint, by and with the consent of the Senate, an inspector to act under the direction of the said Board of Health and the State Health Officer making such investigations, inspections and reports, and performing such other duties in respect to the enforcement of this Act as the said Board of Health officer may require. [Acts 1913, p. 90, § 4; Act Feb. 25, 1915, ch. 23, § 4.]

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## CHAPTER FIVE

### SPECIAL QUARANTINE REGULATIONS

**Article 4562. [4333] Incoming vessels to be stopped.**

Cited, *Powell v. Stephenson* (Civ. App.) 189 S. W. 570.

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## CHAPTER SIX

### PURE FOOD REGULATIONS

<p>Art. 4575. Appointment, salary and bond of dairy and food commissioner.</p> <p>4577. Appointment, salary and bond of assistant chemist.</p>	<p>Art. 4579. Inspectors; appointment, duties and salary.</p>
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**Article 4575. Dairy and food commissioner; appointment, salary and bond.**

Note.—By Act June 5, 1917, 1st C. S. ch. 48, § 2, post, art. 7085b, the salary of the "Pure Food and Dairy Commissioner" is fixed at \$3,000.

**Art. 4577. Assistant chemists; appointment; salary; bond.**

Note.—By Act June 5, 1917, 1st C. S. ch. 48, § 2, post, art. 7085b, the salary of the "Chemist in the Pure Food and Dairy Department" is fixed at \$2,400.

**Art. 4579. Inspectors; appointment; duties; salary.**

Note.—By Act June 5, 1917, 1st C. S. ch. 48, § 2, post, art. 7085b, the salary of inspectors in the Pure Food and Dairy Department is fixed at \$1,500.

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**CHAPTER SEVEN**
**EMBALMING BOARD**

**Art.**  
4599. Duties and powers of board.

**Art.**  
4605. Provisions of chapter do not apply to what.

**Article 4599. Duties and powers of board.**—The Board of Embalming shall have the power and it shall be its duty:

1. To prescribe and maintain a standard of proficiency as to the qualifications of those engaged, and who may engage in the practice of embalming in connection with the care and disposition of dead bodies in the State of Texas, and, in this connection, the said board shall have the right and the power, to be exercised at its discretion, to employ capable and efficient lecturers and demonstrators in the science of embalming for the benefit of all licensed embalmers in this State. The said lecturers and demonstrators shall meet not more than once in each year with annual session of the 'Texas Funeral Directors' and Embalmers' Association.

2. To meet at least once in each year, and oftener, as the proper and efficient discharge of its duties may require. At least sixty days' notice of the time and place of the meeting of said board shall be given by publication in at least three daily newspapers published in different towns and cities of the State. Three members of the board shall constitute a quorum for the transaction of all its business and the performance of all its duties; the board shall make an annual report to the State Health Officer, a copy of which shall be furnished to each and every licensed embalmer in the State of Texas, upon the condition of embalming in Texas, which report shall embrace all the proceedings of the board, and give an itemized account of money received and paid out by said board, shall show to whom paid and specifically for what purpose it was paid, and also the names of all embalmers duly licensed under this chapter. And it shall be the further duty of said board to deliver all money on hand at the end of the term of each board, after all the outstanding debts have been paid, to their successors in office. [Acts 1903, p. 123, § 4; Act March 30, 1915, ch. 137, § 1.]

**Explanatory.**—Act March 30, 1915, c. 136, amends subdivisions 1 and 2 of article 4599 of ch. 7, title 66. The act took effect 90 days after March 20, 1915, date of adjournment.

**Art. 4605. Provisions do not apply to what.**

Cited, *Billingsley v. Houston Oil Co. of Texas* (Civ. App.) 132 S. W. 373.

## TITLE 67

## HOLIDAYS—LEGAL

Art.

4606. What are legal holidays.

4607a. Texas Flag Day.

Art.

4607b. Sam Houston Memorial Day.

**Article 4606. What days are legal holidays.**

**Monday after legal holiday on Sunday.**—Reply by chairman of Railroad Commission to an inquiry by railroad company as to whether the following Monday would be recognized as free time, when Sunday was also a legal holiday, held not to show a rule of the Commission to that effect, and under rule 2 of the Commission, a carrier was not excused, by reason of local custom to observe the following Monday, from duly transporting freight on Monday, because Sunday, as March 2d, was a legal holiday. *Consumers' Lignite Co. v. Houston & T. C. R. Co.* (Civ. App.) 179 S. W. 306.

**Art. 4607a. Texas Flag Day.**—Whereas, it is eminently desirable that the people of our beloved State should realize more fully the blessings of liberty gained by our heroes in defense of the Alamo and in the immortal struggles at San Jacinto; and,

Whereas, there is now no adequate recognition of March 2d—Texas Independence Day; therefore

Be it Resolved by the Legislature of the State of Texas, the House and Senate concurring, that March 2d shall hereafter be designated as "Texas Flag Day," and that the Governor of Texas be requested to issue his proclamation each year before March 2d, so declaring, and that he urge the people of Texas to observe it by displaying on all public buildings, including the school houses, of the State, the Texas flag; and that the Superintendent of Public Buildings and Grounds be instructed hereafter on all days of the year, except upon National occasions, to have the Texas flag unfurled upon the flagstaff of the Capitol at Austin. [H. C. R. No. 6, Feb. 18, 1915, p. 276.]

**Art. 4607b. Sam Houston Memorial Day.**—Whereas, the second day of March A. D. 1917, will be the 124th anniversary of the birth of Sam Houston, and the 81st anniversary of the adoption, upon his motion, of the Declaration of Independence; and

Whereas, the name of the great patriot and statesman is indissolubly linked with all that is most glorious in the annals of Texas; and

Whereas, it is proposed to erect at Houston Texas, a city named in his honor and near which lies the battlefield upon which the army led by him won a glorious victory which achieved the independence of Texas, a memorial to commemorate his exalted character, splendid achievements and heroic patriotism; therefore be it

Resolved, by the House of Representatives the Senate concurring, that Friday, March 2, 1917, and March 2nd of each year thereafter, be and the same is hereby designated as "Sam Houston Memorial Day," and that the Governor of Texas be and he is hereby requested to issue his official proclamation under the great seal of the State, calling upon the people to celebrate the anniversary with fitting ceremonies, and to contribute to a fund to be known as the Sam Houston Memorial Fund for the purpose of erecting said Memorial, to the end that all the people of Texas may have part in doing a too long delayed honor to the memory of a patriot who has rendered Texas invaluable service in her struggle for liberty, and in after years as President of the Republic of Texas, and still later as one of her representatives for

twelve years in that august parliament the Senate of the United States, and as Governor of this imperial commonwealth which eventuated out of the Republic which had its birth on the battlefield of San Jacinto. [H. C. R. No. 2, Jan. 30, 1917, p. 489.]

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## TITLE 67 A

### HOME GUARD

[For Ranger Home Guard, see arts. 6766a-6766e]

Art.	Art.
4607½. Home guard in counties may be organized.	4607½b. Organization.
4607½a. Guard subject to call of sheriff; right to carry arms.	4607½c. Drills and uniform.
	4607½d. Expense, how paid; return of arms, etc.

**Article 4607½.** Home guard in counties may be organized.—That whenever a state of war exists between the United States and another nation there may be created and organized with the consent and under the direction of the County Court of any county, a Home Guard composed of citizens of such county and of the United States of America over the age of 21 years. [Act Oct. 15, 1917, ch. 20, § 1.]

**Art. 4607½a.** Guard subject to call of sheriff; right to carry arms.—Such Home Guard shall at all times be subject to the orders of the sheriff of such county, and the members thereof as a whole and individually shall at all times be subject to the call to duty by the sheriff to preserve order in any section of the county; provided, such Home Guard as a whole or as individuals shall be authorized to carry on and about their person pistols and such other weapons as may be necessary when called to actual duty by the sheriff. [Id., § 2.]

**Art. 4607½b.** Organization.—Such Home Guard shall be organized to conform as nearly as practicable to the organization of military units. [Id., § 3.]

**Art. 4607½c.** Drills and uniform.—Such Home Guard may engage in such drills at such times and places as the commanding officer may prescribe, and may be uniformed in manner not to conflict with Section 125, Act of the Congress of the United States, Approved June 3, 1916. [Id., § 4.]

**Art. 4607½d.** Expense, how paid; return of arms, etc.—The organization and maintenance of such Home Guard shall be without expense to the State of Texas, or any county, city or town; provided, however, that counties, cities and towns may through their lawfully constituted governing bodies appropriate from their public treasuries moneys wherewith to provide arms and ammunition for such Home Guard under such rules and regulations as they may prescribe; provided that all persons who receive arms from the county shall return all guns and ammunitions to the County Judge when they are not on duty. [Id., § 5.]